

In the High Court of Judicature at Madras

Reserved on : 05.7.2023	Delivered on : 10.7.2023
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Coram :
The Honourable Mr.Justice N.ANAND VENKATESH

Criminal Original Petition Nos.15850, 15854,
16429, 16441, 17855 and 18843 of 2022 &
all connected pending Crl.M.Ps.

Sv.Rm.Ramanathan,
Managing Director
Abirami Mega Mall Pvt. Ltd.

...Petitioner in
Crl.O.P.No.15850
of 2022

N.Venkatesh, Managing Partner,
Woodlands Theatre

...Petitioner in
Crl.O.P.No.15854
of 2022

C.T.Ramanathan
Padmam Theater Proprietor

...Petitioner in
Crl.O.P.No.16429
of 2022

Aishwarya Rajinikanth

...Petitioner in
Crl.O.P.No.16441
of 2022

Dhanush, owner of Wunderbar

Film Private Ltd.-cum-actor of
Velai Illa Pattadhari film

...Petitioner in
Crl.O.P.No.17855
of 2022

A.V.M.Kumaran

...Petitioner in
Crl.O.P.No.18843
of 2022

Vs

1.State rep.by Dr.V.K.Palani
Authorized Officer for Section 5
of COTPA, 2003,
Deputy Director (Research),
Directorate of Public Health &
Preventive Medicine,
DMS Campus, Teynampet,
Chennai-6.

...R1 in Crl.O.P.
Nos.15850,
15854, 16441 &
17855 of 2022 &
Respondent in
Crl.O.P.Nos.
16429 & 18843
of 2022

2.S.Cyril Alexander, State Convenor,
Tamil Nadu People's Forum for
Tobacco Control (TNPFTC),
Chennai-24.
(R2 impleaded as per order dated 24.8.2022
in Crl.M.P.No.13246 of 2022 in Crl.O.P.No.15850
of 2022; Crl.M.P.No.13247 of 2022 in Crl.O.P.No.
15854 of 2022; Crl.M.P.No.13252 of 2022 in
Crl.O.P.No.16441 of 2022 & Crl.M.P.No.13251
of 2022 in Crl.O.P.No.17855 of 2022)

...R2 in Crl.O.P.
Nos.15850,
15854, 16441 &
17855 of 2022

PETITIONS under Section 482 of the Criminal Procedure Code praying to call for the records and quash the complaint in S.T.C.No. 4004 of 2022 against the petitioners/A3, A8, A5, A2, A1 and A4 respectively on the file of the 18th Metropolitan Magistrate Court, Saidapet, Chennai.

For Petitioners in CrI.O.P.Nos. 15850 & 15854 of 2022	: Mr.S.Ravi for M/s.Gupta & Ravi
For Petitioners in CrI.O.P.Nos. 16441 & 17855 of 2022	: Mr.P.S.Raman, SC for Mr.Vijayan Subramanian
For Petitioner in CrI.O.P.No. 16429 of 2022	: Mr.V.Chandrakanthan
For Petitioner in CrI.O.P.No. 18843 of 2022	: Mr.Ullasavelan
For R1 in CrI.O.P.Nos.15850 15854, 16441 & 17855 of 2022 & Respondent in CrI.O.P. Nos.16429 & 18843 of 2022	: Mr.A.Damodaran, Additional Public Prosecutor
For R2 in CrI.O.P.Nos.15850, 15854, 16441 & 17855 of 2022	: Mr.S.Sathiachandran

COMMON ORDER

These criminal original petitions have been filed challenging the

proceedings initiated by the first respondent in CrI.O.P.Nos.15850, 15854, 16441 & 17855 of 2022 and respondent in CrI.O.P.Nos.16429 & 18843 of 2022 (for brevity, the complainant) before the 18th Metropolitan Magistrate Court, Saidapet, Chennai-15 in S.T.C.No.4004 of 2022 for an alleged offence under Section 5 of the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 (hereinafter called the COTPA), which is punishable under Section 22 of the COTPA.

