**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA**

Ceylon Tobacco Company PLC
No. 178, Srimath Ramanathan
Mawatha, Colombo 15.

**PETITIONER**

Vs.

C.A 336/2012 (Writ)

1. Hon. Maithripala Sirisena
Minister of Health
Ministry of Health.
"Suwasiripaya",
Colombo 10.

2. Dr. Nihal Jayathilaka
Secretary,
Ministry of Health.
"Suwasiripaya",
Colombo 10.

3. National Authority on Tobacco and Alcohol
"Suwasiripaya",
Colombo 10.

**RESPONDENTS**

**BEFORE:** Anil Gooneratne J. &
Malinie Gunaratne J.

**COUNSEL:** Faiz Musthapha P.C., with Ali Shabry P.C. and C.Wijesinghe, Faizer Marker, M. Bandara M. Careem, R. Cooray and Mohamed Imthiyas instructed by Sudath Perera Associates for the Petitioner

Janak de Silva D.S.G., with Suranga Wimalasena S.C. for the Respondents

**ARGUED ON:** 03.02.2014 & 07.02.2014

**DECIDED ON:** 12.05.2014

**GOONERANTNE J.**

The Petitioner in this Writ Application is the Ceylon Tobacco Company PLC. A Writ of Certiorari is sought to quash the tobacco products (labeling and packaging) Regulation No. 1 of 2012, published in Gazette Notification marked P11 of 8.8.2012. A mandate in the nature of Writ of prohibition is also sought against the three Respondents, proceeding to make regulation prescribing health warnings for tobacco products containing

pictorials, graphics, images or any other non-textual content under Section 30 read with Section 34 of the National Authority on Tobacco and Alcohol Act No. 27 of 2006. Petitioner in terms of sub para (d) of the prayer to the petition has sought an interim order staying the operation of the above regulation referred to in Gazette marked P11. The learned President's Counsel for the Petitioner on 20.2.2013 supported this application for the issuance of interim relief. However the then Hon. President of this court by his order dated 22.2.2013 refused to grant and issue an interim order as prayed for in the prayer to the petition.

Petitioner Company sought Special Leave to Appeal from the order of the Court of Appeal dated 22.2.2013. However on a perusal of the record, I find that the state, at an early stage of the above leave to appeal application gave an undertaking to the Supreme Court that the impugned regulation will not be operationalised, and as such undertaking had been extended from time to time, and on 1.4.2013 Supreme Court ordered the status quo to be maintained. Such an order pronounced by the Supreme Court to maintain the status quo also had been extended periodically.

The Petitioner in this application is challenging the vires of regulation P11 as amended. More particularly regulation P11 as amended are ultra vires

of the powers of the Minister, of the National Authority on tobacco and Alcohol Act No. 27 of 2006 (hereinafter called NATA Act) and that Section 34(1) does not provide for pictorial health warnings. The Respondents with objections have filed Gazette Notification marked R3 and R15. Perusal of R3 and R15 it appears that regulation (P11) shall come into operation on 1st March 2013 and regulation No. 1 of 2012 (P11) is further amended according to R15 and regulation Nos. 5, 6 & 7 amended and a new regulation 11, added to regulation (P11). As such the Petitioner Company submits that the impugned regulations seek to:

(i) Introduce mandatory pictorial health warnings to be displayed on packets of cigarettes covering 80% of the total area of a pack.

(ii) Impose a descriptor ban (use of descriptions 'light' 'low' and 'mild'.

(iii) Print date of production on every cigarette stick.

(iv) Print of information on the relevant constituents and emissions of tobacco products, including formaldehyde and other toxic contents if any

(v) Print health warnings and other information in a font size of not less than 10 and in all 3 languages.

The learned President's Counsel for Petitioner raised numerous points and objections to favour the case of the Petitioner. The main argument advanced by the learned President's Counsel for the Petitioner and referred to inter alia, the following matters to demonstrate that the impugned subordinate legislation should be rejected since it is:

(a) Unreasonable and disproportionate to the main statute.

(b) Impossibility of compliance (time factor) and the insertion of multiple labels and the failure to prescribe dimensions of health warnings. The submission of impossibility of compliance was an argument advanced when supporting for interim relief. Petitioner did not hesitate to put forward this submissions also when the substantive matter was argued.

(c) To require the printing of constituents and emissions. Regulations is ambiguous resulting in varying interpretations

(d) A requirement to print the date of production and date of expiry on cigarette sticks. It is practically impossible to comply. Further Section 34(1) requires only a single label.

(e) To prescribe pictorial health warnings to cover 80% of the front and back surface areas, has by subsidiary legislation illegally subverted the statutory right of Petitioner to effectively use its intellectual property rights, recognized under the Intellectual Property Act.

(f) Petitioner not heard before publication of impugned regulations. Breach of natural justice.

(g) Exclusion of the Beedi, cigars and white illicit whites from the application of the impugned regulations.

It is the position of the Petitioner that (a) to (F) above would make Regulation Nos. 5, 6, 7 and 8 and the added Regulation No. 11, ultra vires the provision of the NATA Act.

Learned President's Counsel was also critical of the Respondents stance of reading Section 34 of the NATA Act (an Act itself is to give effect to who Framework Convention on Tobacco Control (FCTC)) in harmony with FCTC obligations. FCTC does not require 80% pictorial warnings (Article 11 of FCTC) FCTC require only 50% or more. Further FCTC do not use pictorial, do not impose a binding obligation to use pictures.

