

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 27th DAY OF AUGUST, 2019

PRESENT

THE HON'BLE MR.ABHAY S. OKA, CHIEF JUSTICE

AND

THE HON'BLE MR.JUSTICE MOHAMMAD NAWAZ

WRIT PETITION No.36696 of 2017 (GM-RES)PIL

BETWEEN:

COUNCIL FOR HARM
REDUCED ALTERNATIVES,
HAVING ITS REGISTERED OFFICE AT 63,
FLOOR 2, A & 7 B MUNICIPAL IND EST,
DAINK SHIVNERI MARG, WORLI,
MUMBAI, MUMBAI CITY,
MAHARASHTRA, INDIA-400018.
REPRESENTED BY ITS MEMBER,
MR. HOSHANG, MAJOR.

... PETITIONER

(BY SRI. PRAMOD NAIR, ADVOCATE FOR
SRI. PINGAL KHAN, ADVOCATE)

AND:

STATE OF KARNATAKA,
REPRESENTED BY ITS CHIEF SECRETARY,
VIDHANA SOUDHA, AMBEDKAR VEEDHI,
BENGALURU-560 001.

...RESPONDENT

(BY SRI. T.L. KIRAN KUMAR, AGA)

THIS WRIT PETITION IS FILED UNDER ARTICLE 226 & 227
OF THE CONSTITUTION OF INDIA, PRAYING TO QUASH
CIRCULAR DATED : 15.06.2016 ISSUED BY THE RESPONDENT
(CIRCULAR) PRODUCED AS ANNEXURE-A ETC.

THIS PETITION COMING ON FOR PRELIMINARY HEARING
'B' GROUP THIS DAY, **CHIEF JUSTICE** MADE THE FOLLOWING:-

ORDER

This petition is specifically filed as a 'Public Interest Litigation' by the petitioner which is claiming to be a Section 8 Company registered under the provisions of the Companies Act, 2013. It seeks to challenge ban imposed by the State Government on E-cigarettes. The challenge in this petition is to the Circular dated 15th June 2016, by which the Government of Karnataka prohibited the sale, manufacture, distribution, trade, import and advertisement of Electronic Nicotine Delivery Systems (ENDS), its parts and components, any shape or size of cartridges containing nicotine in the public interest. It also banned online sale of Electronic Nicotine Delivery Systems (ENDS), which are commonly known as 'E-cigarettes'.

2. The first submission of the learned counsel appearing for the petitioner is that in the objections filed by the State Government, they have not supported the impugned order by referring any specific power conferred on the State by any law to pass the impugned order. He relies upon the orders passed by the High Court of Delhi

and High Court of Judicature at Bombay, which prima-facie hold that ENDS is not a drug within the meaning of Section 3(b) of the Drugs and Cosmetics Act, 1940 and therefore, there is no power to impose such a ban. His second submission is that by a Circular, such a ban cannot be imposed. His third submission is that though ENDS is harmful, it is less harmful than the cigarettes and therefore, use of ENDS could have been regulated.

3. His submission is that there is scientific material to show that as ENDS is less harmful than of tobacco cigarettes, it is often used as an integral part of a de-addiction programme for nicotine and tobacco addicts.

4. His next submission is that there is a discrimination which is violative of Article 14 of the Constitution of India. His submission is that on one hand, sale, manufacture and distribution of tobacco cigarettes is not prohibited, but on the other hand, prohibition is imposed as regards ENDS, which is less harmful.

5. Lastly, he relied upon the Doctrine of Proportionality . In support of the said contention, he relied upon the decision of the Apex Court in the case of ***Om Kumar and Others vs. Union of India***¹.

6. This petition is purportedly filed in public interest as is specifically stated so in the cause title of the petition. In paragraph-33, the petitioner has accepted that ENDS is harmful as it uses nicotine, but contended that it is less harmful than the tobacco cigarettes. In the impugned order, it is stated thus:-

“It has come to the notice of the State Government that Electronic Nicotine Delivery Systems (ENDS) commonly known as E-cigarette and other similar technologies by whatever name called products mainly containing chemical/drugs like nicotine with propylene glycol as main ingredients have adverse to the public health.

