

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

In the matter of an application for
Mandates in the nature of Writs of
Certiorari and Prohibition under Article
140 of the Constitution of the
Democratic Socialist Republic of Sri
Lanka.

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

Petitioner

C.A. Application No.336/2012

Vs.

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"

385, Ven. Baddegama Wimalawansa
Thero Mawatha
Colombo 10.

Respondents

BEFORE : **S. SRISKANDARAJAH, J (P/CA)**
COUNSEL : Romesh de Silva PC with Harsha Amarasekera PC, Shanaka
Amarasinghe and Ms Dilumi de Alvis,
for the Petitioner,
Arjuna Obeysekera DSG with Suranga Wimalasena,
for the Respondents

Supported interim order on : 20.02.2013

Order on : 22.02.2013

S.Sriskandarajah, J,

The Petitioner is a company incorporated in Sri Lanka and carries on the business of manufacturing, exporting and selling of cigarettes of different brands. The Petitioner submitted, the cigarette industry of Sri Lanka is currently regulated by the Direction No.100, published in Gazette Extraordinary No.969/6 dated 31st of March 1997, issued under Section 6(1)© of the then Consumer Protection Act No.1 of 1979, which continues in force under the said provisions in the consumer affairs Authority Act No.9 of 2003, and the cigarette industry is also now regulated by the National Authority of Tobacco and Alcohol Act No.27 of 2006. The petitioner in this application is challenging, by way of a Writ of Certiorari, to quash the tobacco products (labeling and packing) Regulation No.1 of 2012, published by the 1st Respondent in the Government Gazette Extraordinary No.1770/15 dated 8th August 2012.

The Petitioner is also seeking in this application an interim order staying the operation of the aforesaid regulation No.1 of 2012, pending the hearing and final

determination of this application. This order is in relation to the interim relief sought by the Petitioner.

The Petitioner submitted that the said regulation is ultra vires to the provisions of Section 34 of the National Authority on Tobacco and Alcohol Act. The Petitioner contended that the Minister, under Section 34(1) has the power and authority to publish regulations which prescribes the dimensions of labels to be included on a tobacco pack containing a statement of the tar and nicotine contained in each tobacco product, and such health warnings prescribed by regulations. It is the contention of the Petitioner that the Minister's powers are limited to this section and he cannot introduce regulations that go beyond the scope of the provisions of the said section. It is the contention of the Petitioner that the said section only provides for health warnings to be written, printed or typographical and it has not provided for pictorial health warnings. Regulation No.1 of 2012, which was published on the 8th of August 2012, has made specific reference to pictorial health warnings that are to be embodied in the packet, package, carton or label. The learned Counsel for the Respondent submitted, the words used in the said section "such health warning, as may be prescribed, could include pictorial warnings as well."

The Petitioner also contended that it is impossible to print the relevant contents and emissions contained in cigarettes, including nicotine, tar, formaldehyde and other toxic contents. It is the contention of the Petitioner that tobacco smoke is a complex mixture of over 5600 identified chemicals of which, at least 150 are reported to be toxic or potentially toxic. Therefore, it is not possible to define a definite list of tobacco and tobacco smoke components that have been identified as toxics, for the Petitioner to print relevant information in the package or carton containing cigarette, as required by the said regulation.

The Petitioner also contended that printing pictorial health warning to cover not less than 80% of the total area of the packet is also an impossible task that the Petitioner or any manufacturer to comply with.

In reply, the learned D.S.G. submitted that the clarification to Regulation No.1 of 2012 was published in the Government Gazette Extraordinary No.1797/22, published on the 15th of February 2013, and the said Gazette has specifically provided for the pictorial warning to cover not less than 80% of the total area of a pack, package or carton, is now amended and the present position is that the pictorial warning shall be printed on the top surface area of both front and back side of every cigarette pack, package or carton containing cigarette, and shall cover an area of not less than 80% of the top surface area of both front and back side of every cigarette pack, package or carton. The submission of the D.S.G is that the above clarification has made it clear that the pictorial warning could be practically printed in the pack, package or a carton containing cigarettes, and it is not an impossibility. The learned D.S.G. also submitted that the amended regulation has made it clear that the toxic element that has to be printed and exhibited in the said pack, package or carton is only the nicotine and tar that is contained in each tobacco product, and it need not include the whole list of toxic element that could be identified in a tobacco product. Therefore, he submitted that printing of such information in a cigarette pack, package or carton is not impossible and, the submission of the learned President's Counsel for the Petitioner that complying with Regulation No.1 of 2012 is impossible, has no merit.