Another argument advanced, was that the NATA Act does not empower the Minister to make regulation generally for carrying out the intention/purpose/principles in enacting the NATA Act. The Minister is only empowered to make regulations required to be prescribed or in which regulations are authorized or required by the Act. Minister cannot make regulations generally of any matter for carrying out the intention/purpose/principles in enacting the NATA Act. Attention of this court was drawn to several other statutes where a Minister is generally permitted, a general rule making power on all matters by the

use of legislative language e.g. Condominium Property Act, Employees Provident Fund Act, Employees Trust Fund Act, Inland Revenue Act, etc. Petitioner argues that the Minister does not have the power to grant a blanket rule making power.

President's counsel for Petitioner submitted that regulation Nos. 2 & 3are not authorized by Section 34 of the NATA Act. As such the regulation is ultra vires. The Consumer Authority Act No. 9 of 2003, already regulates on conduct that is misleading or deceptive. He referred to Section 30 of the Act No. 9 of 2003. As such Minister has no power to make regulations 2 & 3. It was also submitted that under Section 34 the required label shall contain a statement of the tar and nicotine content of the product and a health warning. The printing of information relating to other constituent and emissions is not required or prescribed. As such requirement of printing information relating to constituent and emissions in regulation 6 is ultra vires. the phrase 'including its nicotine and tar cannot be read as only tar and nicotine in background of having 5,600 identified chemicals in cigarette smoke. Section 34 already contains provisions on same. As such there is no need for delegated regulations. NATA Act does not require the date of manufacture and or the expiry date to be printed thereon and regulation 7 is also ultra vires . Further printing in a font size of 10 in all 3 languages clearly renders the regulations practically impossible to perform.

The learned Deputy Solicitor General on behalf of the Respondents submitted in his oral submissions, at the very outset to the evidence of harmful effects of tobacco smoking and invited court to, document R8, (pg. v) mainly to the material contained in the foreword. He also referred to the preamble of the WHO Framework Convention on Tobacco Control more particularly to 3rd para which state about the serious concern about increase in the worldwide consumption and production of cigarettes. Article 8 (pg. 8 of R8) refer to scientific evidence has unequivocally established that tobacco smoke cause death, decease and disability. He also invited us to R6, the S.C. Determination 13-22/05 on National authority on Tobacco & alcohol Bill especially Clause 34 which have the objective of enhancing health and the quality of life. The objectives cannot be reconciled with the harmful effects of tobacco and alcohol products and the objectives of the bill are not inconsistent with the Constitution. Learned Deputy Solicitor General referred to document R11 (pg. 5) to emphasis on the death rate as a consequence of smoking cigarettes. (inclusive of passive smoking) R12 on regional situation of tobacco control in the South East Asia Region and the figures of deaths and decease.

Learned Deputy Solicitor General in his address to court referred to packaging and labeling of tobacco products, more particularly to Article 11(1) b

11(1) (iv) of R8 to emphasis on international standards that Sri Lanka, is bound to adopt and follow in its national legislation, since our country was a signatory to the Who Framework Convention on Tobacco Control. Reference was also made to R4 cigarette package health warnings (pg. 7) i.e effectiveness of warnings, increase with larger size, and use of pictures. R10 (para 14) refer to use of pictorials. Para 15 of R10 gives details of evidence when compared with text only health warnings and messages those with pictures.

- Are more likely to be noticed;
- Are rated more effective by tobacco users;
- Are more likely to remain salient over time;
- Better communicate the health risks of tobacco use;
- Provoke more thought about the health risks of tobacco use and about cassation
- Increase motivation and intention to quit; and
- Are associated with more attempts to quit.

By a gradual process the learned Deputy Solicitor General drew the attention of this court to the preamble of the National Authority on Tobacco and Alcohol Act No. 27 of 2006. It was the position of the Respondents that the above act of Parliament envisage a variety of matters to protect public health. He drew the attention of this court to letter R9 by the Chairman of the National Authority on Tobacco and Alcohol to the Minister of Health. We have noted the contents of

R9, along with Section 15 (J) of the Act. section 15(J) reads thus (clearly explains adherence to International Treaties).

> To recommend adherence to such International Treaties and Conventions dealing with Tobacco and Alcohol as the Government may ratify and accede to;

It was the contention of the learned Deputy Solicitor General that reading Section 30 and 34 of the above Act, should not be construed in the absence of International Treaties and Conventions which had been ratified and signed by Sri Lanka. Section 30 is the enabling section to frame regulations and Section 34 impose a prohibition on sale of tobacco products without health warnings etc. We were also invited on behalf of the Respondents to consider a purposive construction and referred to several rules of interpretation/constructions relevant to the National Authority on Tobacco and Alcohol Act No. 27 of 2006, especially as regards Section 30 and 34 of the Act.

The Petitioner Company is one of the oldest business establishments engaged in the manufacture, export and distribution of cigarettes in our country. There is no total prohibition placed on the tobacco industry, but it is and has to be subject to certain restrictions and controls imposed by statute. It is so all over the world. The Respondents in this application as well as the Government of the day and any successive governments are duty bound to protect the civil society and its

citizens from all possible health hazards, caused due to cigarette smoking, and tobacco products. Scientific evidence prove and establish that smoking of cigarettes and use of tobacco cause death, illness and disability. Even the Petitioner does not dispute this aspect which cause all bad health effects to the people and its consumers.

