



2024 : DHC : 509



\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Judgment reserved on : 22 January 2024**  
**Judgment pronounced on : 24 January 2024**

+ **FAO 84/2022 & CM APPL. 16749/2022**

**DIRECTORATE GENERAL OF HEALTH SERVICES**

..... Appellant

Through: **Mr. Anupam Srivastava, ASC**  
**for GNCTD with Ms. Sarita**  
**Pandey Adv.**

versus

**SOM PAN PRODUCT PVT. LTD.** ..... Respondent

Through: **Mr. Dushyant K. Mahant, Adv.**

+ **FAO 89/2022 & CM APPL. 17347/2022**

**DIRECTORATE GENERAL OF HEALTH SERVICES**

..... Appellant

Through: **Mr. Anupam Srivastava, ASC**  
**for GNCTD with Ms. Sarita**  
**Pandey Adv.**

versus

**VISHNU POUCH PACKAGING PVT. LTD.** ..... Respondent

Through: **Mr. Dushyant K. Mahant, Adv.**

**CORAM:**

**HON'BLE MR. JUSTICE DHARMESH SHARMA**

## **J U D G M E N T**

### **FACTUAL BACKGROUND**

1. This common order/judgment shall decide the two appeals, FAO 84/2022 and FAO 89/2022, filed by the appellant, who is the defendant in the two Civil Suits in question under Section 94 read



with Order XLIII Rule 1 (r) of the Civil Procedure Code, 1908<sup>1</sup> assailing separate orders dated 15.12.2021 passed by the learned Additional District Judge-02, Tis Hazari Court, Central District, Delhi<sup>2</sup> in CS DJ No. 1588/2018 titled “Som Pan Product Pvt. Ltd. vs. Directorate General of Health Services” and in CS DJ No. 1070/2018 titled “Vishnu Pouch Packaging Pvt. Ltd. vs. Directorate General of Health Services”. The impugned orders raise a common question of law arising from a similar set of facts and circumstances.

### **FAO 84/2022**

2. Briefly stated, the appellant/defendant issued a show cause notice dated 25.04.2018 to the respondent company for displaying huge board display of “DILBAGH”, a brand dealing in tobacco products, at Dabri flyover for an event of Kathu Shyam Katha and a community marriage function. It was the case of the appellant that “DILBAGH” being a registered brand of tobacco under Section 34 of the Trade Marks Act, 1999<sup>3</sup>, the said advertisement or publicity for promotion of “DILBAGH” Pan Masala is an indirect / surrogate advertisement, and therefore, is in violation of Section 5 of The Cigarettes and Other Tobacco Products (Prohibition of Advertising and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003<sup>4</sup>.

3. The said notice was replied to by the respondent/plaintiff vide its letter dated 07.05.2018 challenging the show cause notice *inter alia*

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<sup>1</sup> CPC

<sup>2</sup> Trial Court

<sup>3</sup> TMA

<sup>4</sup> COTPA



on the ground that they were not manufacturing any tobacco product of “DILBAGH” brand in India, and therefore, the question of surrogate / indirect advertisement of the tobacco product of “DILBAGH” brand does not arise. The show cause notice dated 25.04.2018 was challenged in civil suit bearing CS DJ No 1588/2018 seeking Permanent Injunction & other reliefs, and an application under Order XXXIX Rule 1 & 2 CPC was moved for grant of ad-interim injunction against the appellant/defendant from taking any action against the respondent/plaintiff company under the law.

**FAO No. 89/2022**

4. Likewise, in this appeal too, the appellant/defendant issued a show cause notice on 01.03.2018 to the respondent/plaintiff company for putting up a huge and strategic display / promotion of “VIMAL”, a brand dealing in tobacco products, that had been published on the front page of the newspaper ‘Times of India’, in its edition dated 01.03.2018 wherein ‘Vimal Elaichi’ was promoted. It was the case of the appellant that “VIMAL” being a registered brand of tobacco under class 34 of the TMA, the said advertisement was an indirect / surrogate advertisement for promotion of ‘VIMAL Elaichi’, thus falling foul of Section 5 of the COTPA.

