

26.09.2019
S/L No.1
Court No.4
(AP)

AST 40 of 2019
Plume Vapour Private Ltd. & Anr.
Vs.
Union of India

With

AST 41 of 2019
M/s. Woke Vapors Pvt. Ltd.
Vs.
Union of India & Ors.

Dr. Abhishek Manu Singhvi, senior advocate,
Mr. Jishnu Saha, senior advocate,
Mr. Sajam Poov,
Mr. Amar Gupta,
Mr. Manoj Kumar Tiwari,
Mr. Sanjay Ginodia,
Mr. Sushovit Dutt Majumdar,
Ms. Pusali Sinha Chaudhury,
Mr. S. Ginodia

...for petitioners (AST 40 of 2019).

Mr. Anindya Kr. Mitra, senior advocate,
Mr. Soumya Ray Chowdhury,
Mr. Awani Kr. Roy,
Mr. Himanshu Chaubey,
Mr. Srijan Sinha,
Mr. Ritesh Kr. Ganguly,
Mr. Surajit Biswas

...for petitioners (AST 41 of 2019).

Mr. Animesh Kanti Ghosal, senior advocate,
Mr. Vipul Kundalia,
Mr. Tapan Bhanja,
Mr. M.C. Prusty,
Mr. S. Lamba

...for respondents.

Mr. Singhvi, learned senior advocate, moves the writ petition holding out challenge to Ordinance dated 18th September, 2019 being

Prohibition of Electronic Cigarettes (Production, Manufacture, Import, Export, Transport, Sale, Distribution, Storage and Advertisement) Ordinance, 2019.

He submits, petitioner no.1 is a company engaged in business of dealing in electronic cigarettes. Petitioner no.2 is shareholder of the company, smoker of electronic cigarettes and aggrieved by infringement upon his right to choose less harmful alternative to combustible tobacco cigarettes. He submits on comparison of harm caused by combustible cigarettes, beedi and cigar versus electronic cigarettes, also referred to as 'Electronic Nicotine Delivery Systems (ENDS)'. Referring to page 70 of the petition he seeks to demonstrate, there is no tar content in ENDS, negligible carcinogens and 0-5 mg/10 puffs of ENDS (as equivalent to smoking a cigarette). He refers to Evidence Review of e-cigarettes and Heated Tobacco Products 2018, on a report commissioned by Public Health England. The report says cancer potencies of e-cigarettes were largely under 0.5% of the risk of smoking. Among e-cigarette users, two studies of biomarker data for acrolein, a potent respiratory irritant, found levels consistent with non-smoking levels. The report suggests ENDS could be a source of preventable risks. It recognizes ENDS to be a measure to help existing smokers to quit smoking. Although long term hazards of ENDS use are not clearly defined, e-cigarettes are probably close to Nicotine Replacement Therapy (NRT). Report summary also says, tobacco harm reduction and regulation of e-cigarettes have had

different approaches adopted in different countries around the world. World Health Organisation (WHO) recognizes a role for e-cigarettes as part of harm reduction strategy for smokers.

He then refers to American Cancer Society Position Statement on Electronic Cigarettes. There is clear statement that current generation e-cigarettes is less harmful than smoking but the health effects on long term use is not known. The statement says, many smokers choose to quit smoking without the assistance of a clinician and some opt to e-cigarettes to accomplish this goal. He then refers to Annual Review of Public Health 2018, which carries a graph showing levels of harm, starting with no harm. Combustible tobacco finds place in that part of the graph, showing harm at extreme toxicity.

Annexure P-14 is record of Unstarred Question no.4444, answered on 7th September, 2019 in Lok Sabha. The answer given was, inter alia, Government is aware of the marketing of electronic cigarettes or e-cigarettes. In that context he draws attention to preamble of the Ordinance. He submits, the object appears to be to protect the people from harm. It appears to have been necessitated on invitation to parties to World Health Organisation Framework Convention on Tobacco Control held on 21st May, 2003, to consider prohibiting or regulating, inter alia, ENDS and that parties to the conference took decision to invite themselves to consider banning or restricting advertising, promotion and sponsorship of ENDS. He submits, there is no recital of a treaty, to bring in application of

article 51 of the Constitution of India. Banning or restricting is in relation to advertisement, considered to be urged upon parties, to consider. He submits, on that preamble the Ordinance was promulgated, to come into force at once. It is open to judicial review.

He submits, the Executive action is manifestly arbitrary, disproportionate and excessive. He relies on judgement of Supreme Court (Constitution Bench) in **Shayara Bano Vs. Union of India** reported in **(2017) 9 SCC 1**, paragraphs 87 and 101. He submits, the action is disproportionate as a complete ban, to achieve object of reducing harm, in respect of ENDS, since combustible cigarettes are more harmful. Lesser drastic alternative of regulating dealing with ENDS could have been done. It is also unreasonable by under classification, for which proposition he relies on judgment of Supreme Court (Constitution Bench) in **State of Gujarat Vs. Shri Ambica Mills Ltd.** reported in **(1974) 4 SCC 656**, paragraphs 53 to 55.

He also cites judgement of Supreme Court (Constitution Bench) in **Mohammed Faruk Vs. State of Madhya Pradesh** reported in **1969 (1) SCC 853**, paragraph 10 and more recently in **Shreya Singhal Vs. Union of India** reported in **(2015) 5 SCC 1**, paragraphs 26 to 32, on failure to consider less drastic alternatives, leading to conclusion of the action being disproportionate. He then relies on **Godawat Pan Masala Products I.P. Ltd. Vs. Union of India** reported in **(2004) 7 SCC 68**, paragraphs 48, 49, 51 and 53. He submits, in **Godawat** (supra) point for consideration was with regard

to challenge to notification banning Pan Masala, which does not include tobacco. The notification was held to violate fundamental right of appellants under article 19(1)(g). A contrast was made with provisions in Cigarettes and Other Tobacco Products (Prohibition of Advertising and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003. He submits, in said Act, only sections 4, 5 and 6 mandate prohibition, that too in specific cases. The Act is regulatory. He reiterates, ENDS is less harmful than combustible tobacco cigarettes covered by the Act. Supreme Court noticed that the Act of 2003 does not ban sale of tobacco products, listed in the schedule, except to minors.

There has been infringement of fundamental right of choice, had by petitioner no.2 under article 21. The right to chose has been recognized as part of right to life. He relies on judgement of Supreme Court (Constitution Bench) in **K.S. Puttaswamy Vs. Union of India** reported in **(2017) 10 SCC**, paragraphs 297 to 299. He submits also on balance of convenience. In the facts and circumstances, allowing what is going on, notice had by the Government as on or before 7th September, 2012, balance of convenience and prevention of irreparable damage would be served by interim order staying commencement of the Ordinance as against no order being made. He submits, interim order to issue be confined to his clients.

List on 30th September, 2019 marked at 12:30 PM for the other writ petition (AST 41 of 2019) being moved.

Union of India will be heard in opposition, regarding interim order, on 1st October, 2019 when also the writ petitions are to be listed, marked at 2 PM.

(Arindam Sinha, J.)