The subject matter of this Writ Application cannot be considered in isolation of data and material gathered from other jurisdictions. Though the challenge before court is more or less focused on subordinate legislation, all necessary and relevant background facts need to be ascertained not only from within our country, but from also a global point of view since pictorial warnings on cigarette packs are accepted displayed and adopted all over the world, both in developed and developing countries as well as in 3rd world countries. The prime necessity all over the world being to protect all from health hazard, death, decease and disabilities. As such I do consider it essential to examine initially whatever available research, studies around the world and the attitudes of the authorities concerned with reference to case law in favour and against tobacco packaging warning messages and pictorial/graphic warnings, before giving my mind to the vires of the regulations (P11) framed under NATA Act.

I would include the following in this judgment, an excerpt of a report from the University of Waterloo, Canada : (though it is somewhat prolex)

*Health warnings on tobacco packages:*
*Summary of evidence and legal challenges*

*Prepared by:*

*David Hammond PhD*
*Department of Health Studies,*
*University of Waterloo Canada*
*200 University Ave West*
*Waterloo, ON*
*CANADA N2L, 3G1*
*January 2008*

***www.global.tobaccofreekinds.org***
***Website visited on 2nd May 2014***

To date, more than 17 countries have passed legislation requiring large pictorial health warnings on cigarette package: Dozens of other jurisdictions are currently preparing similar legislation in response to the international labeling regulations under Article 11 of the World Health Organization Framework Convention on Tobacco Control. The evidence on effective packaging and labeling practices has grown rapidly over the past decade to keep pace with theses regulatory developments. A consistent pattern of findings has emerged from this body of research:

- Package health warnings are among the most prominent and cost-effective health communications available
- Health warnings have high awareness and visibility among non-smokers and youth.
- Obscure text warnings have little impact

- Large, pictorial warnings can increase health knowledge, motivation to quit, and cessation behavior.
- Pictorial warnings are especially important for reaching low-literacy smokers and children
- Messages that depict health risks in a vivid and emotionally arousing manner are most effective.
- "Graphic" information should be accompanied by supportive cessation information.
- There are no adverse effects in response to pictorial warnings.
- Large pictorial warnings are credible and have high levels of public support.

This report also includes a review of legal challenges to health warning regulations in Canada and the European Union. In both jurisdictions, national courts have ruled against tobacco manufacturers and have upheld comprehensive labeling regulations including requirements for large pictorial health warnings on packages.

## Background: Tobacco Packaging

Packaging is an important component in the overall marketing strategy of consumer goods. Packaging helps to establish brand identity in competitive markets and serves as an effective form of promotion both at the point of purchase and while the product is being used. Packaging is particularly important for consumer products such as cigarettes, which have a high degree of social visibility. Unlike many other consumer products, Cigarette packages are displayed each time the product is used and are often left in public view between uses. Cigarette packages also serve as an important link to other forms of tobacco advertising. Package designs help to reinforce brand imagery that is communicated through other media, and play a central role in point of purchase marketing, which now accounts for a majority of the industry's promotional spending in Canada and the US.

## Health warnings: Evidence

This section provides a review of the scientific literature and research on health warning labels. The section begins with a review of general evidence on health communications, followed by evidence specifically related to tobacco warning labels on packages.

### 2.1 The use of pictorial information in health communications

A wide variety of research has clearly demonstrated the effectiveness of using pictures and imagery in health communications.

- Warnings with pictures are significantly more likely to draw attention and result in greater information processing.
- Pictures improve memory for the accompanying text and encourage individuals to imagine health consequences.
- Health warnings with pictures are also more likely to be accessed when on individual is making relevant judgments and decisions.

#### Experimental Research

Experimental research on cigarette warnings has also found that picture-based warnings are more likely to be rated as effective versus text-only warnings both as a deterrent for new smokers and a means to increase cessation among current smokers.

#### Populations-surveys and impact evaluation

A series of population-based surveys have compared the effectiveness between text and pictorial warnings. To date, surveys have been conducted in Brazil Thailand, Singapore, Uruguay, Mexico, Canada, New Zealand, Australia, the United Kingdom and the United States. These findings are consistent with both the experimental and government commissioned research: graphic warnings are more likely to be effective on virtually every

outcome that has been evaluated. The following provides a brief summary of the evidence key area.

Pictorial warnings are more likely to be noticed and read than text-only warnings including by non-smokers

- Health warnings on cigarette packages are among the most prominent sources of health information: more smokers report getting information about the risks of smoking from packages than any other source except television.
- Findings from Thailand and elsewhere, indicate that considerable proportions of non-smokers also report awareness and knowledge of package health warnings.
- Picture help to minimize the "wear-out' of health warnings over time.

Picture warnings increase awareness and recall of the health effects from tobacco use

- The impact of warnings on health knowledge depends upon the prominence of warnings: obscure text warnings have little effect, large pictures warnings have the greatest effect.
- Pictorial warnings increase how often smokers think about the health effects.