As I have observed above, the case has to be argued on its merit but, at this stage, this Court is only considering the issue of an interim order, as prayed for in the Petition. It is settled law that a stay order is an incidental measure pending disposal of the main matter before the Court. In *Billimoria Vs. Minister of Land and Land Development and Mahaweli Development and two others*, (1978 - 1979 - 1980), 1 Sri LR page 11, the Supreme Court observed that the Court had to decide whether writ could issue or not, and this could not be decided without notice being first issued on the respondents affording

them an opportunity of being heard. All this would have taken considerable time. The interests of justice, therefore, require that a stay order be made as an interim measure. It would not be correct to judge such orders in the same strict manner as a final order. The interim orders, by their very nature, must depend a great deal on a Judge's opinion as to the necessity for interim action. In *Duwaratchi and Another Vs. Vincent and Others* (1984) 2 Sri L.R. page 94, the Court laid down the principles on which an interim order could be issued. It held, an interim stay order in a writ application is an incidental order made in the exercise of the inherent or implied power of the Court. The Court should be guided by the following principles:-

- 1) Will a final order be rendered nugatory if the Petitioner is successful?;
- 2) Where does the balance of convenience lie?
- 3) Will irreparable or irremediable mischief or injury be caused to either party?

The ratio of the judgment in *Bilimoria Vs. Minister of Land, Land Development and Mahaweli Development and 2 others* and *Duwaratchi Vs. Vincent Perera* is that in considering the question of interim order the Court must bear in mind that an interim order is made in the exercise of inherent or implied power of court, in circumstances where the final order is, if the Petitioner is successful, be rendered nugatory and the aggrieved party will be left holding a decree worthless for all purpose. In the light of the above principle, if one considers the interim order sought in this application, the interim order is to stay the operation of the Tobacco Products (Labeling and Packing) Regulation No.1 of 2012 which was published on the 8th of August 2012. This Regulation has laid down certain guidelines that have to be followed by the manufacturers of tobacco products, viz., to display labels which contain pictorial warnings that are prescribed in the said Gazette Notification. The Petitioner's contention is that those requirements published in the Gazette are ultra vires to the provisions of the National Authority on Tobacco and Alcohol Act. If that is the contention of the Petitioner and if the Petitioner satisfies this Court at the argument stage and if the Court holds with the Petitioner, then the regulations

will be quashed by a Writ of Certiorari. In that event the Petitioner need not follow the said regulations any further, so that non-issuance of an interim order in the given circumstances will not affect the Petitioner's ultimate remedy, and the Court's final order will not be rendered nugatory. Until such an order is made, the Petitioner could comply with the regulations that are published under the said law.

The only other argument put forward by the Petitioner is that it is impossible for the Petitioner to comply with the requirements of the said regulation. Firstly, the Petitioner submitted that there is insufficient time for them to comply with the said regulation. In fact, the regulation was published on the 8th of August 2012, and the Petitioner was aware of its application from that date, and the said regulation will only be coming into operation on the 1st of March 2013. In those circumstances the Petitioner cannot claim that the Petitioner was not given adequate notice for the Petitioner to comply with the said regulation. Further, the Petitioner complains that certain requirements made in the said regulation cannot be fulfilled by the Petitioner due to lack of clarity, in particular, the 80% space that has to be covered in the package and the toxic contents that has to be included in the package. These matters have been clarified by the Minister, the 1st Respondent, by publishing an amended regulation, the said amended regulation was also published by Gazette notification dated 15th February 2013. This amended regulation facilitated the Petitioner and answers his concern in relation to the impossibility of complying with the said regulation and, in those circumstances this Court is of the view that the balance of convenience does not lie in favour of the Petitioner and there is no material to show that irreparable or irremediable mischief that would be caused to the Petitioner if an interim order is not issued in the given circumstances. Therefore, this Court refuses to issue an interim order, as prayed for, by the Petitioner in this Application.

President of the Court of Appeal