2. The complainant filed the private complaint against the petitioners namely A1 to A5 and A8 with the following allegations :

(i) The second respondent in CrI.O.P.Nos.15850, 15854, 16441 & 17855 of 2022 namely Mr.Cyril Alexander approached this Court by filing W.P.No.24355 of 2014 to direct the Principal Secretary to Government of Tamil Nadu, Department of Health and Family Welfare, Secretariat, Chennai-9 to prosecute one M/s.Wunderbar Films Private Limited under Section 5 of the COTPA and further direct the Principal Secretary to the Union of India, Ministry of Information and Broadcasting, New Delhi-1 to take appropriate action against the

Chairman, Central Board of Film Certification, Chennai-34 for the dereliction of duty committed in respect of violations of law by the said M/s.Wunderbar Films Private Limited.

(ii) The said writ petition came to be disposed of by a learned Single Judge of this Court by an order dated 27.10.2021 by issuing certain directions. Pursuant to that, the Committee constituted under the COTPA considered the directions issued by this Court in the said order and found that the accused persons had pasted posters in the nature of advertisement for the movie 'Velaiyilla Pattathari' (for short, the movie) wherein a scene depicting smoking of cigarette was exhibited. The Committee further found that the same would tantamount to violation of Section 5 of the COTPA and authorized lodging of a complaint against the accused persons;

(iii) The private complaint came to be filed by the complainant with the specific allegation that the violation was done by the producer of the movie, the owner and actor of the movie and the proprietors of various theatres where the movie was sought to be released. The further allegation that has been made in the complaint was that as the advertisement had directly or indirectly suggested or promoted the use or consumption of cigarettes and as the actor in the movie was

displayed to be smoking cigarettes, it would unnecessarily attract those in the adolescent age, lead to cultivating such a habit and ultimately go against the interest of the younger generation. Accordingly, it was alleged that the accused persons committed an offence under Section 5 of the COTPA, which is punishable under Section 22 of the COTPA.

3. Heard the learned respective counsel appearing for the petitioners, the learned Additional Public Prosecutor appearing for the complainant and the learned counsel appearing for the private respondent.

4. This Court has carefully considered the submissions made by the respective learned counsel on either side and perused the materials available on record.

5. The short issue that arises for consideration in these petitions is as to whether the allegations made in the complaint will constitute an offence under Section 5 of the COTPA.

6. Mr.S.Cyril Alexander, who was impleaded as the second respondent in some of the above criminal original petitions, claims to be the State Convenor of a movement, which fights against cigarette and tobacco products. According to him, M/s.Wunderbar Films Private Limited came out with the movie in question, which was released on 18.7.2014. He found that the advertisement banners of the movie were erected in front of many theatres all over Tamil Nadu carrying the picture of the lead actor prominently smoking cigarette. Further according to him, there was a conspicuous absence of the disclaimer mandated under the relevant Rules for a minimum duration of 20 seconds whereby the concerned actor should have informed about the ill effects of the tobacco products in the beginning and in the middle of the movie and when it is displayed in the television, the private respondent found that there is a violation of Section 5 of the COTPA and Rules 8(1)(d) and 8(1)(i) of the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Rules, 2004 (for short, the Rules).

7. Therefore, earlier, the said Mr.S.Cyril Alexander filed a public

interest litigation before this Court in W.P.No.21698 of 2014 for taking action against the violators and it was dismissed by the First Bench of this Court by an order dated 13.8.2014 in the following terms :

"The norms regarding monitoring the prohibition under the Cigarettes and Other Tobacco Products Act, 2003, are in force and a Committee is already constituted, as is the own case of the petitioner as per pages 1 to 3 of the typed set. Representation is stated to have been made to the Committee. It is for the Committee to find out whether there is any violation or not. Every citizen cannot become a super censor board or a super authority in the form of petitioning the Court under a public interest litigation.