Health warnings promote cessation behavior

- Significant proportions of adult and youth smokers report that large comprehensive warnings have reduced their consumption levels increased their motivation to quit and increase the likelihood of remaining abstinent following a quit attempt.

Prominent health warnings increase in the use of cessation services.

Research conducted in Brazil, the UK, the Netherlands, and Australia has examined changes in the usage of national telephone "helplines" after contract information was in package health warnings. Each of these studies reports significant increases in call volumes. For example calls to the tollfree smoking cessation helpline in the Netherlands increased more than 3.5 times after the number was printed on the back of one of 14 package warnings. Therefore while it is not possible to precisely quantify the impact of health warnings on smoking prevalence or behavior, all of the evidence conducted to date suggests that health warnings can promote cessation behavior and that larger pictorial warnings are most effective in doing so.

Picture warnings appear to be especially effective among youth

- More than 90% of Canadian youth agree that picture warnings on Canadian packages have provided them with important information about the health effects of smoking cigarette, are accurate, and make smiling seem less attractive. Other national surveys of Canadian youth suggest similar levels of support and self reported impact.
- A recent study with Australian school children found that students were more likely to read , attend to think about, and talk about health warnings after the pictorial warnings were implemented in 2006. Experimental and established smokers were more likely to think about quitting and to forgo a cigarette, while intention to smoke was lower among those students who had talked about the warning labels and had forgone cigarettes.

Pictorial health warnings are essential in countries with low literacy and multiple languages

- Text-only health warnings have little or no effect among those who cannot read. This includes illiterate individuals, individuals who may be literature but only in a language other than that used for text warnings. As well as young children.

- Text-only health warnings, therefore, can increase health disparities across socio-economic groups
- The most effective way to reach low-literacy smokers is to include pictures., which can be universally understood,, including by young children.
- Preliminary evidence suggests that countries with pictorial warnings demonstrate fewer disparities in health knowledge across educational levels.

Prominent health warnings have the potential to undermine brand appeal and the impact of package displays at retail outlets

- A Quebec Supreme Court Judge in Canada remarked upon this phenomenon in a ruling regarding the industry's challenge to pictorial warnings in Canada:
  "Warnings are effective and undermine tobacco companies' efforts to use cigarette packages as badges associated with a life style.

In the United States in the year 2009 the congress passed the Family Smoking and Tobacco Control Act (Tobacco Control Act) 21 USCA. In that Act among many powers delegated to the Food and Drug Administration (FDA), the congress mandated the FDA to adopt a Rule requiring new graphic warnings on cigarette packages and advertisements. In June 2011 the FDA Rule required that coloured graphic warnings cover fifty percent (50%) of the front and back of each cigarette package sold in the U.S. This regulation is consistent with required warning label on cigarette packages in a number of other countries including

Canada, Australia, Brazil and Thailand. In consequence of publishing these regulations by the FDA, tobacco companies filed the following cases where courts expressed different views

On August 31, 2009, five tobacco manufacturers and one retailer filed suit in U.S District Court for the Western District of Kentucky to challenge several provisions of the Tobacco Control Act. This case, Discount Tobacco City & Lottery v. Food and Drug Administration (Discount Tobacco) upheld the graphic warning requirements. This decision was upheld on appeal to the U.S. Court of Appeals for the Sixth Circuit. On August 16,2011, five tobacco manufacturers filed suit in the U.S. District Court for the District of Columbia to challenge the FDA's final regulation governing graphic warning labels for cigarettes. In this case, R.J. Reynolds Tobacco Co. v. Food and Drug Administration (RJ. Reynolds), the court found that the graphic warning rule unconstitutionally limited the tobacco companies' right to freedom of speech. On appeal, the U.S. Court of Appeals for the D.C. Circuit upheld the district court's finding that the graphic warning requirement was unconstitutional. The federal government has decided not to appeal this decision to the U.S. Supreme Court.

Overview of the above two cases

Discount Tobacco

In Discount Tobacco, the Sixth Circuit upheld the provisions of the Tobacco Control Act that authorized and directed the FDA to issue a rule requiring large, graphic warnings to be placed on cigarette packages and advertisements. The Act requires color pictorial images showing the health effects of smoking to appear on the top half of all cigarette packs, and twenty percent (20%) of the upper portion of cigarette advertisements, along with new textual warnings. The companies argued that these provisions were overly restrictive and infringed upon their free speech rights under the First Amendment.

In January 2010, Judge Joseph H. McKinley, Jr. of the U.S. District Court for the Western District of Kentucky upheld the graphic warning label requirements, along with other key provisions of the Tobacco Control Act. Judge McKinley found that the "content and format" of the warning labels were justified in light of evidence that consumers do not pay attention to current warnings, and ruled that the warnings were not too burdensome because the companies retain half of the space on the cigarette packs and eighty percent (80%) of cigarette advertisements for their own speech. The tobacco companies appealed this ruling to the U.S. Court of Appeals for the Sixth Circuit. In March 2012, a three-judge panel upheld Judge McKinley's ruling on the graphic warning label requirements. The appeals court ruled that the graphic warnings do not "impose any restrictions on the (tobacco companies') dissemination of speech, nor do they touch upon plaintiff's core speech." The court also held that the textual warnings mandated by the Tobacco Control Act were "reasonably tailored to overcoming the informational deficit regarding tobacco.

