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Litigation, Consumer Action and Judicial Verdicts

Issues related to tobacco control have featured prominently in the Indian courts of law and the judicial verdicts have had a major impact on government policies as well as tobacco trade practices. The cases considered by the courts arose from either petitions filed by advocates of tobacco control pleading for stronger regulatory measures or by the tobacco industry, which challenged some of the regulatory measures.

The Indian judiciary has adopted an innovative approach to issues of public interest. A category of ‘public interest litigation’ (PIL) was developed in the 1970s, wherein any individual or organization could approach the court seeking its intervention on a matter of public interest. In such cases, it is not necessary for the plaintiff to be the directly affected party. Even a letter written to the High Court (apex court at the state level) or the Supreme Court (apex court at the national level) by a citizen or a group of citizens can be treated as a petition, if the court decides that a matter of public interest is involved. This has often been referred to as ‘epistolatory’ jurisprudence. The courts have, in many cases, even taken *suo moto* notice of newspaper reports on issues of public interest and issued notices to governments or even private parties. Such ‘judicial activism’ has resulted in several landmark judgments in areas such as environmental pollution and provision of essential health care. While foreign judgments are not binding upon Indian courts, the Indian judiciary has taken a view that they would like to draw the ‘light’ from any source, indigenous or foreign, so long as it is relevant and useful to promote and protect the citizen’s fundamental

rights. All of these practices have had an influence on tobacco-related litigation in India.

High Court of Kerala calls for a ban on smoking in public places in the State of Kerala

Responding to the apparent apathy of the policy-makers to several matters of public interest, Indian courts have often pioneered significant judicial interventions. The High Court of the State of Kerala in July 1999 issued a path-breaking judgment that, for the first time in India, banned smoking in public places. This order was applicable throughout the State of Kerala, and included a ban on smoking in theatres, bars, restaurants, shops, schools, trains, bus stands and footpaths.

The Plaintiff

A PIL petition was filed before the High Court of Kerala by a woman who complained of problems caused by exposure to tobacco smoke from co-passengers during frequent travel by bus. This writ petition (No. 24160/1998) was the first of its kind in India and was filed under Article 226 of the Constitution, contending that second-hand smoking violates the right to life that is guaranteed under Article 21 of the Constitution. The petition sought that appropriate measures be taken by the government to prosecute and punish persons guilty of smoking in public places as the same amounted to ‘Public Nuisance’, as defined under Section 268 of the Indian Penal Code (IPC).

The Judgment

In response to this petition, the High Court of Kerala delivered a judgment which stated that public health law to eliminate exposure to second-hand smoke is long overdue. The Court held that the policy-makers should pursue all the strategies that would help accomplish that goal including education, legislation, regulation, litigation and enforcement of the existing laws.

The Court relied upon various resolutions adopted by WHO, of which India is a party, especially the one adopted in the year 1986 urging Member States to formulate a comprehensive National Tobacco Control Strategy. The Court held that it was really saddening that despite India being a signatory to these resolutions, no significant follow-up action has been taken, except banning smoking in some public places and public transport, and printing a statutory warning on cigarette packets. It observed that even here the action has been half-hearted. The Court, noting the disturbing tobacco statistics, lamented the inaction on the part of the State. The Court held that the word 'Life' in Article 21 has not been defined but affirmed that it does not mean, nor can it be restricted only to, the vegetative existence or mere animal life from conception to death. The expression 'Life' has a much wider meaning, bringing within its sweep some of the finer graces of human civilization, which makes life worth living. Maintenance of health and the environment falls within the purview of Article 21, as their degradation adversely affects the life of citizens. Exposing unsuspecting individuals to second-hand smoke, with ominous consequences, amounts to taking away their life, by a slow and gradual process. In the light of the above, the Court held that:

- Public smoking of tobacco, whether in the form of cigarettes, cigars, *beedis* or otherwise, is illegal, unconstitutional and violative of Article 21.
- Tobacco smoking in public places falls within the purview of the penal provisions relating to 'Public Nuisance' as contained in the IPC and also the definition of air pollution as contained in the statutes dealing with the protection and preservation of the environment, in particular the Air Prevention and Control of Pollution Act, 1981.
- The Court further directed the print and electronic media to take note of the judgment and caution the public about the penal consequences of violation of the ban on smoking in public places.