5. The respondent/plaintiff company also replied to the show cause notice vide letter dated 08.03.2018 and refuted the allegations that the publicity of its product in question was in any manner surrogate advertisement and *inter alia* it was stated that they are not manufacturing any tobacco product of “VIMAL” brand in the domestic market. The respondent/plaintiff company also challenged



the show cause notice by filing suit CS DJ No. 1070/2018 seeking permanent injunction & other reliefs, and filed an application under Order XXXIX Rules 1 & 2 of the CPC seeking temporary injunction against it from proceeding in terms of the impugned show cause notice dated 01.03.2018.

6. The applications in the aforesaid two Civil Suits under Order XXXIX Rule 1 & 2 of the CPC were decided vide separate orders dated 15.12.2021, whereby the operation of the impugned notices dated 25.04.2018 and 01.03.2018 was stayed, which is being assailed in the present two appeals. Further, the respondent/plaintiff companies were allowed to carry out their advertisement campaign with regards to the product in question till the final disposal of the suit.

### **GROUND OF APPEAL**

7. The grounds taken for appeal in the two appeals are more or less of a similar nature and the separate impugned orders dated 15.12.2021 are assailed *inter alia* on the ground that the learned Trial Court decided the application under Order XXXIX Rule 1 & 2 of CPC without first deciding the issue of the maintainability of the suit *qua* section 29 of the COTPA, which provides protection to the government authorities against any suit, prosecution or legal proceeding for an action done or intended to be done in good faith; and that Section 5 of COTPA categorically bars advertisement of cigarettes and other tobacco products by any person engaged or purported to be engaged in the production, supply and distribution of cigarettes and tobacco products.



8. **In this regard, in FAO No. 84/2022**, it was stated that admittedly, the respondent is engaged in the business of selling “DILBAGH” pan masala amongst other established products of “DILBAGH” brand, that *inter-alia* includes chewing tobacco, zarda, bidi and gutka; and that the learned Trial Court failed to appreciate that the trademark “DILBAGH” is registered by the respondent/plaintiff under **Class 34 (Tobacco)** and *inter-alia* sells products known as ‘Dilbagh Pan Masala’, ‘Dilbagh Tango Gulab’, ‘Scented Mithi Supari’, ‘Dilbagh Tanatan Khaini, Dilbagh Ragda’, ‘Dilbagh Bidi’ etc., that categorically puts the respondent/plaintiff in the category of persons covered within the four corners of Section 5 COTPA; and that the learned Trial Court failed to appreciate that the use of brand name “DILBAGH” is a clear case of surrogate or indirect advertisement of its pan masala by using tobacco of brand “DILBAGH” and it is emphasized that ‘gutka’ is only one of the forms of tobacco, which is banned for sale in India and that learned Trial Court failed to appreciate that grant or refusal of injunction will adversely affect the interest of general public of health, which cannot be compensated otherwise.

9. **Likewise, in FAO 89/2022** the impugned order dated 15.12.2021 is assailed *inter alia* on the grounds as stated above, except that for the similarity to the effect that ‘VIMAL’ brand is registered by the respondent/plaintiff company under **Class 34 (Tobacco)** and *inter-alia* sells products known as ‘Vimal Pan Masala’, ‘Vimal Zarda’, ‘Vimal Apna Tobacco’, ‘Vimal Jhatka’, ‘Vimal Ragda’, ‘Vimal Signature’, ‘Vimal King’ and it is submitted that the



learned Trial Court failed to appreciate that indirect use of ‘VIMAL’ brand in advertisement would amount to surrogate advertisement in terms of Section 5 of the COTPA r/w Rule 2 (e) of COTP Rules.

