

Mr. Mahesh Bhatt and Kasturi and Sons

v.

Union of India (UOI) and Anr.

High Court of Delhi

7 February 2008

Writ Petition (Civil) Nos. 18761 and 23716/2005 and 7410-11/2006

Citation: 2008BusLR366(Del), 147(2008)DLT561

Judges: Mukul Mudgal and Sanjiv Khanna, JJ.

JUDGMENT

Sanjiv Khanna, J

1. At the very outset, we begin with the Caveat, which is almost universal whenever constitutional validity of a legislation is challenged. While deciding the question of constitutional validity, we do not pronounce judgment on whether the impugned legislation is desirable and should have been enacted. A legislation may be constitutional, yet it may not be desirable [Denis v. U.S. reported in (1950) 341 U.S. 492.

2. The present Writ Petitions challenge the legality and validity of some of the provisions of the Cigarette and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 (hereinafter referred to as 'the Act', for short) and the amended Cigarettes and Other Tobacco Products Prevention of Advertisements and Regulation of Trade and Commerce, Production, Supply and Distribution) Rules, 2005 (hereinafter referred to as 'the Rules', for short). It may be noted that Writ Petition (Civil) Nos. 18761/2005 and 23716/2005 titled Mahesh Bhatt v. Union of India was filed in this Court, while other two Writ Petition (Civil) Nos. 7410-

11/2006 titled *Kasturi and sons v. Union of India and Anr* were initially filed in Madras High Court but later on transferred to this Court, by Order dated 27th March, 2006 passed by the Hon'ble Supreme Court.

3. The petitioner in Writ Petition (Civil) Nos. 18761/2005 and 23716/2005 is a reputed Writer, Director and Producer of films and television programmes. The Writ Petitioner in the other two petitions is engaged in publication of the newspaper 'The Hindu'. Both the petitioners claim that the amended Rules violate Freedom of Speech and Expression guaranteed under Article 19(1)(a) of the Constitution of India and are not protected under Article 19(2). It is the contention of the petitioners that if the amended Rules are upheld, they will gag and stifle the film, electronic and print media from expressing themselves and curtail their freedom to communicate, inform public and portray society as it actually exists. Considerable emphasis is placed upon the fact that business and use of tobacco is legal and is not *res extra commercium*. Learned Counsel appearing for Kasturi and Sons had submitted that the restrictions and prohibitions under the Act and as envisaged by the amended Rules would prevent the print media from even disseminating news in public interest and therefore violates the right to Freedom of Speech and Expression guaranteed by the Constitution. It was urged that the said legislations are not reasonable. The legal contentions and issues raised by the parties have been dealt with and examined by us while giving our reasoning. The respondents, on the other hand, had drawn our attention to the object and purpose behind the amendments, the reason and cause why the Act was enacted. It was accordingly submitted that the Rules as framed are constitutionally valid and Article 19(1)(a) of the Constitution is not violated. To avoid prolixity, we are not reproducing in detail the legal contentions and the issues raised separately.

(I) PROVISIONS MADE SUBJECT MATTER OF CHALLENGE

4. The Act was made applicable to the whole of India on 1st May, 2004 The relevant provisions of the Act for the purpose of deciding the writ petitions read as under:

‘Section 3(a). "advertisement" includes any visible representation by way of notice, circular, label, wrapper or other document and also includes any announcement

made orally or by any means of producing or transmitting light, sound, smoke or gas;

Section 5. "Prohibition of advertisement of cigarettes and other tobacco products.-

(1) No person engaged in, or purported to be engaged in, the production, supply or distribution of cigarettes or any other tobacco products shall advertise and no person having control over a medium shall cause to be advertised cigarettes or any other tobacco products through that medium and no person shall take part in any advertisement which directly or indirectly suggests or promotes the use or consumption of cigarettes or any other tobacco products.

(2) No person, for any direct or indirect pecuniary benefit, shall-

(a) display, cause to display, or permit or authorise to display any advertisement of cigarettes or any other tobacco product; or

(b) sell or cause to sell, or permit or authorise to sell a film or video tape containing advertisement of cigarettes or any other tobacco product; or

(c) distribute, cause to distribute, or permit or authorise to distribute to the public any leaflet, hand-bill or document which is or which contains an advertisement of cigarettes or any other tobacco product; or

(d) erect, exhibit, fix or retain upon or over any land, building, wall, hoarding, frame, post or structure or upon or in any vehicle or shall display in any manner whatsoever in any place any advertisement of cigarettes or any other tobacco product:

Provided that this sub-section shall not apply in relation to-

(A) an advertisement of cigarettes or any other tobacco product in or on a package containing cigarettes or any other tobacco product;

(B) advertisement of cigarettes or any other tobacco product which is displayed at the entrance or inside a warehouse or a shop where cigarettes and any other tobacco products are offered for distribution or sale.

(3) No person, shall, under a contract or otherwise promote or agree to promote the use or consumption of-

(a) cigarettes or any other tobacco product; or

(b) any trade mark or brand name of cigarettes or any other tobacco product in exchange for a sponsorship, gift, prize or scholarship given or agreed to be given by another person.

Section 22. "Punishment for advertisement of cigarettes and tobacco products.- Whoever contravenes the provision of Section 5 shall, on conviction, be punishable-

(a) in the case of first conviction, with imprisonment for a term which may extend to two years or with fine which may extend to one thousand rupees or with both, and

(b) in the case of second or subsequent conviction with imprisonment for a term which may extend to five years and with fine which may extend to five thousand rupees.

Section 31. "Power of the Central Government to make rules: (1) The Central Government may, by notification in the Official Gazette, make rules to carry out the provisions of this Act.

(2) Without prejudice to the generality of the foregoing power, such rules may

provide for all or any of the following matters, namely-

(a) specify the form and manner in which warning shall be given in respect of cigarettes or other tobacco products under Clause (o) of Section 3;

(b) specify the maximum permissible nicotine and tar contents in cigarettes or other tobacco products under the proviso to Sub-section (5) of Section 7;

(c) specify the manner in which the specified warning shall be inscribed on each package of cigarettes or other tobacco products or its label under Sub-section (2) of Section 8;

(d) specify the height of the letter or figure or both to be used in specified warning or to indicate the nicotine and tar contents in cigarettes or other tobacco products under Section 10;

(e) provide for the manner in which entry into and search of any premises is to be conducted and the manner in which the seizure of any package of cigarettes or other tobacco products shall be made and the manner in which seizure list shall be prepared and delivered to the person from whose custody any package of cigarettes or other tobacco products has been seized;

(f) provide for any other matter which is required to be, or may be prescribed.

1. Every rule made under this Act and every notification made under Section 30 shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive session aforesaid, both Houses agree in making any modification in the rule or notification or both Houses agree that the rule or notification should not be made, the rule or notification shall thereafter have effect only in such modified form or be of no

effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or notification.’

5. Under Section 31 of the Act, the Central Government has power to make rules for carrying out the provisions of the Act. These rules are required to be notified in the Official Gazette. In terms of Sub-section 3 to Section 31 of the Act, every Rule and notification made has to be laid before each House of Parliament. Initially, the Rules, five in number, were framed and notified on 25th February, 2004 and came into force on 1st May, 2004. The Rules notified on 25th February, 2004 deal with prohibition of smoking in public places, prohibition of advertisements of cigarettes and other tobacco products and prohibition of sale of tobacco products to minors. Rule 4 relating to prohibition of advertisement of cigarettes and tobacco products deals with the size of the board to be used for advertisement at the entrance or inside a warehouse or shops where cigarettes and tobacco products are offered for consumption as well as the requirement to print/display a warning.

6. In 2005, the Ministry of Health and Family Welfare, Government of India notified amendments in the aforesaid Rules which were proposed to be made effective from 1st August, 2005. The aforesaid Notification has since then been modified and amended on several occasions. We are concerned with validity of Rule 4 as last modified, which reads as under:

‘4. Prohibition of advertisement of cigarettes and other tobacco products.-

(1) The size of the board used for the advertisement of cigarettes and any other tobacco products displayed at the entrance of a warehouse or a shop where cigarettes or any other tobacco products is offered for sale shall not exceed sixty centimeters by forty-five centimeters.

(2) Each such board shall contain in an Indian language as applicable, one of the following warnings occupying the top edge of the board in a prominent

manner measuring twenty centimeters by fifteen centimeters, namely:

(i) Tobacco causes cancer, or

(ii) Tobacco kills.

(3) The health warning referred to in Sub-rule (2) must be prominent, legible and in black colour with a white background.

(4) The display board shall only list the type of tobacco products available and no brand pack shot, brand name of the tobacco product or other promotional message and picture shall be displayed on the board. The display board shall not be backlit or illuminated in any manner.