The Supreme Court of India directs a ban on smoking in public places across India

Upholding this judgment and recognizing the delay of the legislature in enacting a national law, the Supreme Court of India in November 2001 stepped in to ban smoking in public places such as schools, libraries, railway waiting rooms and public transport throughout the country, and directed the Centre and States to take necessary action to ensure implementation of the ban (*Murli Deora versus Union of India and Others* 1999: civil no. 316/99).

The Pleint

A PIL was filed in the Supreme Court of India on 12 July 1999 by Murli Deora, a former member of the Indian Parliament. The following were cited as respondents:

1. Ministry of Health and Family Welfare
2. Ministry of Environment, Forests and Wildlife
3. Ministry of Food and Consumer Affairs
4. Ministry of Chemicals and Fertilizers
5. Ministry of Finance
6. Ministry of Agriculture
7. India Tobacco Company Limited
8. Vazir Sultan Tobacco Industries Limited
9. Godfrey Philips India Limited
10. Golden Tobacco Company Limited
11. Tobacco Institute of India

This writ petition drew attention to the infringement of the fundamental rights guaranteed under Articles 14, 19 and 21 of the Constitution of India and negation of the Directive Principles of State Policy articulated in Article 39(e) and Article 47 of the Constitution. The relevant Articles are as follows:

- Article 14: Equality before law...
- Article 19: Protection of certain rights regarding the freedom of speech, etc...

The rights protected under this article include the right to practise any profession or to carry on any occupation, trade or business (Article 19[1]g). However, sub-clause (6) of Article 19 states in connection with the right specified in Article 19 (1) (g) that nothing in sub-clause (g) shall affect the operation of any existing law in so far as it imposes, or prevents the state from making any law imposing, in the interest of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

- Article 21: Protection of life and personal liberty except according to the procedure established by law...No person shall be deprived of his life or personal liberty except according to the procedure established by law.
- Article 39 (e): Certain principles of policy to be followed by the state...that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength.
- Article 47: Duty of the state to raise the level of nutrition and the standard of living and to improve public health...The state shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties, and in particular the state shall endeavour to bring about prohibition of the consumption, except for medical purposes, of intoxicating drinks and of drugs which are injurious to health.

The petitioner stated that he was compelled to file the PIL in public interest, on account of inaction of the State in regulating the use of tobacco. He stated his intention to agitate on behalf of the silent masses that fall victim to the silent killer. The petition threw light upon the hazards of tobacco use and listed the harmful chemicals contained in tobacco smoke. It also highlighted the connection between deadly diseases such as cancer and the use of tobacco. To elucidate this point, the petition relied upon several reports of the US Surgeon General.

The petition contended that tobacco consumption in India, in the form of cigarettes, increased from 21 million kg in 1951–1952 to 80 million kg in 1994–1995. The Indian youth had been severely affected by these changing trends, as result of which citizens were facing the threat of deadly diseases, thereby affecting the mortality rate. This contravenes the duty of the State to take measures to increase the level of nutrition and health and to improve the standard of living of the people. Moreover, the use of tobacco has given birth to another category of smokers, namely, second-hand smokers. Thousands of non-smokers are being affected by the smoke in the atmosphere causing the diseases and disorders that a smoker faces, for no fault of theirs. This is a gross violation of the right to life guaranteed by the Constitution, for the life of these innocent victims is taken away without the procedure established by law. Such gross violation of rights also amounts to ‘public nuisance’, for the obvious reason that while a smoker smokes out of his own volition, a second-hand smoker is compelled to do the same and face the threats of smoking without his consent and free will.

The petition further contended that the only legislation that was present in the country at that time, namely the Cigarettes (Regulation of Production, Supply and Distribution) Act, 1975 had failed considerably in achieving the objective, which is self-evident in the title of the Act. It merely provides a mild specified warning that ‘cigarette smoking is injurious to health’, which is grossly inadequate in the light of the harmful effects of tobacco smoking. The petitioner contended that the Act had completely failed to regulate advertisements promoting and glamourizing cigarette smoking and thereby made no serious effort to stop the tobacco industry from shamelessly flaunting their products through every possible form of the media.