**LEGAL SUBMISSIONS:**

10. Learned counsel for the appellant/defendant vehemently urged that the learned Trial Court did not consider the issue of maintainability of the suit *qua* Section 29 of the COTPA, and it completely overlooked the scope and ambit of Section 5 of the COTPA, which prohibits direct and indirect advertisement, which has to be read along with Rule 2 (e) (i) of the COTP Rules, 2004. Reference was invited to the Notification dated 31.05.2005<sup>5</sup> to the effect that indirect advertisement would *inter alia* include use of name or brand of tobacco products for marketing, promoting or advertising other goods, services and events under Rule 2 (e). Learned counsel for the appellant also challenged the observations of the learned Trial Court contained in paragraph (7.1) onwards of the impugned order(s) to the effect that *since the sale of gutka is banned through the country, there is no reason / occasion for the respondent to indulge in surrogate advertisement for promotion of product which cannot be sold in the country*. It was pointed out that the act of indirect or surrogate advisement has to be appreciated in the context of manufacturers or traders selling pan masala without tobacco with flavoured chewing tobacco in separate sachets but often conjointly sold together by the same vendor. In her submissions she relied on the

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<sup>5</sup> G.S.R. 345(E), dt. 31-5-2005 (w.e.f. 2-11-2006) by Ministry of Health & Family Welfare, as corrected by G.S.R. 599(E), dt. 28-9-2006.



decision in **Union of India & Ors. v. Unicorn Industries**<sup>6</sup>. Learned counsel further relied on **Mahesh Bhatt and ors v. Union of India and Ors**<sup>7</sup> and **Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd.**<sup>8</sup>

11. *Per contra*, learned counsel for the respondent/plaintiff company urged that merely for the fact that the brand names are registered under Class 34 *per se* does not imply indirect or surrogate advertisement of banned products, particularly when the brand name is also registered under Class 29, 30 and 31 of the TMA for various other kinds of food products. Alluding to the advertisements / publicity material in question, which was found to be objectionable, it was vehemently urged that the same does not in any manner promote, sell or imply marketing of the banned items in the nature of gutka, tobacco or banned substances. It was urged that if there is any issue of permissibility of the product now being sold by VIMAL brand names on question on health grounds, the government is very well within its powers to ban the manufactures sale or marketing of the products, which in any case has not been done, so much so that export of gutka and tobacco items is allowed. Referring to the provisions of the COTPA and relevant Rules, it was urged that Section 29 of the COTPA is inapplicable as the impugned show cause notice issued in the two cases by the appellant are *ultra vires* of the said Act.

### **ANALYSIS AND DECISION**

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<sup>6</sup> AIR 2019 SC 4436.

<sup>7</sup> 2008 SCC OnLine Del 159.

<sup>8</sup> (1999) 7 SCC 1.



12. I have given my thoughtful consideration to the submissions<sup>9</sup> advanced by the learned counsel for the rival parties at the Bar. I have gone through the record of the case besides written submissions and the case law relied upon by the parties.

13. The main plank of the challenge to the impugned orders passed by the learned Trial Court is with regard to the suits being barred by Section 29 of the COTPA, which reads as under:-

**“29. Protection of action taken in good faith.**

No suit, prosecution or other legal proceeding shall lie against the Central Government or any State Government or any officer of the Central Government or any State Government for anything which is in good faith done or intended to be done under this Act.”

14. It is well settled that Section 9 of the CPC vests jurisdiction with the Civil Courts for trying any suit or proceedings under common law unless the suit or proceeding is expressly or impliedly barred by any law. At the core of a provision laying down exclusion of jurisdiction of the Civil Court lies the fundamental question as to whether or not the action or anything done under the Special Act is maintainable or fall within the jurisdiction of such Act. In the case of **Nusli Neville Wadia v. Ivory Properties & Ors.**<sup>10</sup>, it was held that the Court has power or inherent jurisdiction to entertain suits in respect of actions or proposed action falling outside the scope and ambit of the special jurisdiction. Reference can also be made to **Ishar Singh v. National Fertilizers & Anr.**<sup>11</sup>, **Chiranjilal Shrilal Goenka**

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<sup>9</sup> Written Submissions on behalf of Appellant/Defendant filed on 17/12/2023; Written Submissions on behalf of Respondent/Plaintiff filed on 22/01/2024.