(5) The owner or manager or in-charge of the affairs of a place where cigarettes and other tobacco products are sold shall not display tobacco products in such a way that they are visible so as to prevent easy access of tobacco products to persons below the age of eighteen years.

(6) No individual or a person or a character in films and television programmes shall display tobacco products or their use:

Provided that this sub-rule shall not apply to-

(a) old Indian films and old television programmes, produced prior to coming into effect of this notification, being screened in a cinema hall or theatre or aired on television;

(b) old foreign films and old television programmes, including dubbed and sub-titled "foreign films" and television programmes, being screened in cinema halls or theatres or aired on television;

(c) Indian or foreign documentaries and health spots displaying use of tobacco products made to clearly and unambiguously reflect the

dangers and dire consequences of tobacco use being screened in cinema hall or theatre or aired on television;

(d) live coverage of news, current affairs, interviews, public meetings, sports events, cultural events and the like, being telecast on television whereby there is a purely incidental and completely unintentional coverage of use of tobacco products:

Provided further that the exemptions under Clauses (a), (b), (c) and (d) above shall not extend to display of brands of tobacco products or tobacco product placement in any form:

Provided also that close ups of cigarette packages or tobacco products shall not be permissible and such scenes shall be edited by the producer or distributor or broadcaster prior to screening in cinemas or theatres or airing on television.

Explanation (1).- For the purpose of this sub-rule, all films that receive Central Board of Film certification prior to the effective date of this notification shall be categorized as "old films".

Explanation (2).- For the purpose of this sub-rule, "foreign film" implies "imported" as defined in the Cinematography (Certification) Rules, 1983.

(6A) In case of old Indian and foreign films, the owner or manager of the cinema hall or theatre where the film is being screened shall ensure that anti tobacco health spots of minimum thirty seconds duration each are screened at the beginning, middle and end of the said film. The provisions of this sub-rule shall not apply to Clause (c) of Sub-rule 6.

(6B)(a) In case of old television programmes, it shall be mandatory for the broadcaster to ensure either placement of an anti tobacco health warning as a prominent scroll at the bottom of the television screen during the period of

such display or airing of anti tobacco health spots for a period of minimum thirty seconds during the telecast of each television programme of thirty minute duration or less.

(b) In case the television programme is more than thirty minutes further airtime of thirty seconds shall be allocated for each incremental thirty minutes, for telecasting anti tobacco spots.

(c) The minimum duration of each anti tobacco spot shall be not less than fifteen seconds.

(d) The provisions of this sub-rule shall not apply to Clauses (c) and (d) of Sub-rule 6:

Provided that, the anti tobacco health warning scroll shall be legible and readable with font in black colour on white background with the warnings "Smoking causes cancer" or "Smoking kills" for smoking form of tobacco use and "Tobacco causes cancer" or "Tobacco kills" for chewing and other form of tobacco or such other warnings as may be specified by the Central Government, from time to time.

Provided further that, the anti tobacco health warning scrolls or health spots shall be in the same language(s) as used in the film or television programme. In case of dubbed or sub-titled films or television programmes, the scrolls or spots shall be carried in the language of dubbing or sub-titling.

(7) Sub-rule (6) shall not apply to new Indian or foreign films and television programmes displaying use of tobacco products necessary to represent the smoking of tobacco usage of a real historical figure or for representation of a historical era or classified well known character:

Provided that in very rare cases where there is display or use of

tobacco products due to compulsions of the script, they shall be supported by a strong editorial justification:

Provided further that the display of usage of tobacco products in such movies and television programmes under this sub-rule shall be subject to the following safeguards:

(a) Film and television programs depicting tobacco related scenes shall mandatorily be given 'A' Certification. Such films and television programmes may be permitted to be telecast at such timings as are likely to have least viewership from persons below the age of eighteen years.

(b) The films or television programs, which depict such scenes, would have a disclaimer by the concerned actor regarding the ill effects of use of such products. The disclaimer would be shown in the beginning, middle and end of the film.

(c) Whenever such scenes are shown in a film or television programme, an anti tobacco health warning scroll will be continuously displayed on the screen starting a minute before the scene and would be continuously displayed until one minute after the scene.

Provided also that there shall not be any display of brands of tobacco products or tobacco product placement in any form:

Provided also that close-ups of cigarette packages or tobacco products shall not be permissible and such scenes shall be edited by the producer or distributor or broadcaster prior to screening in cinemas or theatres or airing on television.

Explanation (1).- For the purpose of this sub-rule, all films and

television programmes that receive Central Board of Film certification after the effective date of this notification shall be categorized as 'new'.

Explanation (2).- For the purpose of this sub-rule, representatives from Ministry of Health and Family Welfare shall also be represented in the Central Board of Film Certification.

(8) Wherever brand names or logos of tobacco products form a part of the pictures to be printed in any form or print or outdoor media or footage to be aired through any form of electronic media, it shall be mandatory for the media to crop or mask the same to ensure that the brand names and logos of the tobacco products are not visible, except in case of live or deferred live telecast of sports, cultural and other events or activities held in other countries being aired on television in India.

(9) A Steering Committee shall be constituted under the chairmanship of the Union Health Secretary with representation from among others, the Ministry of Information and Broadcasting, Ministry of Law and Justice, Advertising Standards Council of India, Press Council of India, Members of Parliament and voluntary organizations. This Committee shall take cognizance suo moto or look into specific violations under Section 5 of the Act and shall also evaluate cases related to indirect advertising and promotion and pass orders thereof.'

7. It may be noted here that the aforesaid amended Rules have not yet been enforced. We may also note that the original amendments as notified had put a complete bar and prohibition from showing any person/character in a film or a television programme using tobacco products. Under the amended and modified rules, some exceptions have been carved out.

8. Reference to Articles 19(1)(a), 19(2), 21 and 25 of the Constitution of India were also

made and are relevant for deciding the present petitions. The relevant portions of the said Articles are reproduced below:

‘Right to Freedom

19. Protection of certain rights regarding freedom of speech, etc.-

(1) All citizens shall have the right-

(a) to freedom of speech and expression;

(b) x x x x x

(c) x x x x x

(d) x x x x x

(e) x x x x x

(g) x x x x x

[(2) Nothing in Sub-clause (a) of Clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of [the sovereignty and integrity of India,] the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.]’

‘Article 21. Protection of life and personal liberty.- No person shall be deprived of his life or personal liberty except according to procedure established by law.’

‘Right to Freedom of Religion

Article 25. Freedom of conscience and free profession, practice and propagation of

religion.- (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law-

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Explanation I.- The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.

Explanation II.- In Sub-clause (b) of Clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jain or Buddhist religion and the reference to Hindu religious institutions shall be construed accordingly.'

(II) WHETHER THE CENTRAL GOVERNMENT IS EMPOWERED TO LEGISLATE THE ACT AND THE RULES

9. The challenge is to legislative competence of the Parliament and the Central Government to enact the Act and the Rules. It is stated that the said enactments are primarily to protect public health, which is a State Subject in List I of Schedule VII, as per Entry 6.

10. Answer to this submission of the petitioners can be found in Section 2 of the Act, which reads as under:

Section 2. "Declaration as to expediency of control by the Union.- It is hereby declared that it

is expedient in the public interest that the Union should take under its control the tobacco industry."

11. Under Article 246 of the Constitution, the Union Government is entitled to enact any legislation in relation to an industry, control of which is declared by the Parliament to be expedient in public interest, as stipulated in Entry 52 of the Union List in Schedule VII.

12. The legislators of this country possess plenary power of legislation. This is so even when there is division of legislative powers subject to the condition that supremacy of the legislators is confined to the topics mentioned as entries in the list conferring powers on them. These entries, however, are not mutually exclusive at all times. They overlap and are regarded as enumeratio simplex of broad categories. The doctrine of pith and substance is applied to determine whether a legislation falls within an entry or entries conferring legislative power and to decide whether a legislation is valid notwithstanding a slight transgression upon a rival list. This test has been explained by Gwyer, C.J., in *N. Subrahmanyam Chettiar v. Muthuswamy Goundan* reported in 1940 FCR 188 in the following words:

It must inevitably happen from time to time that legislation, though purporting to deal with a subject in one list, touches also on a subject in another list, and the different provisions of the enactment may be so closely intertwined that blind adherence to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule which has been evolved by the Judicial Committee whereby the impugned statute is examined to ascertain its pith and substance, or its true nature and character, for the purpose of determining whether it is legislation with respect to matters in this list or in that.