## R.J Reynolds

In contrast, the U.S. Court of Appeals for the D.C. Circuit found in R.J. Reynolds that the graphic warning rule created by the FDA pursuant to the Tobacco Control Act did violate the tobacco companies' First Amendment rights.

In June 2011, the FDA issued its final rule mandating graphic warning labels on cigarette packages and advertisements. Nine graphic warning images were selected by the FDA, and the tobacco companies were required to display these warnings on a rotating basis. Among these images were a man smoking through a hole in his throat, and ac cadaver with chest staples. Two months after the rule was issued, five major tobacco companies filed suit, challenging the FDA's graphic warning label rule arguing that it forced them to convey the government's message about smoking and advocate against their own product.

In February 2012, U.S District Judge Richard J. Leon held that the FDA's graphic warning label rule violated the tobacco companies' First Amendment rights. The court took issue with the size of the mandated warning labels and concluded that the government has other means of discouraging smoking at its disposal. The FDA appealed this decision to the U.S. Court of Appeals for the D.C. Circuit. In a split ruling, the appeals court found that the rule violated the First Amendment. Two members of the panel ruled that the warning labels exceeded the proper scope of government authority to "force the manufacturer of a product to go beyond making purely factual and accurate commercial disclosures and undermine its own economic interest." The majority also ruled that the FDA failed to prove that the labels would "directly cause" a decrease in smoking rates in the United States.

**(The above material obtained – Tobacco Control Legal Consortium 875 Summit Avenue, Saint Paul, MN 55105.3076 www.publichealthlawcenter.org 651.290.7506**

**Website visited on 2nd May 2014)**

Apart from the above material included in this judgment which demonstrate contrary decisions of the US courts, the research undertaken by those authorities and the initiatives taken by very many countries to protect health of all persons by taking a step to include pictorial, health warnings/graphics in cigarette packets, I am unable to gather from the material made available, whether in our local scene the National Authority on Tobacco and Alcohol, on its own took the trouble to conduct research programmes prior to enacting Act No. 27 of 2006? As a passing comment I would also like to observe, as to whether the authorities concerned in the same way as "Tobacco' thought it fit to apply the same standards for 'Alcohol ' and endeavored to prescribe

regulations for 'Alcohol' also since both tobacco and alcohol are injurious to health and the resulting consequences are very much the same?

The relevant sections of the statute in question are Sections 30 & 34. Section 30 reads Thus:

(1) The Minister may make regulations in respect of any matter required by this Act to be prescribed or in respect of which regulations are authorized or required by this Act to be made.

(2) without prejudice to the generality of the powers conferred by subsection (1), the Minister may make regulations –

(a) identifying the tobacco products that are harmful or injurious to human health;

(b) specifying the types or categories of tobacco products which do not generate smoke.

(3) Every regulation made by the Minister shall be published in the Gazette, and shall come into operation on the date of such publication or on such later date as may be specified in such regulation.

(4) Every regulation made by the Minister shall after thirty days of its publication in the Gazette, be brought before Parliament for approval. Any regulation which is not so approved shall be deemed to be rescinded as from the date of such disapproval but without prejudice to anything previously done thereunder.

(5) Notification of the date on which any regulation made by the Minister is deemed to be rescinded shall be published in the Gazette

Section 34 reads thus:

(1) A manufacturer of a tobacco product shall cause to be displayed, conspicuously and in easily legible print, on every packet containing tobacco products manufactured by such manufacturer, a label of such dimensions as may be prescribed containing a statement of the tar and nicotine content in each tobacco product in such packet and such health warnings as may be prescribed. Different dimensions may be prescribed in respect of packets of different sizes.

(2) A person shall not sell or offer for sale, a packet containing tobacco products unless there is displayed on such packet, a label of the prescribed dimensions containing a statement of the tar and nicotine content in each tobacco product in such packet and the prescribed health warning.

(3) Any person who contravenes the provisions of subsection (1) or subsection (2) shall be guilty of an offence under this Act, and shall on conviction after summary trial before a Magistrate be liable to a fine not exceeding two thousand rupees or to imprisonment for a period not exceeding one year or to both such fine and imprisonment.

I observe that the Minister could in terms of the enabling Section 30, of the NATA Act make regulations on matters required by the Act to be prescribed. That would be the 1st limb that surface from Section 30(1). If one looks at Section 34(1) and 34(2) the matters and material that need to be prescribed could be understood and identified. Then the other limb of Section 30(1), contemplate of making regulations by the Minister, where the Act authorize or require to be done under the Act. Even Section 33(1) connects the

word 'prescribed'. Then subsection (2) of Section 30 seems to bestore on the Minister something more and an additional power from what is given in Section 30(1). As such I do agree with the learned Deputy Solicitor General that if by a narrow interpretation pictorial health warnings are ousted or ruled out, by resorting to Section 30(2) (a) the Minister may make regulations identifying the tobacco products that are harmful or injurious and thereby inclusion of pictorial health warnings could be permitted by regulations. Further I observe that Sections 30(1) and 30(2) are somewhat inter connected by the use of the words "without prejudice to the generality of the powers conferred by sub Section (1)". As such I could safely conclude based on the above interpretation that the regulation in question (P11 as amended by R3 & R15) could be presented by the Minister, subject to views expressed by this court. In the instant case, the regulations have been presented by the Minister in terms of Section 30 read with Section 34 of the NATA Act.

