

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

S.C. (SD) No. 2 / 2015.

In the matter of a reference in terms of Article 122 (1) (b) of the Constitution

“An Act to Amend the National Authority on Tobacco and Alcohol Act, No. 27 of 2006”

BEFORE :

K. Sripavan	-	Chief Justice
Sisira J. de Abrew,	-	Judge of the Supreme Court, and
Priyantha Jayawardena, PC	-	Judge of the Supreme Court

Counsel : Janak de Silva, Deputy Solicitor-General, with Anusha Fernando SSC and Suranga Wimalasena SSC for the Attorney-General

Faisz Musthapha PC with Faisza Markar, Manoj Bandara, Lakshana Perera and Mehran Casseem for Ceylon Tobacco Company PLC. Mr. Musthapha was permitted to make submissions in respect of the Bill.

The Court assembled for the hearing at 10.45 a.m. on 6th February, 2015.

A Bill titled “ AN ACT TO AMEND THE NATIONAL AUTHORITY ON TOBACCO AND ALCOHOL ACT, NO. 27 of 2006 ” has been referred to the Chief Justice by His Excellency the President in terms of Article 122(1) (b) of the Constitution for special determination of this court as to whether the Bill or any provision thereof is inconsistent with the Constitution. The Bill bears an endorsement under the hand of the Secretary to the Cabinet of Ministers to the effect that the Cabinet of Ministers has certified that in its view, the Bill is urgent in the national interest.

Janak de Silva, Deputy Solicitor-General with Anusha Fernando SSC and Suranga Wimalasena SSC appeared on behalf of the Attorney-General and assisted this Court in the consideration of the provisions of the Bill.

Mr. Faisz Musthapha, P.C. sought to intervene on behalf of Ceylon Tobacco PLC on the basis that Ceylon Tobacco PLC is directly affected by the amendments sought by the Bill. The Court gave a hearing to Mr. Musthapha in terms of Article 134(3) of the Constitution.

The Bill seeks to amend Section 34 of the National Authority on Tobacco and Alcohol Act, No. 27 of 2006 in order to comply with Article 11 of Frame work Convention on Tobacco Control (FCTC) on the basis of national interest to comply more effectively with the international obligation of Sri Lanka with a view to protect public health.

The proposed amendment seeks to make the following changes to Act No. 27 of 2006.

- (a) It repeals Section 34 of the said Act and substitutes a new Section,
- (b) A new Section 34A is inserted immediately after Section 34 of the principal enactment.

The amendments made by (a) and (b) above must be read together to understand the changes sought to be made to the said Act. Section 34(1) of the said Act as it stands now does not specify the size of the pictorial health warning contemplated therein. The size of the pictorial health warning was specified by the Minister of Health by regulations made under Sections 30 read with 34 of the said Act. The two amendments explained above are intended to impose 80% as the size of the pictorial health warning by the main Act itself. The amendment also increases the maximum fine to Rs. 50,000/= from Rs. 2,000/=.

- (c) Section 45 of the principal enactment is amended by adding the definition of "health warnings".
- (d) Manufacturers and importers of existing tobacco products are granted a grace period to comply with the provisions of the amendment.
- (e) Regulations already made in terms of Section 34 of the principal enactment prior to February 1, 2015 are kept alive in so far as they are not inconsistent with the provisions of the amendment.

At the hearing before Court, Mr. Janak de Silva suggested the following amendments to the Clause 2 of the Bill;

The amended Clause was made available to both the Court and Mr. Musthapha and it was agreed that submissions be restricted to the amended formulation. The re-formulation of Clause 34 as drafted by the Legal Draftsman and submitted to Court is as follows:

Existing Clause 2 of the Bill shall be replaced with the following:-

" 34 (1) A manufacturer or an importer of a tobacco product shall cause to be displayed conspicuously and in legible print-

- (a) on the top surface area of both front and back sides of every packet, package or carton containing the tobacco product manufactured or imported by such*

manufacturer or importer, such health warnings, as may be prescribed, subject to the provisions of section 34A; and

(b) on every packet, package or carton containing the tobacco product manufactured or imported by such manufacturer or importer, a label or a statement specifying the tar and nicotine content in each tobacco product in such packet, package or carton.

(2) A person shall not sell, offer for sale, supply, distribute or store a packet, package or carton containing tobacco products unless a health warning as provided for in subsection (1) (a) and a label or a statement specifying the tar and nicotine content in each such product as provided for in subsection (1) (b), are displayed conspicuously in legible print on every packet, package or carton containing the tobacco products.