<sup>10</sup> (2020) 2 SCC 557.

<sup>11</sup> 1991 Supp. (2) SCC 649.





**(Deceased) Through LRs v. Jasjit Singh & Ors.**<sup>12</sup> and **Saraswati & Ors. v. Lachanna (Dead) Through LRs**<sup>13</sup>. In other words, if the purported action of the appellant/GNCTD falls within the four corners of the COTPA, the jurisdiction of the Civil Court to entertain any challenge to the Act done or purported to be done under the COTPA shall be excluded.

15. Insofar as FAO No. 84/2022 is concerned, it is pertinent to mention that the learned Trial Court vide the impugned order dated 15.12.2021 also dealt with the objection raised by the appellant/defendant about jurisdiction of the Civil Court being barred by Section 29 of the COTPA, and it would be relevant to reproduce the observations by the learned trial Court, which reads as under:-

“8. The defendant has contended that as per Section 29 of the COTPA Act, no suit or legal proceeding can be instituted against the defendant for actions taken in good faith or under this Act. In this regard, Ld. Counsel for the plaintiff submitted that certain corporation producing alcohol or alcohol related products are advertising their brands through music CDs. No action has been taken against such corporations and/or advertisements.

8.1 The defendant has not given any specific reply in this regard. Accordingly, this point is not addressed by the defendant. At this stage, the court would not like to make any observation regarding the action of the defendant, whether it is in good faith or not.”

16. At first glance, the aforesaid reasoning appears to be quite cryptic and it manifestly appears that the learned Trial Court has failed to address the issue of its jurisdiction to entertain the suit in terms of Section 29 of the COTPA. However, there is more to the story than

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<sup>12</sup> (1993) 2 SCC 507

<sup>13</sup> (1994) 1 SCC 611



what meets the eye. It would be expedient to re-produce Section 5 of the COTPA, which provides as under:-

**“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.



17. It is pertinent to mention here that Section 3(a) of the COTPA defines ‘advertisement’ to include 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. It would further be expedient to draw reference to the Notification dated 31.05.2005<sup>14</sup>, which was passed in exercise of powers conferred under Section 31 of the COTPA thereby laying down COTP Rules, 2004 and Rule 2(e) reads as under:-

“(e) “Indirect advertisement” mentioned in Section 5(1) of the Act means:

- (i) the use of a name or brand of tobacco products for marketing, promoting or advertising other goods, services and events;
- (ii) the marketing of tobacco products with the aid of a brand name or trademark which is known as, or in use as, a name or brand for other goods and services;
- (iii) the use of particular colours and layout and or presentation that are associated with particular tobacco products, and
- (iv) the use of tobacco products and smoking scenes when advertising other goods and services.”

18. It would be expedient to point out that the aforesaid provision came up for a detailed discussion in the cited case of *Mahesh Bhatt (supra)*, wherein it was held as follows:-

“16...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...”

19. It was further observed as follows:-

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<sup>14</sup> *Supra* (n5).



“17...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 direct, 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 any offending advertisement but would permit and tacitly allow indirect advertisements by dealers, manufacturers, media etc.”

20. Further, the following significant observations also came to be made:-

“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 virus 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.”

21. At the same time, what must also be appreciated is that the aforesaid observations came to be passed by this Court in the case of ***Mahesh Bhatt (supra)*** in the context where the constitutional validity of the COTPA besides the Rules framed therein was challenged, which challenge was declined holding *inter alia* that commercial advertisements are entitled to limited protection under Article 19 (1) (a) of the Constitution if they are in public interest and thereby it was held that any restrictions imposed on the electronic media and



cinematographic films prohibiting exposure of cigarette and tobacco products are reasonable and justified.