The petition also sought to compel the legislature to categorize the business of manufacturing cigarettes as a noxious trade since it affects the health and well-being of the citizens of this

country, under Article 19 (1) (g), thereby subjecting it to the restrictions that the State can impose on such trade under Article 19 (6). This was linked to the State's responsibility of improving the standard of living and the health of the citizens. The petition also relied upon Article 39 (e), which makes it obligatory to prevent the entry of children of tender age into unsuitable avocations. In addition, several thousand children below the age of 18 are addicted to tobacco products on account of the easy availability and access.

The petitioner prayed to the judges adjudicating the matter for the following:

- Compensation should be paid by the tobacco companies based on their market share.
- A National Tobacco Policy should be framed, addressing the manufacture, sale, advertisement, distribution and consumption of tobacco products and the plan for a systematic shift from tobacco manufacturing to other industries ensuring minimal labour displacement.
- Smoking in all public places should be prohibited, including government buildings, community halls, stadiums and modes of transport.
- The statutory warning for tobacco products should be direct and sterner using appropriate language such as 'Smoking kills'.
- Further, such warning should be in the local language of the state where it is sold and it should be accompanied by a self-explanatory symbolic illustration of the warning.
- A minimum of 10% of the total surface area in any kind of advertising of tobacco products should be reserved for printing warnings as above. The warning labels should be in approved contrasting colours and prominent enough to attract attention.
- All packages containing tobacco products should be properly labelled and should indicate the content of nicotine and other addictive/carcinogenic agents.
- The advertisement of tobacco products should be restricted to a black text on a white

background except for advertising in places where entry is restricted to adults only.

- Companies manufacturing and selling tobacco products should be prohibited from producing or selling or distributing all non-tobacco merchandise including caps, jackets, playing cards, glasses or bags, etc. bearing their logo or slogan, or selling the message of a tobacco brand.

Tobacco industry's defence

Cigarette manufacturing companies, which figured among the main respondents, however, denied the harmful effects of smoking and pleaded that, in any event, the smoker voluntarily assumes the risk of smoking. The evidence on second-hand smoking, statistical estimates of tobacco-related health burdens and the efficacy of a ban on advertisements were strongly contested by the respondents. To answer some of the other issues, the companies argued that smoking on all domestic flights is disallowed, availability and sale of cigarettes on the complete railway network including inside the trains and on platforms has been banned and restrictions have also been brought in under the Cinematograph Act which prohibits advertisements encouraging smoking. They contended that these measures were adequate to meet the requirements of tobacco control and that no further regulations were required.

Interim judgment

In an interim order passed on 2 November 2001, the Supreme Court of India prohibited smoking in public places and issued directions to the Central and State Governments, and the Union Territories to take effective steps to ensure the prohibition of smoking in the following places: auditoriums, hospital buildings, educational institutions, libraries, court buildings, public offices and public conveyances including railways.

The order stated that, '..it would be in the interest of the citizens to prohibit the smoking in public places till the statutory provision is

made and implemented by legislative enactment. The persons not indulging in smoking cannot be compelled to or subjected to passive smoking on account of acts of the smokers.'

Thereafter, the Central and the State Governments were required to file their replies in the nature of affidavits to bring to the notice of the Court the steps undertaken by them to publicize and fulfil the order.

This decision, a landmark in anti-tobacco jurisprudence, reaffirmed the fundamental right of the public to protection against disease and to the right to a healthy life and clean and wholesome environment, as provided in Article 21 of the Constitution of India. While the petitioner's claim for compensation of Rs 500 billion from tobacco companies was not addressed, the Court did order the Central Government to issue directives to ban smoking in public places. Several of the demands made by the petitioner have been met in The Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003, enacted by Parliament in April 2003.