13. The said test has been applied and accepted by the Supreme Court in several decisions. It is also equally well settled that entries are to be broadly interpreted and not read as falling within water tight compartments. Power to legislate on a subject matter includes power to legislate on an ancillary matter. In *P.N. Krishna Lal v. Govt of Karnataka* reported

in 1994(5)SCALE1 it has been observed:

‘It is not necessary to burden the judgment with copious citations of diverse decisions on the scope of the consideration of an entry in the Seventh Schedule. In *Jilubhai Nanbhai Khachar v. State of Gujarat* AIR 1995 SC 142, this Court extensively considered the scope of an entry in the Seventh Schedule and held that such entry is not a power given to the legislature but is a field of its legislation. The legislature derives its power under Article 246 and other related articles in the Constitution. The language of an entry should be given the widest meaning fairly capable to meet the need of the Government envisaged by the Constitution. Each general word should extend to all ancillary or subsidiary matters which can fairly and reasonably be comprehended within it. When the vires of an enactment is impugned, there is an initial presumption of its constitutionality. If there exists any difficulty in ascertaining the limits of the legislative power, it must be resolved, as far as possible, in favor of the legislature, putting the most liberal construction on the legislative entry so that it is intra vires. Narrow interpretation should be avoided and the construction to be adopted must be beneficial and cover the amplitude of the power. The broad liberal spirit should inspire those whose duty it is to interpret the Constitution to find out whether the impugned Act is relatable to one or the other entry in the relevant list. The allocation of the subjects of the entries in the respective lists is not done by way of a scientific or logical definitions but it is a mere enumeration of broad and comprehensive categories.’

14. Keeping these principles in mind, we reject the argument of the petitioners that the Central Government lacks legislative competence and authority to enact the Act and the Rules.

(III) THE AMENDED RULES ARE ULTRA VIRES THE PARENT STATUTE AND LEGISLATIONS CINEMATOGRAPHIC ACT,1952 AND CABLE TV NETWORK(REGULATION) ACT,1995

15. It was submitted that exhibition of films and television programs are governed by the Cinematographic Act, 1952 and the Cable T.V. Network (Regulation) Act, 1995 which are comprehensive legislations. Reference was also made to the Central Board of Film

Certification guidelines which regulate cinematographic contents of films. It was submitted that these cannot be made subject matter of a anti-tobacco legislation.

16. The above contention of the petitioners cannot be accepted. It is settled that two or more legislations can deal with the same subject matter. The Cinematographic Act, 1952 and the Cable T.V. Network (Regulation) Act, 1995 are specific legislations dealing with the production and exhibition of films and television programmes and also exhibition in the electronic media. The Film Board may also have framed some guidelines but this does not legally bar or prohibit the Central Government from enacting a legislation and making rules dealing with advertisements, both direct and indirect, relating to tobacco and tobacco products. The object and purpose behind the Act and the Rules, which are comprehensive legislations, is to regulate, trade, sale distribution and advertisement of tobacco products and discourage use of tobacco products. It is not necessary for the Central Government to amend the Cinematographic Act, 1952 or the Cable T.V. Network (Regulation) Act, 1995 for this purpose. The Central Government is competent to enact the said Act and amend the Rules in order to achieve it's objectives and purpose. We may refer here to the decision of the Judgment of the Supreme Court in the case of Vijay Kumar Sharma v. State of Karnataka reported in [1990]1SCR614. The proper test is whether effect can be given to the provisions of both the laws or whether both the laws can stand together. Even if both the pieces of legislations relate to Concurrent List but deal with separate and distinct matters though of cognate and allied character, repugnancy does not arise.

17. The second question, is do the amended Rules go beyond and are ultra vires the Act? Section 5(1) of the Act consists of three parts. The first part prohibits any person engaged in production, supply or distribution of tobacco products from advertising. Second part prohibits a person having control over any media to cause advertisement of tobacco products through that medium. The third part prohibits any person from taking part in any advertisement relating to tobacco products. Sub-section (1) however is loosely worded. The phrase "any advertisement which directly or indirectly suggests or promotes the use or consumption of cigarettes or any other tobacco products" can be interpreted, as if it only prohibits a person from taking part in any direct or in-direct advertisement i.e. it relates to

only part three of the sub-section. The said phrase can also be applied to prevent and bar a person who is engaged in production, supply or distribution of tobacco products or a person having control over the media from causing and making direct or indirect advertisements. Keeping in view the nature, object and purpose behind the Act, the evil sought to be curbed, which the Act seeks to deal with and applying the "mischief rule" we prefer the latter interpretation, that is, the Act seeks to prohibit, direct and indirect, advertisement by the person engaged in production, supply or distribution of cigarettes and also any person having control over the media shall be prohibited from advertising, directly or indirectly, cigarettes or tobacco products. Any other interpretation would prohibit a person from participating directly or indirectly in an offending advertisement but would permit and tacitly allow indirect advertisements by dealers, manufacturers, media etc.

18. Sub-section (3) of Section 5 prohibits a person from entering into contract or promote or agreeing to promote tobacco products or even brand name of cigarettes and tobacco products. Section 22 provides for prosecution of persons who infringe or contravene the provisions of Section 5 of the Act.

19. The impugned Rules by definition Clause 2(e) seek to define "indirect advertisement". It cannot be denied that advertisements can be direct or indirect. In the media, surrogate advertisement or indirect advertisement is often resorted to. To leave out indirect advertisements would in fact make the legislation toothless and capable of avoidance at will. Rules seek to effectuate and ensure proper implementation of Section 5 of the Act. The impugned Rules, which seek to define the term "indirect advertisement", therefore cannot be regarded as ultra vires or seeking to go beyond the parent statute. The relevant Rules, their scope, import, purpose and reasonableness has been discussed in the later portion of this judgment and is not being separately examined under this heading.

(IV) VIOLATION OF ARTICLE 19(1)(a) OF THE Constitution

20. Article 19(1)(a) recognises that Freedom of Speech and Expression is a Fundamental Right of every citizen and has to be preserved. Right to express oneself by cinematographic medium or in any print media forms a part of one's Fundamental Right to Speech and

Expression. To that extent, there is no lis between the petitioners and the respondents.

21. The petitioners claim that freedom of expression and speech under Article 19(1)(a) of the Constitution can be curbed or curtailed on the grounds specifically mentioned in Article 19(2) and for no other justification. However well meaning a legislation may be, it is liable to be struck down if the restrictions imposed cannot be justified on the grounds mentioned in Article 19(2) of the Constitution, which forms a complete code. It was submitted that public health does not find mention in Article 19(2) and Therefore the restrictions imposed by the Rules are not permissible. Secondly, 'public order' and 'public health' are not synonymous but distinct and separate and therefore the amended Rules are not protected under Article 19(2) of the Constitution. Reference in this regard is made to Article 25 wherein both phrases 'public order' and 'public health' are used.

(a) RIGHT TO FREEDOM OF SPEECH AND EXPRESSION AND ADVERTISEMENTS OF TOBACCO PRODUCTS

22. Rights conferred under Article 19 are natural civil rights as distinguished from political rights. Freedom of speech and expression is the genus and freedom of press is a species. To have an effective fourth chamber of democracy, freedom of press has been given a high pedestal as it advances public interest, ensures publication and dissemination of ideas, thought and opinions, an absolute necessity for any democratic form of government. This freedom of the media is jealously protected, whether or not it is palatable to the Government, authorities or the majority public opinion. However, freedom of speech is not freedom to state whatever one wants or an absolute right under the Indian Constitution. Freedom of speech and expression have to be broadly interpreted, but cannot be unnaturally stretched lest it becomes self destructive. Rights to be enjoyed by all, require self-discipline and respect for rights of others. Proper exercise of natural civil rights is implicit in Article 19. Recognition under Article 19(1)(a) is to promote and enjoy freedom of speech and expression and not to misuse and propagate use of substances medically and scientifically proven as harmful, causing disease or insalubrity. To hold otherwise will amount to negation of the very objective behind recognition of Fundamental Rights including freedom of speech and expression. Fundamental rights are vibrant and dynamic

concepts.

23. Keeping these aspects in mind, we have to answer the question whether a citizen has right to advertise, directly or indirectly about tobacco products; can and to what extent commercial advertisements are protected under freedom of speech and expression. We are also required to examine what is advertisement and difference, if any, between news/freedom of expression and an advertisement.