2. We are, thus, not inclined to entertain the petition. The writ petition, accordingly, stands dismissed."

8. The said Mr.S.Cyril Alexander thereafter filed the second writ petition in W.P.No.24355 of 2014 with almost a similar prayer and it was disposed of by the learned Single Judge of this Court by an order dated 27.10.2021 by issuing certain directions. The directions issued by this Court seemed to have been acted upon and the State Level Monitoring Committee had found that there is a violation of Section 5 of the COTPA and consequently directed lodging of a private complaint

against the violators.

9. The specific allegations that were made in the complaint are extracted as hereunder :

"8. It is submitted that the Director of Public Health and Preventive Medicine, Chennai-6 was issued legal notice to eleven members dated 17.08.2014, among eleven, three (Producer Council, Director Association, Theater Owner's Federation) members were not considered as violators, because relevant authorities vide Council, Association and Federation for giving instructions strictly to their members to adhere the COTP Act, 2003 and rules to prevent further violation, and also Director of the film is not considered as a violator because the above said violation done (advertisement of smoking scene poster displayed) by the Producer of film and Proprietor of theaters. The writ petition filed by Cyril Alexander in W.P.No.24355 of 2014 on behalf of the 5th respondent (Wunderbar Films Pvt. Ltd. Chennai), Mrs.Ayshwarya Rajinikanth filed counter affidavit so the Director of Public Health and Preventive Medicine, Chennai-6 was included the Producer of film Velai Illa Pattadhari Mrs.Ayswarya Rajiniganth, Director of Wunderbar Films Pvt. Ltd., Chennai and Mr.K.Dhanush owner of Wunderbar Films Pvt. Ltd., Chennai cum actor in Velai Illa Pattadhari film as a violator. So the above said eight members were considered as violators.

9. It is submitted to state that Mr.K.Dhanush,

owner of Wunderbar Pvt. Ltd., Chennai cum actor in Velai Illa Pattadhari film respectively. Under COTPA Act, 2003, Section 5, (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. So, Mr.K.Dhanush, owner of Wunderbar Films Pvt. Ltd. cum actor of film Velai Illa Pattadhari is displayed the smoking scene posters, which is more attracted by the adolescent age groups and also having a chance to increase the cigarettes and other tobacco product usages which leading to cause an immoral turpitude in the circle of younger generations."

10. Section 5 of the COTPA is extracted as hereunder :

"5. (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."

11. The COTPA was brought into force to eliminate all direct and indirect advertisements, promotion and sponsorship concerning tobacco and for providing regulation of trade and commerce, production, supply and distribution of cigarettes and other tobacco products.

12. A careful reading of Section 5 of the COTPA shows that the entire focus is on prohibition of advertisement of cigarettes and other tobacco products. This provision imposes a complete taboo on the advertisement of cigarettes or any other tobacco products by persons engaged in or purported to be engaged in production, supply or distribution of cigarettes or any other tobacco products and also those persons, who have control over a medium to advertise cigarettes or any other tobacco products through that medium and it also prohibits persons from taking part in any advertisement, which suggests or promotes the use or consumption of cigarettes or any other tobacco

products. The provision further bars a person from entering into a contract to promote the use or consumption of cigarettes or any other products.

13. Section 5 of the COTPA is the charging section under a penal law and hence, it has to be construed in a strict manner. The main thrust of the provision is to prohibit persons, who are engaged in production, supply or distribution of cigarettes or any other tobacco products from advertising the same. All the other prohibitions that are prescribed under Section 5 of the COTPA revolve around only those persons engaged in those activities. Hence, the act of advertisement is directly relatable to those, who are engaged in the production, supply or distribution of cigarettes or any other tobacco products. Such advertisements can happen through a medium and through any other person, who may enter into a contract or otherwise to promote the use or consumption of cigarettes and other tobacco products.