The Supreme Court upholds the ban on toothpastes and toothpowders that contain tobacco as an additive

The Government of India, through notification No. GSR-443(E) dated 30 April 1992, prohibited the manufacture and sale of toothpastes/toothpowders containing tobacco. A legal challenge was mounted by the industry on the ground that it adversely affects the fundamental right of a citizen to carry on trade, business or profession of his/her choice. This case (Laxmikant versus Union of India and others; case 739 of 1997) was decided by the Supreme Court in favour of the government. The ban was upheld by the Supreme Court, which ruled that 'the International Conference held in collaboration with WHO was of the opinion that the ban on use of tobacco in toothpaste and

toothpowder should totally be imposed since it is prone to cancer. Under these circumstances, the view taken by the Government of India imposing total prohibition on the use of tobacco in the preparation of toothpowder and toothpaste is well justified in the public interest covered by Article 19 (6) of the Constitution, though it offends the right to carry on trade guaranteed under Article 19 (1) of the Constitution. The imposition of total ban is in the public interest.'

Consumer complaint against a contest organized by a tobacco company fails in the period when tobacco advertising was still legal

Details of this case (VOICE versus ITC) are described in Section 6.4.

The contest was intended for married couples of Indian nationality residing in India. One of the partners had to be a cigarette smoker. Pictures of the prize-winning couples, photographed in glamorous locations, were subsequently advertised widely in the print media as being 'Made For Each Other'. This was accompanied by a picture of a Wills cigarette, with a caption indicating that the tobacco in the cigarette and the filter were also made for each other.

The Voluntary Organization in Interest of Consumer Education (VOICE) filed a complaint in 1984 against the Indian Tobacco Company (ITC), with the Monopolies and Restrictive Trade Practices Commission (MRTPC). The tobacco company was accused of:

- Devising the contest 'to promote cigarette smoking and to promote its business interest'.
- Promoting 'the habit of cigarette smoking which is ex-facie injurious to public health...that the format of the impugned advertisement has been so devised to show a silhouette of a male and a female facing each other with a pack of Wills cigarettes in one corner, as to suggest that they will become

more likeable to each other and to outsiders if they smoke Wills Filter Tipped’.

- Associating the words ‘Made For Each Other’ with the Wills filter cigarette whose ‘filter and tobacco are perfectly matched’. In doing so it is implied that Wills is the best cigarette.
- Using the contest to associate cigarette smoking with conjugal harmony, smartness, beauty, etc. and bestowing dignity and respectability on the act of smoking.

After several years of litigation, the MRTPC struck down the petition on the ground that no case was made out for action against the tobacco company since advertisements of tobacco products were still legal in the print media. An appeal by VOICE was rejected by the Supreme Court of India, on the same grounds. ITC, however, discontinued the contest. With the legal ban on all forms of advertising coming into force from 1 May 2004, the contention of VOICE stood vindicated, despite the initial legal setback.

Voluntary Health Association of India seeks a ban on the sponsorship of cricket

In 1999 a petition was filed before the High Court of Delhi by the Voluntary Health Association of India, raising the issue of surrogate advertising by cigarette manufacturing companies by way of sponsorship of sports events as part of their advertisement campaigns. Specifically, a ban was sought on the sponsorship of the Indian cricket team by the Wills brand of cigarettes manufactured by ITC. The appearance of the Wills logo on the sports apparel worn by the cricketers facilitated the repeated telecasting of that logo to millions of viewers. The respondents were the Union of India (Ministry of Health and Family Welfare, and Ministry of Information and Broadcasting), Board of Control for Cricket in India, Doordarshan (the national television corporation) and ITC. During the pendency of this petition, an affidavit was filed on behalf of

Union of India to the effect that recently a bill was introduced in the Parliament styled as the Cigarette and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Bill, 2001. The Bill proposed a ban on all forms of direct and indirect advertising of tobacco. In view of this, the Court decided to discontinue the consideration of this petition. Even prior to the passage of the Bill in the Parliament, ITC voluntarily withdrew its sponsorship of the Indian cricket team in 2001.

SC lifts ban on *gutka* sale by States, says Central Government should bring law

As detailed in the section on Legislation and Enforcement (Section 6.1), some states imposed a ban on the sale of *gutka* (chewing tobacco, sold in pouches) during recent years. This was done under Section 7 (4) of the Prevention of Food Adulteration Act, 1954, since orally consumed tobacco is classified as a ‘food product’. Section 7 (4) of the Act states that nobody can make or sell ‘any article of food, the sale of which is for the time being prohibited by the Food Health Authority in the interest of public health’. In 2002, Maharashtra and other states invoked this provision to ban *gutka* and *paan masala*. As the Food Health Authority mentioned in the Act is the Director General of the Medical and Health Services of each state, such a ban could be imposed by an executive order. Those states also put a time limit on the ban—for instance, five years in Maharashtra—as Section 7 (4) mentions a prohibition being in force ‘for the time being’.