22. In the cited case of *Unicorn Industries (supra)* there was a challenge to the amendment brought out by the Government by way of notification in the ‘First’ and ‘Second’ Schedule to the Central Excise Tariff Act, 1985 so as to bring the product *pan masala* in the negative list, and the same being no longer eligible from exemption from excise duty. Dismissing the challenge to withdrawal of exemption from imposing of excise duty on *pan masala* with tobacco and *pan masala sans* tobacco, it was observed that the same measures had been brought out after a lot of scientific research conducted by the experts in the field and consumption of tobacco with/sans *pan masala* was hazardous to health, and therefore, bringing the *pan masala sans* tobacco within the ambit of negative list in the Act was found to be in the larger public interest.

23. Reverting to the instant matter, avoiding a long jurisprudential discourse, suffice to point out, the hoarding in question showing the brand name ‘*Dilbagh pan masala*’ and inviting action by the appellant/defendant under Section 5 of the COTPA read with relevant Rules was dealt with by the learned Trial Court to find out a *prima facie* case in favour of the respondent/plaintiff, that reads as under:-

“7.1(b) The main point raised by the defendant is that the plaintiff is carrying out a surrogate ad-campaign whereby the product “DILBAGH PAN MASALA” is being advertised to promote tobacco products of the plaintiff under the brand name “DILBAGH”. On the other hand Ld. Counsel for the plaintiff submitted that since the year 2013 in view of the order by Hon’ble Supreme Court the advertisement and sale of gutka is banned throughout the country. As per the schedule of the COPTA ACT



pan masala without tobacco is not a product to which COPTA ACT applies.

**7.1(c)** In the impugned notice also rule 2(a) of notification dated 31.05.2005 is quoted. It was submitted on behalf of the defendant that Section 5 of the COPTA ACT shall be read with Rule 2(a) of the rules made therein. [It is pertinent to observe that Rule 2(e) of Cigarettes and Other Tobacco Prohibition of Advertisement or Regulation of trade and Commerce, production, supply and distribution) Rules, 2004 is the same as rule 2(a) of notification dated 31.05.2018]. In the rules the words “Indirect Advertisement” are mentioned. In my considered opinion, the words “Indirect Advertisement” correspond to the words “Surrogate Advertisement”, used in advertisement business parlance. For examining a matter of surrogate advertisement Rule 2(e) is the relevant rule. Section 5 of the COPTA ACT prohibits display advertisement, Sale etc. of cigarettes and other tobacco products. In Section 5 of the COPTA Act, there is no specific prohibition regarding surrogate advertisement. It is only upon reading of Rule 2(e) that the situation is clear particularly Rule 2(e)(i) which prohibits the use of a name of brand of tobacco product for marketing, promoting or advertising other goods services and events.

**7.1(d)** It was submitted on behalf of the plaintiff that Dilbagh Pan Masala is 100% tobacco free. It is not the case of the defendant that Dilbagh pan masala has any tobacco or other banned substance. In this regard, it is pertinent to observe that the defendant has nowhere claimed that Dilbagh pan masala contained any tobacco, nicotine or any other banned substance. The defendant has also not produced any material to show, under which class or classes the brand name Dilbagh is registered. The defendant has also not produced any material to show, under which class or classes the brand name Dilbagh is registered. The defendant has nowhere claimed that Dilbagh pan masala is registered under Class 34.

**7.1(e)** It is pertinent to observe that the said hoarding containing the name of the product is question was put at Dabri Flyover. It was a local advertisement within the country. In view of the order of the Hon’ble Supreme Court in the year 2013, the sale of gutka is banned throughout the country. In such circumstances, there is no reason/occasion for the plaintiff to indulge in surrogate advertisement for the promotion of a product which it cannot sell in the country.