The basic and general rule of interpretation is that it must be construed in the ordinary and natural meaning of the word and sentence. However this rule is subject to well accepted exceptions. Having this in mind, when I peruse Section 34 of the above Act in its entirety it appears to me that the

choice is between two interpretations. Section 34(1) envisage a prohibition on sale of tobacco products without health warnings and the tar and nicotine content. There is no specific reference to 'pictorial' health warnings in Section 34 of the Act. Petitioner puts more emphasis on the words 'easily legible print. Learned President's Counsel also relies on the Sinhala version and Section 44 of the Act. It was strongly argued that it is nothing but written letters or words and the health warning could be described accordingly in letters or words. On a plain reading of the Section it appears to be so. However I cannot in the instant case give a narrow meaning and it is the duty of court to give an interpretation in keeping with the intention of the legislature.

A 'health warning' in the context of the statue and applicable to the subject matter of the Writ Application before us, cannot be given a narrow restricted meaning. The term health warning cannot be narrowly interpreted since a warning in today's context and society could be expressed by words, texts, pictures or even by use of symbols. The use of symbols in health communication could attract attention of the consumers. E.g. uses of skull and crossbones as the universal symbol for toxic substances. As such a health warning could attract a variety of meanings inclusive of pictorial health

warnings. It would never have been the intention of Parliament to exclude pictorial health warning since such a pictorial warning need to reach all category of persons. i.e the poor, rich, middle class, literate and illiterate, disabled and as well as children. Petitioner attempts to interpret the above terms differently be referring to various documentation and material, but I am compelled to reject and dismiss such views, since the intention of Parliament gathered from all the material placed before court by the Respondents and the hansard favour the view that health warning referred to in Section 34 could be very comfortably extended to pictorial health warnings.

In the Sinhala version of Section 34 of the words clearly readable. (පහසුවෙන් කියවිය හැකි අකුරින්) would also have to be construed and applied to both the health warnings and statement of nicotine and tar contents. I do agree by perusing extracts from the Malalasekera English-Sinhala Dictionary (5th Ed 2007) produced as A11 & A12 and the Gunasena Maha Sinhala Shabdakoshaya (2008) produced as A13 the word 'letter' to include certain, forms of pictures. Even the Sinhala version should be read in the context of words which state ..... නිකොටින් හා තාර ප්‍රමාණය දැක්වෙන හා සෞඛ්‍යයට හානිකර බවට අනතුරු ඇඟවීමක් ඇතුලත් නියම කරනු ලැබිය හැකි ආකාරයෙන් වූ හා ..... It is understood as a health warning in the prescribed manner. As such

the same interpretation stated above need to be adopted and applied since the primary purpose of statutes is to purpose justice and avoid absurd unacceptable interpretations. Statutory language is not read in isolation, but in its context. This court has been invited to peruse the following extract from Bindra Interpretation of Statutes – 10th Ed pg. 275-6

"It is a well known principle of interpretation of statutes that a construction should not be put upon a statutory provision which would lead to manifest absurdity or futility, palpable injustice, or absurd inconvenience or anomaly. To avoid absurdity or incongruity grammatical and ordinary sense of the words can, in certain circumstances, be avoided. There is no obligation on a court of law to construe a clause as would lead to a clear absurdity which would not possibly be regarded as contemplated by the legislating authority or agency. Since the basic and underlying purpose of all legislation, at least in theory, is to promote justice, it would seem that the effect of the statute should be of primary concern. If this is so, the effect of a suggested construction is an important consideration and one which the court should never neglect. As a result, the court should strive avoid a construction which would tend to make the statute unjust, oppressive, unreasonable, absurd, mischievous or contrary to public interest. One should avoid construction which would result in absurdity and give a harmonious construction so as to avoid making one provision of the Act conflict with the other."

At this point in this judgment I would prefer to refer to some rules of interpretation of Statutes which fortify my views and which enabled me to express the above observations.

**Construction ut res magis valeat quam pereat**

"If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result", "Where alternative constructions are equally open, that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating; and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system."

Maxwell on The Interpretation of Statutes 12th Ed. Pg. 45

**CONSTRUCTION MOST AGREEABLE TO JUSTICE AND REASON**

At pg. 199.....

In determining either the general object of the legislature, or the meaning of its language in any particular passage, it is obvious that the intention which appears to be most in accord with convenience, reason, justice and legal principles should, in all cases of doubtful significance, be presumed to be the true one. "An intention to produce an unreasonable result is not to be imputed to a statute if there is some other construction available." Where to apply words literally would "defeat the obvious intention of the legislation and produce a wholly unreasonable result" we must "do some violence to the words" and so achieve that obvious intention and produce a rational construction. The question of inconvenience or unreasonableness must be looked at in the light of the state of affairs at the date of the passing of the statute, not in the light of subsequent events.

**MODE OF ASCERTAINING MEANING IF OBSCURE**

Pgs. 94/95..