The manufacturers of *gutka* (sold under several trade names) challenged this ban on several grounds. They were especially aggrieved that such a ban was imposed on oral tobacco while smoked tobacco products were permitted for sale. Furthermore, the ban was imposed only in some parts of India while the same products could be sold elsewhere in the country.

Upholding the challenge filed by manufacturers, a bench of the Supreme Court of India ruled, on 2 August 2004, that the provision cited by the states concerned did not authorize them to prohibit *gutka* or *paan masala*. The judgment held that under Section 23 of the same Act, the Centre alone was vested with the power to ban these products. One of the 14 powers conferred on the Centre by Section 23 is to issue a notification 'prohibiting the sale or defining the conditions of sale or any substance, which may be injurious to health when used as food'. Further, Section 24 of the Act makes it clear that a state's rule-making power is limited to 'matters not falling within the purview of Section 23'. In other words, the law forbids States to assume powers that are entrusted to the Centre. The Supreme Court said that given the clear demarcation of powers, the States could not derive any power to ban *gutka* or *paan masala* from Section 7 (4) of the Prevention of Food Adulteration Act, 1954.

This judgment does not, in any way, endorse the safety of *gutka* but merely emphasizes that the Central Government alone can issue orders imposing such a ban, in matters where the primacy of power rests with it. It is, therefore, now a matter which needs to be considered by the Central Government.

Class Action Suit for damages for victims of *gutka* (chewing tobacco)

The Consumer Education and Research Society (CERS) has initiated a Class Action Suit for compensation on behalf of some patients with oral cancer, who developed the illness after being addicted to the chewing of *gutka*. This suit, filed at National Consumer Disputes Redressal Commission, New Delhi covers the following points:

- Inadequacy of the statutory warning
- Inherent damaging nature of tobacco
- Other harmful contents added to tobacco in *gutka*
- Effect of advertisement on uninformed, illiterate and minor persons
- Accessibility and affordability of chewing tobacco for minors
- Findings of medical research establishing multifold increase in probability of cancer for users of tobacco
- Addictive/habit-forming nature of tobacco
- Other ill-effects of tobacco on the general health of the user
- No enforcement of restrictions on sale of *gutka* in the vicinity of educational institutes and free sale and distribution of *gutka* near school gates.

The proceedings and outcome of this Class Action Suit are awaited.

6.3 LITIGATION, CONSUMER ACTION AND JUDICIAL VERDICTS

KEY MESSAGES

- The Indian judiciary adopted the innovative practice of ‘Public Interest Litigation’ (PIL) in the 1970s, wherein any individual or organization could approach the court seeking its intervention on a matter of public interest.
- Civil society groups, including consumer organizations, mounted legal challenges to the tobacco industry. These served to sensitize the government as well as the judiciary to the need for a comprehensive tobacco control legislation.
- Judicial activism has played a major role in providing impetus to the tobacco control legislation, both by directing the government to take much needed steps for tobacco control and by creating a climate of public support for such legislation.
- The High Court of Kerala in July 1999 issued a path-breaking judgment that banned smoking in public places in that state. On 2 November 2001, the Supreme Court of India banned smoking in public places and issued directions to the Union of India, the State Governments and the Union Territories to take necessary action to ensure implementation of the ban.
- The Government of India, through a notification issued in April 1992, prohibited the manufacture and sale of toothpastes/toothpowders containing tobacco. Although a legal challenge was mounted by the industry, the Supreme Court decided in favour of the government.
- Some State Governments imposed a ban on the sale of *gutka*. The manufacturers of *gutka* challenged this ban on several grounds. The Supreme Court of India ruled that the Central Government alone was vested with the power to ban these products.
- Laws related to liability and compensation in relation to tobacco control have not yet evolved in India.