14. While interpreting a penal statute, the Court has to necessarily go by the language used in the provision and see if the facts of the case in hand satisfy the requirements to constitute an

offence.

15. In the instant case, the only allegation that has been made in the complaint is that the advertisement banners of the movie were found to carry the picture of the lead actor prominently smoking cigarette. This act, per se, cannot be brought within the purview of Section 5 of the COTPA since the display was not done by persons engaged in the production, supply or distribution of cigarettes or any other tobacco products and the person, who was depicted as smoking cigarette, was not under any contract with the entity or the person engaged in production, supply or distribution of cigarettes or any other tobacco products nor he was promoting their product.

16. A penal statute has to be strictly construed since the consequence of an action taken under the statute will touch upon the life or personal liberty guaranteed under Article 21 of The Constitution of India. Hence, the Court cannot be swayed by emotions and popular beliefs and the Court has to necessarily construe the provisions strictly and see if the facts of the case make out an offence. If the facts do not constitute an offence, the Court cannot try to expand the scope of the

provision by considering the adverse impact that a tobacco or tobacco product can have on the society and particularly the younger generation.

17. The complainant seemed to have been under the impression that since the producers and the distributors of the movie were engaged in erecting the banners/posters with the lead actor shown to have been smoking, the same would constitute an offence under Section 5 of the COTPA. The producers and the distributors in the present case are engaged in movie business and are not engaged in the business of cigarettes or other tobacco products. This vital distinction between what has been stated in the provision and what comes out of the allegations made in the complaint makes all the difference.

18. The learned Additional Public Prosecutor appearing for the complainant has brought to the notice of this Court the Notifications issued by the Ministry of Health and Family Welfare and published on 25.2.2004 and 27.10.2011.

19. By virtue of these Notifications, the Rules were notified and

certain insertions/additions were also brought in to the Rules. Under Rule 9 of the Rules, there is a bar for depicting any tobacco products or their usage in any form by means of promotional materials and posters of films and television programmes. The Rules do not prescribe a consequence if the same are violated.

20. The criminal complaint has been filed not for the violation of any Rules and it has been filed specifically for the violation of Section 5 of the COTPA. It is now too well settled that the Rules cannot outweigh or override an Act and they have to be read in consonance with the provisions of the Act. Even the punishing section i.e Section 22 of the COTPA speaks only about the contravention of the provisions of Section 5 of the COTPA. Therefore, the Rules that have been shown at the time of hearing do not, in any way, help the case of the first respondent. There is no other allegation in the complaint for violation of any other provisions of the COTPA.

21. Submissions were made by the respective learned counsel appearing for the petitioners on the law of limitation on the ground that the alleged violation took place in the year 2014 whereas the

complaint was filed only in the year 2022.

22. It is not necessary for this Court to go into the issue as to whether the present complaint is barred by limitation since this Court is convinced that the allegations, as found in the complaint, do not constitute an offence under Section 5 of the COTPA.

23. In the light of the above discussions, the continuation of the criminal proceedings as against the accused persons will amount to an abuse of process of court and hence, it requires interference of this Court under Section 482 of the Criminal Procedure Code.

24. Accordingly, the proceedings in S.T.C.No.4004 of 2022 on the file of the 18th Metropolitan Magistrate Court, Saidapet, Chennai against all the accused persons are quashed. In the result, all the criminal original petitions are allowed. Consequently, all connected pending Crl.M.Ps. are closed.

RS

10.7.2023

N.ANAND VENKATESH,J

RS

Index : Yes
Neutral Citation : Yes
Speaking Order : Yes

To

- 1.The 18th Metropolitan Magistrate, Saidapet, Chennai-15.
- 2.The Authorized Officer for Section 5 of COTPA, 2003,
Deputy Director (Research), Directorate of Public Health &
Preventive Medicine, DMS Campus, Teynampet, Chennai-6.
- 3.The Public Prosecutor, High Court, Madras.

Crl.O.P.No.15850 of 2022
etc. cases

10.7.2023