(3) Any person who contravenes the provisions of subsection (1) or subsection (2) commits an offence and upon conviction after summary trial by a Magistrate be liable to an imprisonment of either description for a term not exceeding one year or to a fine not exceeding rupees fifty thousand or to both such fine and imprisonment."

He further submitted that the words " and shall come into operation with effect from February 1, 2015 " in Clause 1 will be deleted as the said date has now passed and the Bill is not intended to be passed with retrospective effect.

Mr. de Silva further submitted that the aforesaid suggested amendments to the Bill can be moved at a Committee stage in Parliament to replace Clauses 1 and 2 of the Bill. He thus argued that effect must be given to Framework Convention on Tobacco Control as Sri Lanka has already signed and ratified the said Treaty.

Mr. de Silva drew the attention of Court to the WHO Framework Convention on Tobacco Control. He drew the attention of Court to Article 2.1 and Article 5.2 of the WHO Framework Convention on Tobacco Control.

"Article 2.1

In order to better protect human health, Parties are encouraged to implement measures beyond those required by this Convention and its protocols, and nothing in these instruments shall prevent a Party from imposing stricter requirements that are consistent with their provisions and are in accordance with international law."

“Article 5.2

Towards this end, each Party shall, in accordance with its capabilities:


- (a) establish or reinforce and finance a national coordinating mechanism or focal points for tobacco control; and
- (b) adopt and implement effective legislative, executive, administrative and/or other measures and cooperate, as appropriate, with other Parties, in developing appropriate policies for preventing and reducing tobacco consumption, nicotine addiction and exposure to tobacco smoke.”

In the determination of S.C. (S.D.) No. 13 – 22/05 (National Authority on Tobacco and Alcohol Bill) it was held that “ the Petitioners who are from the alcohol and tobacco industries and trade do not dispute the findings disclosed in these publications that manage from specialized Agencies of the United Nations; their contention is that the health risk of the illicit trade is far worse and the restrictions sought be placed on the lawful trade would aggravate the health risk resulting from the illicit trade. This argument fails to account for the basic premise that the harmful impact of alcohol, tobacco and for that matter drug, whether the source of supply of such substance is lawful or illicit, is a common pattern of use, addiction and dependence. Undoubtedly, the health risk of illicit use is worse. But, the behavioural tendency of use, addiction and dependence being the same, the lawful trade and the illicit trade would have the effect aggravating such behavioural tendency. The user would have recourse to the licensed sources as well as illicit sources when the behavioural trend is set in motion. Hence, from the point of public health, there is a harmful interlink. The likely pattern is that addiction will start from the licensed source and get aggravated in the fold of the illicit trade. The illicit trade is per se contrary to law, punishable under various statutes and there is no question of regulating an illicit trade. On the contrary the trade that is carried out on the basis of a license or authority of the law, which is found to be harmful to public health should necessarily be subject to restraint in order to minimize the harmful consequences to public health. “

Mr. de Silva drew the attention of the Court to an International Status Report – September 2014 (Fourth Edition) published by the Canadian Cancer Society. Page 2 of the said report contains the following details;

“ The top countries in terms of warning size as an average of the front and back:

1. 85% Thailand (85% of front, 90% of back)
2. 82.5% Australia (75%, 90%)
3. 80% Uruguay (80%, 80%)

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4. 75% Brunei (75%, 75%)
 4. 75% Canada (75%, 75%)
 4. 75% Nepal (75%, 75%)
 7. 65% Togo (65%, 65%)
 7. 65% Turkey (65%, 65%)
 7. 65% Turkmenistan (65%, 65%)
 10. 65% Mauritius (60%, 70%)
 11. 65% Mexico (30%, 100%)
 11. 65% Venezuela (30%, 100%) “

Page 7 of the said report states “ Effective package warnings increase awareness of the health effects and reduce tobacco use. As a result of health warnings, consumers receive more information, not less. Consumers are entitled to be fully informed of the many health effects of tobacco products, and the package is the best way to do that. Studies show that consumers, including children, underestimate the health effects, in low, middle and high income countries. “

Mr. Musthapha relied on the judgment of the Court of Appeal in C.A. Writ Application No. 336/12 (C.A. Minutes of 12.05.14) and sought to argue that the pictorial health warning covering 80% of the front and back side of a packet was unreasonable and is violation of the vested right to use the trade and enshrined in Section 121(1) of the Code of Intellectual Property Act.