24. Advertisements means to make an announcement and inform public and disseminate information through media and other means, to draw the attention of the public/individual concerned to some information. (See, *Municipal Corporation of Greater Bombay v. Bharat PetroChemical Corporation Limited* reported in [[2002]2SCR360]). Advertisements can be direct and also indirect whereby surrogate or product placement, use or trade name display, techniques are adopted but with the object and purpose of drawing attention to the object of publicity. In the present day context, direct and indirect advertisements are employed to attract attention and interest, make the product known and justify its consumption and use. Supply of free medicines to doctors by pharmaceutical companies has been held to be publicity and advertisement. (Refer, *Eskayef v. Commissioner of Income Tax* reported in [[2000]245ITR116(SC)]. For the purpose of deciding the present controversy, both direct and indirect or surrogate information have to be treated alike and dealt with together. They serve the same purpose and objective.

25. Gambling, dealing with intoxicants and money lending by unscrupulous money lenders to small and marginal farmers etc. have been held by the Supreme Court to be *res extra commercium* (extra commercial). However, tobacco products and trading in the same has not been held to be *res extra commercium* by the Parliament and the Courts. (see *Godawat Pan Masala Products I.P. Limited v. Union of India* reported in [AIR 2004SC4057]. At the same time, the pernicious, inherent viciousness and harmful effects of tobacco products is well established and accepted medically as well as in judicial pronouncements. Link between use of tobacco products, cancer, cardiac and respiratory diseases etc. is well documented and accepted. Similarly, effort and desire to attract young and gullible to the world of tobacco has always been the objective of the manufacturers. "Catch them young"

is the motto, and use of tobacco products is projected as synonymous with adulthood, modernity, affluence, social class norm, elegance, etc. Ban and prohibition on direct advertisements of tobacco products has prompted manufacturers and traders to adopt indirect methods or surrogate advertisements to achieve the same result. The fear of falling sales, adverse articles and medical and media reports have prompted the tobacco industry to portray tobacco use as glamorous and socially acceptable, by showing pictures and use by stars and reputed actors, as a stress buster, a habit nurtured by intellectuals, a fashion accessory etc. The list is virtually endless. Should the use of tobacco be allowed and shown in news papers, in films and electronic media because citizens of this country have freedom to speak and express themselves?

26. Life of Law is not logic but experience and wisdom. The question whether commercial advertisement is protected and entitled to protection on the ground of Freedom of Speech and Expression under Article 19(1)(a) of the Constitution of India has been examined by the Supreme Court. In the case of *Hamdard Dawakhana* (supra), it was held that commercial advertisement is not an expression which is protected by Article 19(1)(a) of the Constitution. It was observed as under:

17. An advertisement is no doubt a form of speech but its true character is reflected by the object for the promotion of which it is employed. It assumes the attributes and elements of the activity under Article 19(1) which it seeks to aid by bringing it to the notice of the public. When it takes the form of a commercial advertisement which has an element of trade or commerce it no longer falls within the concept of freedom of speech for the object is not propagation of ideas ' social, political or economic or furtherance of literature or human thought; but as in the present case the commendation of the efficacy, value and importance in treatment of particular diseases by certain drugs and medicines. In such a case, advertisement is a part of business even though as described by Mr. Munshi its creative part, and it was being used for the purpose of furthering the business of the petitioners and had no relationship with what may be called the essential concept of the freedom of speech. It cannot be said that the right to publish and distribute commercial advertisements

advertising an individual's personal business is a part of freedom of speech guaranteed by the Constitution. In *Lewis J. Valentine v. F.J. Chrestensen*. It was held that the constitutional right of free speech is not infringed by prohibiting the distribution in city streets of handbills bearing on one side a protest against action taken by public officials and on the other advertising matter. The object of affixing of the protest to the advertising circular was the evasion of the prohibition of a city ordinance forbidding the distribution in the city streets of commercial and business advertising matter. Mr Justice Roberts, delivering the opinion of the Court said:

This Court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on Government as respects purely commercial advertising.... If the respondent was attempting to use the streets of New York by distributing commercial advertising, the prohibition of the Code provisions was lawfully invoked against such conduct.

27. In the case of *Tata Press Limited v. Mahanagar Telephone Nigam Ltd.* reported in [AIR 1995 SC 2438] , three Judge Bench of the Supreme Court noticed judgments of American Courts on the question whether commercial advertisement are entitled to full first amendment protection. The Supreme Court observed that commercial advertisements nonetheless have the effect of dissemination of information as to the product, nature, quality of the product etc. and this helps the public to take a decision whether or not to purchase the product and know about the same. The Supreme Court also noticed that political, social speeches or public affairs oriented discussions are granted greater degree of protection by the United States' Courts, whereas commercial speech can be restricted and curtailed whenever the Government can show substantial justification for doing so.

28. We may state that the distinction between the first amendment in the United States Constitution and Article 19(1)(a) of the Constitution of India is well understood and recognised and, therefore, the four test formula adopted in United States may not be

applicable in the Indian context. In the case of *Tata Press Limited* (supra) the Supreme Court noticed the difference between commercial advertisements, which are given by individuals for promoting sales and commercial advertisements which are substantially for public benefit and interest. In the case of *Tata Press Limited* (supra), the question related to publication of a telephone directory giving information and details about services and goods being provided by different persons to the general public. The impugned legislations were struck down as they violated freedom of citizens to have access to information that was in the interest of general public, and benefit of the public at large. Similarly in the case of *Indian Express Newspapers Bombay Private Limited v. Union of India* reported in the Supreme Court struck down the impugned legislation as restriction of advertisements had a direct impact on financial health of the newspaper, its circulation and volume by curtailing its financial independence and, Therefore, held to directly infringe freedom of speech and expression. The decision in *Hamdard Dawakhana's* case (supra) was referred to with approval in *Bennett Coleman and Co. v. Union of India* reported in [[1973]2SCR757] , wherein it was held that advertisements no doubt form a part of speech but its true character is reflected by the object for promotion for which it is applied. Reference was also made to the case of *Sakal Papers v. Union of India* reported in [[1962]3SCR842] wherein restriction on space for advertisements was struck down, not on the ground that commercial advertisements are entitled to protection under Article 19(1)(a) of the Constitution, but on the ground that fixation of limits on space for advertisements would reduce earnings, thus affecting economic viability of newspapers and their circulation and, Therefore, would constitute violation of freedom of speech and expression.

29. In the case of *Secretary, Ministry of Information and Broadcasting v. Cricket Association of Bengal* reported in [(1995) 5 SCC 161] Supreme Court held that commercial advertisement no doubt is a form of speech but its true character is reflected by the object for promotion of which it is employed. Only when an advertisement is concerned with the expression or prorogation of ideas that it can be said to be related to freedom of expression and speech. The object and purpose for which advertisement is published is the determining factor. When propagation of ideas and thoughts is inconsequential, but the real purpose and object is promotion of sales of goods and services and personal benefit without any social

purpose, commercial advertisement cannot have the same decree of constitutional protection as in case of social or political speeches. It was, in these circumstances, where requirement of free speech in public interest, over-shadowed the commercial interest that in the case of *Tata Press Limited* (supra) the impugned legislation was struck down for violation of freedom of press. The decision in *Hamdard Dawakhana's* case (supra) has not been obliterated in the case of *Tata Press Limited* (supra). We may refer to some observations of the Supreme Court in the case of *Tata Press Limited* (supra):

‘18. This Court in *Hamdard Dawakhana* case was dealing with advertising of prohibited drugs and commodities. The Court came to the conclusion that the sale of prohibited drugs was not in the interest of the general public and as such could not be a speech within the meaning of freedom of speech and expression under Article 19(1)(a) of the Constitution. The Court further held in the said case that an advertisement is no doubt a form of speech but its true character is reflected by the object for the promotion of which it is employed. *Hamdard Dawakhana* case was considered by this Court in *Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India*. The observations in *Hamdard Dawakhana* case to the effect that advertising by itself would not come within Article 19(1)(a) of the Constitution, were explained by this Court in *Indian Express Newspapers* case 18 in the following words: (SCC pp. 700-02, paras 92 and 93)

We have carefully considered the decision in *Hamdard Dawakhana* case. The main plank of that decision was that the type of advertisement dealt with there did not carry with it the protection of Article 19(1)(a). On examining the history of the legislation, the surrounding circumstances and the scheme of the Act which had been challenged there namely the *Drugs and Magic Remedies (Objectionable Advertisement) Act, 1954* (21 of 1954) the Court held that the object of that Act was the prevention of self-medication and self-treatment by prohibiting instruments which may be used to advocate the same or which tended to spread the evil.

In the above said case the Court was principally dealing with the right to advertise prohibited drugs, to prevent self-medication and self-treatment. That was the main

issue in the case. It is no doubt true that some of the observations referred to above go beyond the needs of the case and tend to affect the right to publish all commercial advertisements. Such broad observations appear to have been made in the light of the decision of the American Supreme Court in *Lewis J. Valentine v. F.J. Chrestensen*. But it is worthy of notice that the view expressed in this American case has not been fully approved by the American Supreme Court itself in its subsequent decisions.