**7.1(f)** Ld. Counsel for the defendant argued that tobacco pouches were being sold with pan masala pouches. Such information was not printed on the pan masala pouches. In this regard, Annexure-A



(colly) was filed alongwith affidavit dated 30.11.2021. In Annexure-A (Colly) there are two pages having black and white print outs of pan masala pouches (including Dilbagh Pan Masala) and tobacco pouches. One envelope containing one pouch each of “Dilbagh Pan Masala”, Vimal Pan Masala and Kamla Pasand Pan Masala is also filed. Small pouches containing tobacco are also in this envelope. However, the defendant did not produce any credible material to show that the plaintiff is advertising these tobacco pouches or that the sale of these tobacco pouches is illegal. On none of these tobacco pouches the brand name “DILBAGH” is anywhere mentioned.

**7.1(g)** In view of the above, it can be summarised that the product in question is not alleged to be containing any tobacco or other band substance. The sale of gutka is banned throughout the country. There is no reason or occasion for the plaintiff to advertise its tobacco products through “indirect advertisement”. Accordingly, the plaintiff has a prima facie case.”

24. Learned counsel for the appellant vehemently urged that Section 3 (p) defines ‘tobacco products’ as those which are specified in the Schedule. The Schedule *inter alia* vide item No.8 reads as “*pan masala or any chewing material having tobacco as one of its ingredients (by whatever named called).*” It would be apposite to appreciate that the use of word ‘or’<sup>15</sup> after *pan masala* and before any ‘chewing material’ *prima facie* signifies that it is used as a *disjunctive word*, and thus, only such *pan masala* which is laced with the tobacco or having tobacco as one of its ingredients i.e., tobacco products that would fall within the mischief of Section 5(1) of the COTPA. There is no challenge to the fact by the appellant that the ‘*pan masala*’ in question is one which is not laded or having ingredients of tobacco. It is also demonstrated that although the brand names are registered under Class 34, the same brand name is also registered for various

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<sup>15</sup> ‘Conj. 1 used to link alternatives. 2 introducing a synonym or explanation of a preceding word or phrase. 3 otherwise’, *Concise Oxford English Dictionary* (OUP 1999).



other kinds of products under Class 29, 30 and 31 of the TMA. Indeed, chewing of *pan masala* is hazardous to health but the State Government or for that matter the Central Government has not chosen to ban the sale or marketing of the same. In the cited case of ***Mahesh Bhatt (supra)*** the Division Bench of this Court quoted with approval from the decision in ***Denis v. US***<sup>16</sup> that “*a legislation may be constitutional yet it may not be desirable*”.

25. The plea of the appellant that Rule 2 (a) of the COTP Rules is squarely applicable, is not tenable as both the respondents/plaintiffs are not engaged in manufacturing, marketing or sale of tobacco, gutka, bidi, or zarda in any manner in the country. Further, the plea that advertisement by using brand name ‘DILBAGH *pan masala*’ is indirect or surrogate advertisement since *pan masala* is clandestinely sold or marketed or made available for sale, or marketed along with gutka along with tobacco products is a question which can only be decided after recording evidence by the parties. In other words, the plea that in order to circumvent the ban on sale of gutka and *pan masala* containing tobacco, the same or other sister manufacturers and traders are selling *pan masala* sans tobacco with flavoured chewing tobacco in separate sachets but often conjointly sold together by the same vendors from the same premises, is a matter of evidence to be decided during the trial.

26. Likewise, is the position with regards to use of brand name “VIMAL” in the questioned advertisement, which is under challenge in FAO 89/2022, which is about display of a hoarding selling

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<sup>16</sup> (1950) 341 US 492





‘VIMAL Elaichi’, which by no means falls under the Schedule to the COTP Rules. At the cost of repetition, the plea that ‘VIMAL Elaichi’ is sold along with other products under the same brand with flavoured chewing tobacco in separate sachets conjointly and often from the same premises, is one which would require recording of evidence. It would be mere repetition that other products of brand name “VIMAL” are also registered under Class 29, 30 and 31 of the TMA. It is a matter of evidence whether or not use of brand names for selling articles such as *pan masala* and *Elaichi* would amount to indirect or surrogate advertisement so as to promote, sell or imply marketing of banned items in the nature of gutka or tobacco, which incidentally is not banned for export from India.