Nicotine is a Chemical Substance, it is addict forming and poisonous to the Human beings. Use of this may leads to causes for Heart Disease, Respiratory Diseases, once it

¹ (2001)2 SCC 386

is consumed may leads to addict formation. Sometimes it may causes death to Human beings”.

7. There are detailed objections filed by the State Government raising a contention that no public interest is involved in this petition. The harmful effects of Electronic Nicotine Delivery System (ENDS) / E-cigarette) have been highlighted in the objections.

8. Today, the learned Additional Government Advocate produces the white paper on ENDS released by Indian Council of Medical Research, in which, it is expressed that impending epidemics of e-cigarettes use, can lead to a public health disaster in India.

9. Writ jurisdiction under Article 226 of the Constitution of India is always discretionary and equitable. This is a petition purportedly filed in public interest. It is not necessary the writ Court to interfere with every action which is illegal. The submissions canvassed across the bar will have to be tested on the basis that the petitioner is seeking to act in public interests. We are constrained to say that

the submissions which would be normally canvassed by the manufacturers of ENDS are canvassed by the petitioner who claims to be a pro bono litigant especially the contention raised based on Article 14 of the Constitution of India. It will be very interesting to note what is averred in paragraph-33 of the petition. The petitioner has stated thus:-

“33. It is pertinent to clarify that, the Petitioner herein is neither contending that ENDS is not harmful nor denying the fact that nicotine is not harmful in nature. However, it is less harmful than tobacco cigarettes and is often used as an integral part of a de-addiction programme for nicotine and tobacco addicts. It is therefore essential that the use, manufacture and sale of ENDS be regulated in the State of Karnataka rather than be banned outright. The respondent can establish various rules, regulation and guidelines to regulate the manufacture, sale and use of ENDS like the EU’s Tobacco Products Directive. The respondent can regulate the nicotine content and the use of other chemical in the e-liquids. Further, the State can various quality standard for e-

liquids, which will ensure that no low-quality e-liquid containing harmful chemicals is sold in the State of Karnataka. Similarly, the Respondent can also establish various rules, regulation and guidelines for the ENDS device itself. This would help the Respondent achieve the object that it intended to in the Circular without having to impose a blanket ban on the manufacture, sale and use of ENDS”.

10. In paragraph-38, the petitioner has stated thus:-

“ 38. In the event the interim relief prayed for is not granted the users of ENDS who are using it for the purpose of smoking cessation would be gravely affected as they wouldn't have an effective and accessible alternative for the purpose of smoking cessation. Further, the various manufacturers of ENDS would suffer grave losses due to shut down of their manufacturing units and loss of profits and this would in turn deny users of ENDS access to such a product. On the other hand, if the order prayed for is granted, the Respondents will not suffer any loss”.

(underline supplied)

11. Thus, it is expressly clear that the petitioner which is claiming to be a Section 8 Company and is claiming to act in public interest is in fact espousing the

cause of manufacturing units of ENDS. The petitioner who claims to act in public interest is worried more about the loss to the manufacturers rather than the harm to public health. The orders on which reliance is placed have been passed at the instance of the manufacturers of ENDS. Apart from the fact that it can be inferred the petitioner is espousing the cause of manufacturers of ENDS, when the petitioner itself has admitted that ENDS is harmful, it is impossible to accept that public interest is involved in seeking removal of ban on E-cigarettes.

12. We are constrained to observe that by filing such PIL by openly pleading that the impugned order will affect the manufacturing units, the petitioner has abused the jurisdiction of this Court and especially the PIL jurisdiction. The petitioner wants ban on the said product to be lifted only to ensure that manufacturing companies are benefited. Therefore, this is a fit case where the petitioner will have to be saddled with heavy costs. Considering the nature of averments made in the petition and the submissions made across the bar, we quantify the costs at Rs.1,00,000/-. We

clarify that while dismissing this PIL, we have not gone into the legality and validity of the impugned order.

13. Accordingly, we dismiss this petition in the nature of PIL. We direct the petitioner to pay costs of Rs.1,00,000/- to the respondents within a period of six weeks from today.

Though the petition is dismissed, regarding the compliance of order on payment of costs, petition to be listed under the caption 'Orders' on 14th October, 2019.

**Sd/-
CHIEF JUSTICE**

**Sd/-
JUDGE**

Srl.