We shall refer only to two of them. In his concurring judgment in *William B. Cammarano v. United States*, Justice Douglas said:

Valentine v. Chrestensen...held that business of advertisements and commercial matters did not enjoy the protection of the First Amendment, made applicable to the States by the Fourteenth. The ruling was casual, almost off hand. And it has not survived reflection.

In *Jeffrey Cole Bigelow v. Commonwealth of Virginia* the American Supreme Court held that the holding in *Lewis J. Valentine v. F.J. Chrestensen* was distinctly a limited one. In view of the foregoing we feel that the observations made in the *Hamdard Dawakhana* case are too broadly stated and the Government cannot draw much support from it. We are of the view that all commercial advertisements cannot be denied the protection of Article 19(1)(a) of the Constitution merely because they are issued by businessmen.

19. The combined reading of *Hamdard Dawakhana* case and the *Indian Express Newspapers* case leads us to the conclusion that commercial speech cannot be denied the protection of Article 19(1)(a) of the Constitution merely because the same are issued by businessmen.

20. Advertising is considered to be the cornerstone of our economic system. Low prices for consumers are dependent upon mass production, mass production is dependent upon volume sales, and volume sales are dependent upon advertising. Apart from the lifeline of the free economy in a democratic country, advertising can

be viewed as the lifeblood of free media, paying most of the costs and thus making the media widely available. The newspaper industry obtains 60%/80% of its revenue from advertising. Advertising pays a large portion of the costs of supplying the public with newspaper. For a democratic press the advertising subsidy is crucial. Without advertising, the resources available for expenditure on the news would decline, which may lead to an erosion of quality and quantity. The cost of the news to the public would increase, thereby restricting its democratic availability.’

30. The Supreme Court further observed that commercial advertisements helps dissemination of information regarding the product and the public also benefits by the information which is available and honest and economic marketing is protected under Article 19(1)(a). It was observed that said freedom is both for the speaker as well as the recipient of the speech, but an advertisement for a life saving drug may be more important and leads greater public interest than an advertisement for pure trade consideration.

31. Looking from the above perspective, we do not think that advertisement of tobacco and tobacco products, direct or indirect, can qualify and satisfy the test as propounded by the Supreme Court to fall within the ambit of Article 19(1)(a), Freedom of Speech and Expression. The underlying principle is larger public interest and the said common thread is the foundation and edifice of the judgments of the Supreme Court. In *Hamdard Dawakhana* (supra), Supreme Court was dealing with advertisements of drugs and commodities which purportedly were and it was not in the interest of the general public that such advertisements should be published. The purpose and object was to prevent spread of evil of consumption of magical drugs and remedies through commercial advertisements. In *Sakal Newspapers, Bennett and Coleman and Indian Express Newspapers* (supra) it was observed that the direct impact of the offending legislations was to curtail circulation, diminution of revenue by placing restrictions on advertisements and therefore the legislations were held to be ultra vires and offending Freedom of Speech and Expression. In *Tata Press Ltd.* (supra) the Court felt that the publication of circulation of the compilation in the form of Yellow Pages was beneficial for the public and the public element tilted the scale in favor of the publisher. The Court in para 24 of its judgment, has

highlighted that it was protecting the right of the recipient of the speech under Article 19(1)(a) by allowing the publication of Yellow Pages. Therefore, the right of the recipient rather than the advertiser has to be also kept in mind as the Right to Freedom of Speech and Expression should be both available to the speaker as well as the recipient.

32. Right to publish and distribute commercial advertisements for personal business cannot be granted the same pedestal and meridian as freedom of speech and expression given to press to disseminate news, public speeches etc. A commercial advertisement has an element of trade and commerce and does not fall strictly within the concept of freedom of speech for it is not for propagation of ideas' social, political, economic or furtherance of literature or human thought. A commercial advertisement may be creative but in a puritan sense it is entitled to protection under Article 19(1)(a) of the Constitution only when it is claimed and established to be in public interest. When the purpose is to merely earn profits by selling products/services, hardly any element of free speech as such is involved. Protection under Article 19(1)(a) in such cases will obviously be limited and subject to the public interest test, as compared to protection in cases where the main purpose and object is to impart information to third persons about ideas, thoughts and opinions. Therefore, advertisements inviting general public to try, promote or continue use of tobacco products, betting, gambling or commending drugs and other intoxicating substances as cure for diseases, do not come under the Right to Freedom of Speech and Expression as a Fundamental Right. "Commercial speech" can be restricted more easily as compared to political or social speeches relating to public affairs, when and if the Government can show substantial justification for doing so. Fundamental Right of Freedom of Speech and Expression guaranteed under Article 19(1)(a) of the Constitution cannot and should not be extended to grant protection to any purely commercial speech which encourages use of tobacco products leading to disease and health problems.

33. There is a difference between 'an advertisement' and 'news'. A newspaper certainly has a right to publish news items and photographs and the said right is protected under Article 19(1)(a) of the Constitution but so long as an item or a publication can be regarded as a news item and not an advertisement, protection under Article 19(1)(a) will be

available. The test to determine whether a particular publication, article or photograph is a news item or an advertisement is by applying the principle of dominant purpose or pith and substance test. If the publication, photograph, etc. is published with a view to advertise, directly or indirectly tobacco use, it will not get any protection under Article 19(1)(a) of the Constitution. On the other hand, if a photograph or publication is made with the primary object and purpose of disseminating an idea- social, religious, economic etc. and with the said primary object and purpose in mind, it will qualify and will be entitled to protection under Article 19(1)(a) of the Constitution.

34. It is the predominant nature and character of the article, picture etc. which will determine whether it is a commercial advertisement for use of tobacco product, having no element of free speech or a news item published in public interest for the purpose of disseminating information.

(b) WHETHER IMPUGNED LEGISLATIONS PASS THE TEST OF ARTICLE 19(2) OF THE Constitution.

35. Freedom to air one's views is a Fundamental Right and lifeline of a democratic country. Attempt to suffocate and stifle the said Right has to be justified and should pass the tests under Article 19(2), which permits reasonable restrictions on the grounds mentioned therein. The grounds mentioned in Article 19(2) relied upon by the respondents are said to be in the interest of public order, morality, decency and inducement for committing an offence. We proceed to examine each ground relied upon by the respondents.

36. The expression 'public order' has come up for consideration before the Supreme Court in number of cases when political activists were detained under preventive detention enactments. Reference in this regard can be made to *Superintendent, Central Prison v. Ram Manohar Lohia* reported in [1960 CriLJ 1002] . The Supreme Court held that the concept of 'public order' is wide and can be split up into different parts. It was observed that interest of security of the State, decency, morality or contempt of court, defamation and incitement to an offence, grounds which are specifically mentioned in Article 19(2) of the Constitution, can be brought under the head 'public order', but juxtaposition of different

grounds in Article 19(2) indicates that they must ordinarily intend to exclude each other. 'Public Order' is, Therefore, something which is separate and demarcated from other grounds mentioned in Article 19(2). Looking at the history and the philosophy behind Article 19(2), it was held that 'Public Order' is synonymous with public peace, safety and tranquility. The Supreme Court also noticed that to take protection under Article 19(2) on the ground of 'Public Order', it is necessary that the legislation should have intimate connection between the enactment and 'public order' sought to be maintained. Connection should be proximate and not remote or fanciful. In this regard we may also note that the language employed in Article 19(2) is that the legislation must be in the interest of 'Public Order' and not for maintenance of 'Public Order' (and thus wider and broader) but subject to the condition that the legislation should be reasonable and the restrictions imposed should not be such which are excessive and go beyond the objective which they seek to achieve. The restrictions imposed by the Legislature must have proximate connection and nexus with public order and should not be far-fetched and remote in the chain of its relation with public order. It was accordingly observed in the case of *Ram Manohar Lohia (I)* (supra):

18. The foregoing discussion yields the following results: (1) "Public order" is synonymous with public safety and tranquility: it is the absence of disorder involving breaches of local significance in contradistinction to national upheavals, such as revolution, civil strife, war, affecting the security of the State; (2) there must be proximate and reasonable nexus between the speech and the public order; (3) Section 3, as it now stands, does not establish in most of the cases comprehended by it any such nexus; (4) there is a conflict of decision on the question of severability in the context of an offending provision the language whereof is wide enough to cover restrictions both within and without the limits of constitutionally permissible legislation; one view is that it cannot be split up if there is possibility of its being applied for purposes not sanctioned by the Constitution and the other view is that such a provision is valid if it is severable in its application to an object which is clearly demarcated from other object or objects falling outside the limits of constitutionally permissible legislation; and (5) the provisions of the section are so inextricably mixed up that it is not possible to apply the doctrine of severability so as to enable us to affirm the validity of a part of it and reject the rest.