27. In so far as the legal parameters of irreparable loss and balance of convenience are concerned, the reasoning of the learned Trial Court in the two cited cases are *ditto* to the following effect:

“7.2(a) The balance of convenience is in favour of the plaintiff. The plaintiff can be allowed to continue with its pan masala business as per law. If the advertisement of the plaintiff for the product in question is stopped during the pendency of this suit it will cause loss of revenue as well as goodwill which will be irreparable. It may be argued that the plaintiff can be compensated in terms of money, however, the loss of good will cannot be assessed or compensated. If the product of a manufacturer is missing from the market for sometime; it is not probable for the said product to make a comeback.”

28. Again, while the aforesaid reasoning at first impact appears to be a little erratic, but then what can be deciphered is that the respondent/ plaintiff has a fundamental right to carry on business under Article 19(1)(g) of the Constitution of India, for the sale and



marketing of *pan masala* sans tobacco so long as it is has constitutional sanction. When that legal right exists, certainly the appellant/defendant could only take action for banning publicity or advertisement of such permitted items if their action falls within the four corners of law. Indeed, there is the issue of public health hazard but then when the government has not chosen to ban it, both parameters of balance of convenience and irreparable loss tilt towards the respondent/plaintiff. Here, reliance on decision in *Colgate Palmolive (India) Ltd. (supra)* is misplaced since it was in relation to action taken by the Monopolies and Restricted Trade Practices Commission passing an order of restrain as regards the display of a ring around the family as ‘*Suraksha Chakra*’ in the Colgate Palmolive hoardings, print advertisements and TV commercials, which directions were passed in terms of Section 12A of the Monopolies and Restrictive Trade Practices Act, 1969<sup>17</sup>. Indeed, it was held that while

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<sup>17</sup> Section 12A. **Power of the Commission to grant temporary injunctions.**—(1) Where, during an inquiry before the Commission, it is proved, whether by the complainant, Director General, any trader or class of traders or any other person, by affidavit or otherwise, that any undertaking or any person is carrying on, or is about to carry on, any monopolistic or any restrictive, or unfair, trade practice and such monopolistic or restrictive, or unfair, trade practice is likely to affect prejudicially the public interest or the interest of any trader, class of traders or traders generally or of any consumer or consumers generally, the Commission may, for the purposes of staying or preventing the undertaking or, as the case may be, such person from causing such prejudicial effect, by order, grant a temporary injunction restraining such undertaking or person from carrying on any monopolistic or restrictive, or unfair, trade practice until the conclusion of such inquiry or until further orders.

(2) The provisions of Rules 2-A to 5 (both inclusive) of Order XXXIX of the First Schedule to the Code of Civil Procedure, 1908 (5 of 1908), shall, as far as may be, apply to a temporary injunction issued by the Commission under this section, as they apply to a temporary injunction issued by a civil court, and any reference in any such rule to a suit shall be construed as a reference to any inquiry before the Commission.

*Explanation I.*—For the purposes of this section, an inquiry shall be deemed to have commenced upon the receipt by the Commission of any complaint, reference or, as the case may be, application or upon its own knowledge or information reduced to writing by the Commission.



granting ad-interim injunction the Court *inter alia* has to consider whether grant of refusal of injunction would adversely affect the interest of general public, which can or cannot be compensated otherwise. It was also underscored that in order to hold that the practice, which is questioned in a case, would affect prejudicially public interest must be based on some tangible evidence. In the instant matter before this Court, that stage is yet to arrive.

29. In view of the foregoing discussion, both the above noted appeals filed by the appellant/defendant are dismissed.

30. The pending applications also stand disposed of.

31. Nothing contained herein shall tantamount to an expression of opinion on the merits of the case.

32. A copy of this judgment be sent to learned Trial Court for information and records.

**DHARMESH SHARMA, J.**

**JANUARY 24, 2024**

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*Explanation II.*—For the removal of doubts, it is hereby declared that the power of the Commission with respect to temporary injunction includes power to grant a temporary injunction without giving notice to the opposite party