CRAIES ON STATUTE LAW

> If (as is often the case) the meaning of an enactment, whether from the phraseology used or otherwise, is obscure, or if the enactment is, as Brett L.J. said in The R. L. Alston, "unfortunately expressed in such language that it leaves it quite as much open, with regard to its form of expression, to the one interpretation as to the other," the question arise, "What is to be done? We must try and get at the meaning of what was intended by considering the consequences of either construction." And if it appears that one of these constructions will do injustice, and the other will avoid that injustice, "it is the bounden duty of the court to adopt the second, and not to adopt the first, of those constructions." However "difficult, not to say impossible," it may be to put a perfectly logical construction upon a statute, a court of justice "is bound to construe, it, and, as far as it can, to make it available for carrying out the objects of the legislature, and for doing justice between parties."

**Bindra, Interpretation of Statutes, 10th Ed., pg. 277**

> "When there is doubt or a patent absurdity and the grammatical construction fails to give effect to the plain intention of the Act, as gathered from the preamble, then the courts are competent to and should rewrite the section in such a way so as to give effect o the Act".

As observed above adherence to such International Treaties and conventions is provided in terms of Section 15(J) of the NATA Act. Having perused R8 (WHO Framework Convention on Tobacco Control – referred to as FCTC) refer to inclusion of pictures or pictograms, in Article 11. It considers the harmful effect of tobacco and promote health warnings to be included in packaging and labeling. Space to be occupied within a ratio of 50% or more but not less than 30%.

According to rule of construction of statutes, legislature is presumed not to enact rules contravening international law or common law of realm.

The Judges may not pronounce an Act ultra vires as contravening international law, but may recoil, in case of ambiguity, from a construction which would involve a breach of the ascertained and accepted rules of international law. (Bindra Interpretation of Statutes. 10th Ed. Pg. 204.

Our Supreme Court in decided cases emphasized the need to interpret domestic law in harmony with Sri Lanka's international commitments even in cases where no specific domestic law had been enacted to give effect to its international obligations.

In Weerawansa Vs. A.G 2000 (1) SLR 387 at 409

"Should this court have regard to the provisions of the Covenant? I think it must. Article 27(15) requires the State to "endeavor to foster respect for international law and treaty obligations in dealings among nations". That implies that the State must likewise respect international law and treaty obligations in its dealings with its own citizens, particularly when their liberty is involved. The State must afford them the benefit of the safeguards which international law recognizes.

In the background it would be wrong to attribute to Parliament an intention to disregard those safeguards. The PTA cannot be interpreted as dispensing, by implication or inference, with the safeguard of prompt production before a judicial officer under and in terms of Article 13(2) ".

Having read FCTC (R8) and the guidelines for implementing of Article 11 (R10) of the FCTC there cannot be any prohibition to convey the message by pictorial health warnings. As such apart from the matters stated in this judgment as regards inclusion and interpreting health warning to cater to pictorial health warning more support is lent, to do so from documents R8 and R10. Our courts recognize international commitments and articles 27(15) of the Constitution, endeavor to foster respect for international law and treaty obligation. As such I reject the argument that Section 34(1) of the NATA Act provide only for textual warnings. Health warnings in the context of said section and the NATA act need to be interpreted in a meaningful and purposive way and not so narrowly as the Petitioner argues. It may be essential to do some violence to the words to achieve the intention of the legislature. It is so because the message need to reach all category of persons in our country inclusive of children as observed above. Words of a section of a statute should be interpreted harmoniously to avoid conflict, friction, absurdity and inconvenience.

On behalf of the Petitioner Company, we also had the benefit to hear the submissions of Mr. Ali Sabry, President's Counsel, on the aspect of Petitioner's Intellectual Property Rights. We find some substance in those submissions of learned President's Counsel. As such we are inclined to adjust the 20% space

allocated to the Petitioner Company in a more reasonable and a meaningful way for the following reasons.

In view of Sections 121(1) and 121(2), of the Intellectual Property Act the rights of the registered owner of a trademark take both positive and negative forms in the sense that section 121(1) allows the registered owner to use the trademark, assign or transmit the mark and conclude licence agreements in respect of the trademark and 121(2) allows the registered owner to preclude third parties from using the trademark or a sign misleadingly similar to the trademark. (S.N. Silve J. in Leelananda v. Earnest de Silve (1990 (2) Sri LR 237-240-241).

These rights are subject to the limitations recognized under section 122 of the IP Act. These limitations restrict the right of the registered owner to preclude third parties from using the mark in certain specified circumstances. They do not restrict the positive rights of the registered owner – the right to use the trademark etc.

Even section 35(1)(a) of NATA Act recognizes the right of the registered owner to use the trademark. Section 35(1) of NATA Act prohibits the advertisements involving tobacco but section 35(1)(a) expressly permits the use of trademarks in respect of tobacco.

These statutory provisions clearly indicate that the registered owner of a trademark has the right to use the trademark. A trademark is used in trade and commerce. The use is intended to achieve the owner's reasonable business objectives – to reach the consumers and promote the commercialization of the concerned goods.

Consequently, the petitioners should have a reasonable opportunity to exercise the rights attached to their registered trademarks such as the use of the trademarks to reach the consumers and promote the commercialization of their goods. It is noted that the law does not prohibit the sale of tobacco. The petitioners can sell etc. tobacco subject to the lawful restrictions. They have the right to sell tobacco using their trademarks.