37. In *Ram Manohar Lohia* (supra), the Supreme Court had quoted the observations of the Supreme Court of United States in *Cantewell v. Connecticut* reported in [(1940) 310 US 296] wherein it has been held that public order is understood as an offence against public safety and public peace. But this restricted interpretation given by the Supreme Court of the United States was not accepted and it was held that public order in India is synonymous with public safety and tranquility. It is absence of public disorder. Explaining this aspect in *Madhu Limaye v. Sub-Divisional Magistrate* reported in [1971CriLJ1720] , the Supreme Court observed that overlapping of public order and public tranquility is only partial and not always synonymous. There can be matters which disturb public tranquility without disturbing public order. Public Order no doubt requires absence of disturbance of the state of serenity in society but also goes further. The Court used the French phrase 'ordre publique' and held that it will include (and therefore not restrictive) absence of any acts which are dangerous to the security of the State and also acts which are comprehended by the expression 'ordre publique' but not acts which disturb only the serenity of others. Reference was made to another judgment in the case of *Dr. Ram Manohar Lohia v. State of Bihar and Anr.* reported in [1966 CriLJ 608] , (referred to as *Lohia's Case II*), where expounding the phrase 'maintenance of public order', the Supreme Court gave example of three concentric circles with law and order representing the largest circle, public order representing the middle circle and security of the State representing the smallest circle.

38. Security of the State is the smallest circle and has a more restricted meaning than public order. Public order must be distinguished from law and order and security of the State. Law and order is the largest circle and encompasses public order as well as every day turbulence and tribulations which every enforcing law authority has to deal with. Public order, on the other hand, refers to breaches which are important and as a consequence, which have some degree of seriousness and also impact on the public life. In *Lohia's (case II)* (supra), it has been described as equal to breaches or absence of disorder of significance. Public disorder is aggravated form of disturbance of public peace, which affects the general current public life. Public disturbance having no serious significance and not disturbing normal day-to-day life of general public, cannot be regarded as breach which can be classified as

disturbance of public order.

39. Applying the above principles, it cannot be held that the impugned legislation has been enacted for maintenance of public order. Undoubtedly, use of tobacco products is harmful and unhealthy but legislation to control tobacco advertisements cannot be regarded as legislation in an effort to control or to maintain public order. It cannot be said that advertisements of tobacco products causes disturbance and breaches of significant intensity and consequence that it creates public disorder. Advertisements displaying use of tobacco products do not cause and disturb public peace, tranquility or general safety as interpreted by the Supreme Court.

40. Can the impugned legislation be justified on the ground of morality or decency? The expressions 'morality' and 'decency' have moral, ethical and sexual connotations. It has been described in *Ramesh Yeshwant Prabhoo (Dr) v. Prabhakar Kashinath Kunte* reported in [AIR 1996 SC 1113]

‘28. ...Two of the heads mentioned are: decency or morality. Thus any law which imposes reasonable restrictions on the exercise of this right in the interests of decency or morality is also saved by Clause (2) of Article 19. Shri Jethmalani contended that the words 'decency or morality' relate to sexual morality alone. In view of the expression 'in the interests of' and the context of election campaign for a free and fair poll, the right to contest the election being statutory and subject to the provisions of the statute, the words 'decency or morality' do not require a narrow or pedantic meaning to be given to these words. The dictionary meaning of 'decency' is correct and tasteful standards of behavior as generally accepted; conformity with current standards of behavior or propriety; avoidance of obscenity; and the requirements of correct behavior? (The Oxford Encyclopaedic English Dictionary); 'conformity to the prevailing standards of propriety, morality, modesty, etc.: and the quality of being decent' (Collins English Dictionary).

29. Thus, the ordinary dictionary meaning of 'decency' indicates that the action must be in conformity with the current standards of behavior or propriety, etc. In a

secular polity, the requirement of correct behavior or propriety is that an appeal for votes should not be made on the ground of the candidate's religion which by itself is no index of the suitability of a candidate for membership of the House. In *Kneller (Publishing, Printing and Promotions) Ltd. v. Director of Public Prosecutions*, [(All ER p. 905)] the meaning of 'indecent' was indicated as under:

Indecency is not confined to sexual indecency; indeed it is difficult to find any limit short of saying that it includes anything which an ordinary decent man or woman would find to be shocking, disgusting and revolting.

Thus, seeking votes at an election on the ground of the candidate's religion in a secular State, is against the norms of decency and propriety of the society.'

41. While the observations of the Supreme Court in the above case were in relation to an election speech, but to draw an analogy from it one can clearly say that "indecent" and "immoral" are words that do not necessarily have sexual connotations and these terms could be used to describe actions that would shock, disgust or disturb the existing societal norms. The requirements of art and literature include within themselves a comprehensive view of social life and not only in its ideal form and the line is to be drawn where the average moral man begins to feel embarrassed or disgusted without the redeeming touch of art or genius or social values. Advertisements of tobacco products cannot per-se be regarded as immoral. Consumption of tobacco or smoking is unhealthy but is not immoral. The term 'decency' is more expansive in its scope. Use of tobacco products and smoking in a conservative society may be regarded as indecent as in case of smoking before elders or parents, but, it may be difficult to categorize and regard smoking or use of tobacco products as something which would shock, disgust or disturb existing societal norms. However, we need not express a final opinion on this aspect in view of the findings on the interplay between Article 19(1)(a) and Article 21 of the Constitution of India.

42. The argument of the respondents that infringement of Section 5 of the Act is a punishable offence and, therefore, the impugned legislation is protected under

Article 19(2) on the ground that violation of Rule 5 results in incitement to an offence, is also liable to be rejected. The argument is somewhat incongruous for validity of Section 5 and the Rules is itself subject matter of constitutional challenge on the ground that it violates fundamental right of freedom of speech and expression. The impugned legislation cannot be defended as a permissible restriction protected under Article 19(2) as the violation of the impugned legislation constitutes an offence. When constitutional validity of a provision is under challenge for violation of Article 19(1)(a) of the constitution, Government cannot defend the legislation on the ground that violation of the legislation itself constitutes an offence and, therefore, protected under Article 19(2) on the ground of incitement to commit an offence. In fact, such a plea can be conveniently and routinely raised in all constitutional challenges by incorporating in the impugned legislation itself a penal provision.

(V) RIGHT TO LIFE AND ARTICLE 19(1)(a) OF THE Constitution.

43. The fundamental freedoms enumerated in Articles 19 and 21 of the Constitution of India have to be read together and together they form a weave of fabric of fundamental rights conferred on the citizens of India. Together they ensure that constitutional rights are protected and enjoyed. However, the freedom mentioned in Articles 19 and 21 are not necessarily mutually supportive as noticed in the case of *M.H. Devendrappa v. Karnataka State Small Industries Development Corporation* reported in [[1998] 1 SCR 919]. Freedom of speech of one may affect the freedom of movement of another or right to form an association may curtail the freedom to express views against some activities. For proper exercise of all Fundamental Rights, certain restrictions are implicit. Further rights must be harmoniously construed for effective enjoyment with minimum of such implied and necessary restrictions. In the said case, citizens joining Government service it was held should observe code of conduct to maintain discipline and efficiency. In the case of *Dharam Dutt v. Union of India* reported in [AIR 2004 SC 1295], the Supreme Court drew a distinction between a right which does not strictly fall within the sweep of a Fundamental Right but is a concomitant, adjunct or expansion or incident of that right and in such cases it was held that validity of an impugned legislation is not tested by reference to

Articles 19(2) and 19(6) but on the ground of reasonableness or if it comes into conflict with any other provision of the constitution. To some extent these aspects have been highlighted in the earlier part of this judgment but these aspects require further elucidation in view of interplay between Right to Life and Freedom of Speech and Expression.

44. Right to health and healthy life is protected under Article 21 of the Constitution. Right to life guaranteed under the said Article has been interpreted to mean right to healthy life. The impugned Act and the amended Rules seek to protect right to health and right to life under Article 21 of the Constitution. Supreme Court in *Murli Deora v. Union of India* reported in [AIR 2002 SC 40] had observed as under:

‘2. Fundamental right guaranteed under Article 21 of the Constitution of India, inter alia, provides that none shall be deprived of his life without due process of law. Then why should a non-smoker be afflicted by various diseases, including lung cancer or of heart, only because he is required to go to public places? Is it not indirectly depriving of his life without any process of law? The answer is obviously, yes. Undisputedly, smoking is injurious to health and may affect the health of smokers but there is no reason that health of passive smokers should also be injuriously affected. In any case, there is no reason to compel non-smokers to be helpless victims of air pollution.