This Court is now exercising its constitutional jurisdiction by virtue of a reference made by His Excellency the President in terms of Article 122(1)(b). The submission of the learned President’s Counsel that the amendments sought to be made would affect the decision of the Court of Appeal in Writ Application No. 336/12 is misconceived as this Court is exercising sole and exclusive jurisdiction to determine any question as to whether the Bill or any provision thereof is inconsistent with the Constitution. One of the objects of Act No. 27 of 2006 as stated in the preamble to the said Act is to “identify the policy on protecting public health in order to eliminate harms relating to tobacco and alcohol”. A policy once formulated is not good for ever. The Government has the power to change the policy. The executive power is not limited to frame a particular policy. It has untrammelled power to change, re-change, adjust and readjust the policy taking into account the relevant and germane considerations. It is entirely in the discretion of the Government how a policy should be shaped. It should not however be arbitrary and capricious. As rightly submitted by Mr. Faisz Musthapha “to declare what the law is, or has been, is a judicial power; to declare what the law shall be, is legislative.” Thus, the covering the area of 80% of both front and back sides of every packet, package or carton contacting cigarettes

and other tobacco products cannot be considered arbitrary and capricious. In this context it may be appropriate to reproduce the observation made by this Court in S.C. (S.D.) No. 13-22/05 (National Authority on Tobacco and Alcohol Bill) which reads thus:-

“ In this connection we cite the observations made by Supreme Court of India in the case of Vincent vs Union of India 1987 All India Reporter – S.C. 1 – page 990 at page 995 which reads as follows:

“.....maintenance and improvement of public health have to rank high as these are indispensable to the very physical existence of the community and on the betterment of these depends the building of the society of which the Constitution makers envisaged. Attending to public health, in our opinion, therefore, is of high priority – perhaps the one at the top.”

Ceylon Tobacco Company PLC in the Writ Application urged that the regulations formulated under Act No. 27 of 2006 with regard to pictorial warnings were ultra vires, since the said Act does not empower the Minister to make such regulations. The said argument was rejected by the Court of Appeal. The Court of Appeal in its judgment held that Section 30 read with Section 34 of the said Act enables the Minister to prescribe pictorial health warnings by way of subordinate legislation. Hence, this Court does not see any violation based on the judgment of the Court of Appeal.

Mr. Musthapha sought to argue that the change of policy is likely to frustrate the legitimate expectation of Ceylon Tobacco Company PLC and has an important bearing on the protection afforded by Article 12 of the Constitution. Once the Government lays down a policy it has to follow it uniformly. Government cannot resort to such policy in certain cases where it likes and depart from the said policy as it chooses. Having laid down a definite policy if the Government pick and choose by an irrational method certain traders only, than that would amount to an arbitrary action violative of Article 12. The legitimate entitlement of Ceylon Tobacco Company PLC to continue to engage in lawful trade and to use its trade mark as provided in the Intellectual Property Act has not been hindered by the proposed amendments. Thus, the Court does not see any violation of Article 12 and/or 14(1)(g) of the Constitution. The grace period given in Clause 5 in order to comply with the provisions of Section 34A is reasonable in its operation and the Court would hesitate to intervene and strike down what the Government has proposed. This Court cannot strike down a decision to grant a grace period only up to 1st June, 2015. The Court can interfere only if the policy decision is patently arbitrary, discriminatory or mala fide.

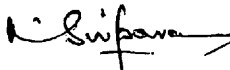
Mr. Janak de Silva submitted that the provisions of the Bill do not violate any Article of the Constitution. We are inclined to agree with the submission made by Mr. Janak de Silva.

We have considered the amendments sought to be made and are of the opinion that the proposed amendments are within the legislative powers of the Parliament and do not violate any of the provisions of the Constitution.

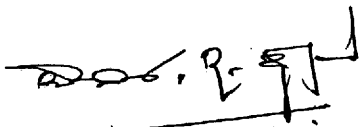
We accordingly determine that neither the Bill nor any provision thereof is inconsistent with the Constitution.

In conclusion we wish to place on record our appreciation for the valuable assistance rendered by the Deputy Solicitor General and the learned President's Counsel.

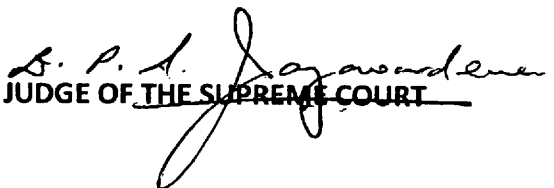
K. SRIPAVAN


CHIEF JUSTICE

SISIRA J. DE ABREW


JUDGE OF THE SUPREME COURT

PRIYANTHA JAYAWARDENE, PC


JUDGE OF THE SUPREME COURT