Where 80% of the pack is covered with the health warning, the practical issue that arises is whether the remaining 20% is reasonably sufficient to present and exhibit the mark or in other words to use the mark. Having considered the size of the packs and other relevant facts, I am of the view that 20% of the space is not reasonably sufficient to present and exhibit a trademark 20% of the space is not exclusively left for the trademark. It may carry other information as well. In such a space, the presentation of the trademark necessarily becomes comparatively very small. The owner of a trademark cannot

reach the consumers with his mark which is hidden in the health warning. The consumers will also not be able to see and identify the trademark properly and consequently the source of the respective goods. They have to make extra efforts to see or identify the trademark, when they buy the goods. Such a situation will unreasonably interfere with the statutory right of the owner of the trademark to use it frustrating the whole purpose of a trademark and of the trademark law.

Moreover, the Trademark Law, while protecting the rights of the owners of the registered trademarks, attempts to safeguard the interests of the consumers as well. In a market where there are several brands or trademarks in respect of same or similar goods the protected trademarks enable the consumers to make their choice. The consumers can identify the goods and the source of the goods that they actually want to buy through trademarks and brands without being misled to purchase the goods of wrong sources and wrong quality. Where only 20% of the space is available for the presentation of the trademark and other information, the consumers will not be able to see the trademark properly and make their choice properly and effectively. The packs of each manufacturer may look the same where 80% of the space is covered with the health warning. When the trademarks are not obviously and clearly presented, the unscrupulous traders

may even misuse such situation to mislead the consumers by selling products from wrong sources rather than selling what actually the consumer wants to buy.

This court observes that a balance need to be maintained, having considered the case of either party. Health of each and every citizen of our country and all those living in Sri Lanka permanently or in a temporary capacity is paramount and need to be protected. On the other hand a legally established business/industry cannot be denied its legitimate rights, flowing from the laws of our country. If 80% of the space is covered by health warnings the remaining space would not be sufficient to display the manufacturers trade mark. At the oral hearing of this application, the learned Deputy Solicitor General very correctly conveyed to this court that the authorities concerned would be agreeable and willing to allocate 75% of the space for health warnings. However at that point of time of the hearing the learned President's Counsel for the Petitioner Company was not prepared to act on the above ratio of 75%, as he may have thought that to accept the suggestion of learned Deputy Solicitor General would not be in the best interest of his client. However it is the view of this court that warnings/pictorial health warning should cover a space between 50% to 60%. Thus giving the Petitioner Company at <u>least</u> 40% space to manage the Companies

Trade Mark rights, within that space. The authorities concerned are directed to suitably amend the regulation to allocate a ratio anything between 50% to 60% for health/pictorial warnings.

We have also noted the contents of motion dated 14th March 2014, filed by the registered Attorney-at-Law for the Respondents. The said motion indicates that regulations marked P11, R3 & R15 had been placed before Parliament and same had been approved by Parliament on 19.2.2014. Section 30(4) of the NATA Act requires the regulations to be placed before Parliament after 30 days of its publication in the Gazette for approval. Regulations not so approved deemed to be rescinded. As such after a lapse of the 30 day period, as stated in section 30(4) the regulation, need to be placed before Parliament. I cannot see a prohibition as regards the provisions conferred in Section 30(4) to place the regulations before Parliament at any time after 30 days of publication in the Gazette. Now that regulation P11, R3 & R15 are approved by Parliament as subordinate legislation it remains valid for all purposes which has a quasi – Parliamentary validity subject to the views expressed by this court, as regards regulation No. 5 of P11 as amended by regulation R15. The space to be occupied for pictorial health warnings should only occupy a space in the ratio anything between 50% to 60% for the reasons contained in this judgment. The 1st

Respondent is directed to suitably amend the above regulation in keeping with the direction given by this court. The above requirement in the circumstances of this case would not offend the principle of proportionality. The attempt to introduce pictorial health warnings is only to minimize the harmful health consequences of smoking cigarettes. There is no total prohibition or ban on the Tobacco Industry or to engage in its business by the Petitioner Company. The regulations only attempt to impose a valid restriction or exercise some control for the benefit of safeguarding health of our people and as such the principles of proportionality cannot be offended.

In all the facts and circumstances of this Writ Application, we are of the view as stated in this Judgment and subject to the view expressed by this court as regards regulation No. 5 of P11 as amended by regulation R15, challenge to the regulation in question by the Petitioner on the several grounds urged by the Petitioner is a futile attempt. The regulation in question is not ultra vires the statute. However having regard to the Petitioner's rights flowing from Intellectual Property Act as regards the rights of the registered owner of a trade mark the positive rights of the registered owner, the right to use the trade mark, and the recognition given in terms of Section 35(1) (a) of the NATA Act, this court is mindful of same and as such accepts the position taken in that regard by the

Petitioner. On that account we direct the 1st Respondent to adjust the particular regulation referred to above, accordingly.

The remedy sought by the Petitioner Company are the prerogative Writs of Certiorari and Prohibition which are discretionary remedies of court. The granting of a Writ is a matter for the discretion of court, and court is bound to take into consideration the consequences which by the issue of the writs sought will entail. A Petitioner seeking a prerogative writ is not entitled to relief as a matter of course, as a matter of right or as a matter of routine. In the circumstances, subject to the views expressed by this court application of the Petitioner is refused and dismissed without costs.

Application dismissed.

JUDGE OF THE COURT OF APPEAL

W.M.M. Malinie Gunaratne J.

I agree.

JUDGE OF THE COURT OF APPEAL