3. The Statement of Objects and Reasons of the Cigarettes (Regulation of Production, Supply and Distribution) Act, 1975, inter alia, provides:

Smoking of cigarettes is a harmful habit and, in course of time, can lead to grave health hazards. Researches carried out in various parts of the world have confirmed that there is a relationship between smoking of cigarettes and lung cancer, chronic bronchitis; certain diseases of the heart and arteries; cancer of bladder, prostate, mouth, pharynx and oesophagus; peptic ulcer etc., are also reported to be among the ill-effects of cigarette smoking.

4. Similarly, the Statement of Objects and Reasons of the Cigarettes and Other

Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Bill, 2001, provides:

Tobacco is universally regarded as one of the major public health hazards and is responsible directly or indirectly for an estimated eight lakh deaths annually in the country. It has also been found that treatment of tobacco-related diseases and the loss of productivity caused therein cost the country almost Rs. 13,500 crores annually, which more than offsets all the benefits accruing in the form of revenue and employment generated by tobacco industry.

5. In this view of the matter, when this petition under Article 32 of the Constitution of India came for orders on 31-8-2001, we have passed order for implementing the 1975 Act. At that time of hearing, the learned Attorney-General as well as counsel for the parties submitted that considering the harmful effect of smoking, smoking in public places is required to be prohibited. On this submission, we sought response of the Central Government. As no affidavit was filed during the stipulated time by the Central Government, on 28-9-2001, we were required to adjourn the matter. Today also, when the matter came up for hearing, no response is filed on behalf of the Central Government. However, learned Attorney-General with all emphasis at his command submitted that appropriate order banning smoking in public places be passed. Learned Counsel for the petitioner also submitted to the aforesaid effect. Counsel appearing for other respondents also supported the same.

6. In the petition, it is pointed out that tobacco smoking contains harmful contents including nicotine, tar, potential carcinogens, carbon monoxide, irritants, asphyxiants and smoke particles which are the cause of many diseases including the cancer. It is alleged that three million people die every year as a result of illness related to the use of tobacco products of which one million people belong to developing countries like India. The World Health Organisation is stated to have estimated that tobacco-related deaths can rise to a whopping seven million per year. According to this organisation, in the last half century in the developing countries alone smoking has killed more than sixty million people. Tobacco smoking also adds to the air pollution. Besides cancer, tobacco smoking is responsible for various

other fatal diseases to the mankind.

7. It is further submitted that statutory provisions are being made for prohibiting smoking in public places and the Bill introduced in Parliament is pending consideration before a Select Committee. The State of Rajasthan has claimed to have passed Act 14 of 2000 to provide for prohibition of smoking in places of public work or use and in public service vehicles for that State. It is stated that in Delhi also there is prohibition of smoking in public places.

8. Learned Attorney-General for India submits and all the counsel appearing for the other parties agree that considering the adverse effect of smoking in public places, it would be in the interests of the citizens to prohibit smoking in public places till the statutory provision is made and implemented by the legislative enactment. The persons not indulging in smoking cannot be compelled to or subjected to passive smoking on account of the acts of the smokers.'

45. Similarly, in *Noise Pollution, In re* reported in [AIR 2005 SC 3136] , the Supreme Court held that Right to Life enshrined in Article 21 is not of mere survival or existence but right of persons to live life with dignity, to make it more meaningful, complete and worth living. In the said case, Right to Freedom of Speech and Expression under Article 19(1)(a) of the Constitution was relied upon to permit use of loud speakers and public announcement system in night hours during cultural or religious functions. Question of right to explode crackers used during Diwali and other festivals was also considered. The private parties relied upon Article 25 of the Constitution. It was held that the right to enjoy any Fundamental Right cannot be extended and widened to destroy similar or other rights of others. Words of Jefferson "No one has natural right to commit aggression on the equal right of another" were quoted. Reference was also made to the essay of J.S. Mill on 'Liberty':

Liberty of an individual must be thus far limited-- he must not make himself a nuisance to other.

46. We may refer here to the decision of the Kerala High Court in *P.A. Jacob v. Superintendent of Police, Kottayam and Anr.* reported in [AIR 1993 Ker 1] that Right to Speech implies right to silence. It implies freedom not to listen and not to be forced to listen. The right comprehends freedom to be free from what one desires to be free from. The following quotes from the said judgment will be apt:

‘10. However wide a right is, it cannot be as wide, as to destroy similar or other rights in others.

Jefferson said;

No one has a natural right to commit aggression on the equal rights of another.

J.S. Mill said:

If all mankind minus one were of one opinion, and if only one person was of contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.

Freedom or right, is not an exclusive matter between the State and a citizen. One man's freedom, may destroy another man's freedom. A community of rights, not always synchronizing with each other, have to be harmonised, if any freedom is to be real. In *Abrams v. U.S.* 250 US 616 the United States' Supreme Court said:

Nobody can be compelled to accept any idea...not even of national unity.

Again in *Breard v. City of Alexandria* 341 US 622, the Court highlighted the rights of the recipient or captive audience:

Freedom of speech or press, does not mean that one can talk or distribute where, when and how one chooses. Rights of those, other than the advocates, are involved. By adjustment of rights we can have, both liberty of expression and an orderly life.

In this area, there are no prophets who can commend attention, and for that matter,

not all propagandists and pamphleteers, are prophets.

11. The right to speech implies, the right to silence. It implies freedom, not to listen, and not to be forced to listen. The right comprehends freedom to be free from what one desires to be free from. What could be more basic, to the concept of freedom than this? Justice Douglas articulated this freedom as:

...right to be let alone is the beginning of all freedoms.... When we force people to listen to another's ideas, we give the propagandist a powerful weapon. One man's lyric may be another's vulgarity.

12. Free speech is not to be treated as a promise to everyone with opinions and beliefs, to gather at any place and at any time and express their views in any manner. The right is subordinate to peace and order....’

47. In *Mr. X v. Hospital Z* reported in [(1998) 8 SCC 296], the Supreme Court examined two conflicting Fundamental Rights viz., right to privacy and confidentiality and a right to life under Article 21. It was held that right to lead a healthy life so as to enjoy all faculties of human body in prime condition includes disclosure that the prospective life partner was suffering from a dangerous infectious disease. The Supreme Court quoted from *Allen : Legal Duties* and observed as under:

‘Moreover, where there is a clash of two Fundamental Rights, as in the instant case, namely, the appellant's right to privacy as part of right to life and Ms. Y's right to lead a healthy life which is her Fundamental Right under Article 21, the right which would advance the public morality or public interest, would alone be enforced through the process of court, for the reason that moral considerations cannot be kept at bay and the Judges are not expected to sit as mute structures of clay in the hall known as the courtroom, but have to be sensitive, "in the sense that they must keep their fingers firmly upon the pulse of the accepted morality of the day." (See: *Allen: Legal Duties*).’

48. Keeping all these legal principles in mind we proceed to examine the provisions of the Act and the Rules. Challenge to provisions of the Act being Sections 4, 5, 22, etc. is bound

to fail. Section 4 of the Act merely provides that no person shall smoke in any public place. The decision of the Supreme Court in *Murali Deora* (supra) case has in fact extended the said principle. Section 5 has been explained and interpreted above. Section 22 of the Act, makes violation of some provisions of the Act, a criminal offence. These sections are thus valid and do not in any manner violate Article 19(1)(a) of the constitution.

49. This brings us to the impugned Rules; Sub-rules (6) and (7) of Rule 4 are not very happily worded. Sub-Rule 6 imposes a blanket bar and states that no company or person or character in films shall display tobacco products or their use. The Rules prohibit an individual or a character in a film or television programme from displaying tobacco products or their usage. The proviso to Sub-Rule 6 carve out some exceptions in cases of old Indian and foreign films, television programmes, documentaries and health spots which unambiguously reflect dangers and consequences of tobacco use. Live coverage of news, current affairs, etc. whereby there is purely incidental or unintentional coverage of tobacco products is also protected subject to the condition that close-up of tobacco products, cigarette packets, etc, shall be edited and shall not be screened. But, extended display of tobacco products or promotion of tobacco products by way of embedding any particular brand, trade name or even the generic product is prohibited and are required to be edited before screening or airing on television. In cases of old Indian and foreign films, anti-tobacco health spots have to be screened and in case of old Indian and foreign films having scenes relating to individual or person or character in the film using or displaying tobacco products, certain conditions require to be complied with. The objective is to warn and inform the general public about the harmful effect of tobacco products and to dissuade them from using them. Attempt is to mitigate the impact that a visual representation of an actor using tobacco product may have on the viewer. This is of critical importance in a country like ours where movie stars have for long enjoyed iconic status. The measure is aimed at warning a tempted viewer about the disastrous consequences of tobacco use. Similarly provision has been made in cases of old television programmes, so that the essential artistic elements of the said programme or film are not lost owing to the need to conform to the requirements of this tobacco control legislation. 49A. Sub-Rule 7 begins with a non-obstantive expression and over-rides Sub-Rule 6. It stipulates that Sub-Rule 6

shall not apply to new films or foreign films and television programmes where displaying use of tobacco products is necessary to depict real historical figures, representation of historical era or a classified well-known character. Sub-Rule 7 has two provisos. The first proviso carves out a further exception, which in our opinion should in fact be read as a substantive sub-rule in itself. It stipulates that in very rare cases, display and use of tobacco products will be permitted when justified by strong editorial reasoning borne out of the compulsions of the script. In fact, it may be a misnomer to regard the first proviso to Sub-Rule 7 as a proviso. It is a substantive provision or an exception to Sub-rule 6. Learned Counsel for Union of India had submitted that the proviso sufficiently safeguards freedom of speech and expression and is applicable to new Indian and foreign films and television programmes. Thus under Sub-Rule (7) use of tobacco products in new Indian or foreign or television programmes, has been permitted provided a real historical figure or a well known character is depicted or it represents a historical era. Display and use of tobacco products is also permitted when supported by compulsion of the script, but in such cases, a strong editorial justification and other conditions are required to be satisfied. Further issues relating to editorial justification and compulsions of the script demanding existence of visuals of tobacco usage in the films or programmes are to be dealt with by the Censor Board when they view the film or the television programme and grant certificate for exhibition. This would ensure that the persons judging the desirability, necessity of visuals of tobacco usage includes individuals who are members of the film and art fraternity and that the impugned Rules are not used as a legislation to muzzle free speech. Strong editorial justification to show that compulsion of the script requires display or use of tobacco products, has to be given. Therefore, it cannot be accepted that there is an absolute or a complete bar in display of tobacco use in a new Indian or a foreign film or television programmes. Thus freedom of speech and expression is protected and preserved along with the Right to live a healthy Life. Film and electronic media have been treated differently from print media as it has both audio and visual impact on the minds of the viewers specially young minds. Electronic media has wider reach, as covers a section of society which is not literate and where the print media does not reach. The younger generation is addicted to this media and it is shaping our cultural values, social mores and even what we eat and drink. Movies motivate high degree of attention, retention and have substantial

impact on the mind of the viewer. (See *S. Rangarajan v. Jagivan Ram* reported in [[1989] 2 SCR 204] and *Secretary, Ministry of Information and Broadcasting v. Cricket Association of Bengal* reported in [[1995]1SCR1036]. Safeguards as mentioned in the Rules are valid as they seek to promote and ensure right to a healthy life.

50. Sub-rule (8) prohibits display of brand names and logos of tobacco products and requires that the same should be masked and the names and logos should not be visible in any documentaries, out-door media and footage nor should they be aired through electronic media. An exception has been carved out in cases of deferred live or live telecast of sports, cultural or other events held in other countries and aired on television in India. This exception for live and deferred live broadcasts is necessary as it is not difficult to visualise and understand that during live and deferred live telecast of events in other countries, the broadcaster has little or no control and the provisions of the Act and the Rules would have no applicability. The exception that protects right of the Indian viewers to enjoy and see live and deferred live telecast, cannot be equated and compared with still photographs that are published in the print media. In cases of live and deferred live telecast, transmission is almost instantaneous and the broadcaster has hardly any time to take any corrective or remedial steps. Rigid enforcement of requirements of Rule 8 can disrupt the pleasure and satisfaction of watching a live event. In case of still photographs published in print media necessary time gap between the event and the publication normally exists and therefore the publisher has choice of photographs and can take necessary remedial action/ steps to bring them in conformity with the provisions of the Act and the Rule.

51. In the case of print media, bar and prohibition is imposed on publishing brand names, logos, etc. of tobacco products, in any form of print and to ensure that logo and brand names of tobacco products are not visible. Print media is at liberty to publish pictures by masking or cropping logo or brand name of a tobacco product. We do not think that the said Rule falls foul of Article 19(1)(a) of the Constitution. The Rule does not prevent the print media from publishing news, disseminating ideas, thoughts and information but states that pictures of logo or brand name of a tobacco product should not be exhibited and if required, should be blanked out. We do not think that the said Rule violates

Article 19(1)(a) of the Constitution.

52. One is reminded of the last words of the 'Marlboro man', - Wayne McLaren, who had for 25 years advertised tobacco use and portrayed both, off and on media, image of a tough, handsome and rugged man synonymous with cigarette smoking, - "take care of the children. Tobacco will kill you, and I'm living proof of it." The State has stepped in to take care and protect right to health of the general public, specially the young and vulnerable.

53. Lastly we may refer to Rule 9 which requires constitution of a Steering Committee which will have representatives from Ministry of Information and Broadcasting, Ministry of Law and Justice, Advertising Standards Council of India, Press Council of India, Members of Parliament and voluntary organisations to evaluate cases relating to indirect advertising and take further steps if required in cases of violation of Section 5 of the Act. Constitution of the committee with diverse members representing various interests and groups is a safeguard, which will prevent harassment and abuse of powers and the Rules. It will ensure uniformity and equal application to all and prevent misuse or perverse application of any provision.

(VI) Show Cause Notice

54. This takes us to the question of show cause notice, made subject matter in the writ petition filed by Kasturi and Sons. For the reasons indicated by us, cumulatively and not individually, we feel that the show cause notice should be quashed. Firstly, the show cause notice pertains to period before the amended rules relating to Section 5 were enacted. The new Rules were not applicable. Secondly, the petitioner has pointed out that several similar photographs have been published by other newspapers but it is the petitioner alone who has been singled out. Names and details have been furnished. Union of India in its reply has not denied that similar pictures have been published in other newspapers and no action has been taken against them but details of action taken in some other cases have been stated. No ground or reason has been stated, as to why in other cases, no action was initiated. Thirdly, it is also pointed out that the purpose and the object in publishing pictures is to disseminate news and not to commercially advertise a brand name of a cigarette product. In

fact 'logo' on the 'jacket' of a driver in a Formula One Race though readable but the primary objective is to inform and circulate the news. The publication of the picture cannot be regarded as one, where the predominant purpose and object was to commercially advertise tobacco product(s). In the amended Rules requirement to mask or block out 'logo' has been introduced. Earlier Rules did not mandate any such requirement. Lastly, the position in law regarding interpretation of Section 5 of the Act is now settled, it will not be fair and just, to prosecute the petitioner for a photograph published in the year, 2004.

55. Normally we would have not quashed the show cause notice and gone into the merits at this stage, without final decision by the respondents. However, in the present case, as we have heard the learned Counsel for the parties at great length on the question of constitutional validity as well as the show cause notice, Therefore we have decided the issue rather than relegating the petitioner to file a reply and if required, after final decision, challenge the order passed by the Respondents.

56. Our findings may be thus crystallized:

(A) Commercial advertisements are entitled to limited protection under Article 19(1)(a) of the Constitution if they are in public interest. Commercial advertisements of tobacco products are not expressions protected under Article 19(1)(a) of the Constitution. Commercial advertisements will include indirect or surrogate advertisements which promote and encourage use of tobacco products. However, commercial advertisements are different and distinct from news. The purpose and object behind news is to disseminate information, thoughts and ideas. Pre-dominant nature and character of the article, picture, etc, will determine whether it is a commercial advertisement or a news item/picture.

(B). The impugned Act and the Rules though they strictly do not fall within the ambit of Article 19(2) of the Constitution are intra vires and valid as Fundamental Right under Article 19(1)(a) and Right to Life under Article 21 have to be harmoniously construed to advance interest of general public.

(C) Restrictions imposed on electronic media and cinematographic films are reasonable and justified.

(D) Restrictions imposed on the print media to prevent publication of brand names, logos of tobacco products are also in larger public interest and to promote Right to Life. The Rules also provide for constitution of a committee representing diverse voices, interest and groups and therefore adequate safeguards have been provided to prevent harassment. Individual cases of abuse of powers can always be struck down by Courts.

(E) Show cause notice issued to Kasturi and Sons is quashed for the reasons stated above.

57. The Writ Petitions are accordingly disposed of. In the facts and circumstances of the case there will be no order as to costs.