

Section 9 of the Tobacco Products (Control and Regulation) Act, 2068 (2011) provides that health messages or pictures/graphics must cover 75 percent of any outside packaging and labelling of tobacco products, which is more than 50% as mentioned in the Convention.

Supreme Court, Special Bench

Hon'ble Justice Kalyan Shrestha

Hon'ble Justice Tarka Raj Bhatta

Hon'ble Justice Gyanendra Bahadur Karki

Date of Issue: 2070-9-14-1

068-WO-0383

Subject: Mandamus

Petitioner: Advocate Jyoti Baniya, authorized also on behalf of the Consumer Interest Protection Forum et.al.

Vs.

Respondent: Government of Nepal, Office of the Prime Minister and Council of Ministers, Singhadarbar et.al.

- Since human beings may, knowingly or unknowingly, get addicted to smoking, it is a duty of the State to raise

awareness against smoking, carry out public dissemination in a manner to depress smoking, cause tobacco companies to compulsorily display a warning message that tobacco product is injurious to health and colorful pictures/graphics that carry a message of dangerous effect resulted from the consumption of tobacco product on the outer side of a box, wrapper, packet and packaging of parcel and label of tobacco products and ban its use in public places.

(Paragraph 6)

- As public health is a right that is also related to the enforcement of several rights of an individual including the right to life, problems due to consumption of tobacco products do have effects on and implications to other fundamental rights as well. Thus, it becomes an obligation of the State to make and enforce laws in exercise of the legislative powers and frame necessary rules and to have effective regulation thereof through government mechanisms, as to whether such laws have been implemented.

(Paragraph 8)

- The Tobacco Products (Control and Regulation) Act, 2068 (2011) has come into force since 2068/4/27 (August 12, 2011) upon being authenticated on 2068/1/26 (May 9, 2011); and more than a two-year period has already elapsed since the filing of the present writ petition on 2068/7/22 (November 8, 2011), but an attempt has been made to carry on the production and marketing of manufactured products as if the Act were never enacted, which seems to be a mala fide profit-oriented perspective.

- All manufactured products should have been cleared within the time specified by law from the notified date of commencement of the Act and production should have been started in consonance with the new statutory provisions. Thus, deferring the date of commencement of the Act after any date of filing of the case or of issuance of interim order or of making judgement on the case does not seem to be just.

(Paragraph 29)

- Article 11(1) (b) of the Framework Convention on Tobacco Control provides that a manufacturer must display health warning messages or pictures/ graphics covering 50 percent or more of any outside packaging and Labelling of tobacco products, and that such messages and pictures must not be less than 30 percent of the principal display areas; and Section 9 of the Tobacco Products (Control and Regulation) Act, 2068 (2011) provides that health messages or pictures/graphics must cover 75 percent of any outside packaging and labelling of tobacco products, which is more than 50% as mentioned in the Convention. So, it cannot be said that the provision of Section 9 is inconsistent with the provision of the Convention.

(Paragraph 30)

For the petitioner: Learned Senior Advocate Harihar Dahal, Advocates Jyoti Baniya, Punya Prasad Dangal, Jagannath Mishra

For the respondent: Learned Joint Attorney Kiran Poudel, Learned Senior Advocates Badri Bahadur Karki, Shyam Prasad Kharel

and Anil Kumar Sinha and Advocates Tilak Bikram Pandey, Anup Uprety and Samir Sharma

Referred Precedents:

- Nepal Law Journal, Golden Jubilee Special Issue, 2052 (1995), p. 168, Writ No. 3822 of the year 2062 (2005)
- Surya Nepal Pvt. Ltd. vs. Government of Nepal and others Writ No. WO-0022 of the year 2068 (2011)

Relevant laws:

- Tobacco Products (Control and Regulation) Act, 2068 (2011)
- Tobacco Rules, 2068 (2012)
- Tobacco Directives, 2068 (2011)

Decision

Kalyan Shrestha, J: The short description and verdict of the instant Writ Petition filed in this Court, praying for the issuance of orders including mandamus and prohibition under Articles 32 and 107(2) of the Interim Constitution of Nepal, 2063 (2007) is as follows:

The writ petition reads that the Tobacco Products (Control and Regulation) Act, 2068 (2011) passed by the Legislature of Nepal was authenticated on 2068/1/26 (May 9, 2011), with provisions that all the Sections of the Act except Section 9 shall come into force on the 91st day, and Section 9 on the 180th day, of the authentication of the Act. Now, all Sections, including the Preamble, of the Act are in force. The objective of the Act is- "to make legal provisions to reduce, control and regulate production, sales and distribution and consumption of tobacco products and to control such activities, in order to enhance

health, convenience and economic interest of the general public, since smoking and tobacco consumption are highly injurious to human health and also have negative impacts on economic, social and cultural activities of human beings".

Section 22 of the Act contains various legal provisions, which include a provision that requires the Government of Nepal to create a health tax fund for the controlling of smoking and tobacco products and for the prevention and treatment of diseases caused from consumption of such products. Similarly, Section 9 provides for warning messages, Section 20 provides for functions and duties required to be performed by the Committee, Section 5 sets an obligation to display a notice on prohibition of smoking and tobacco consumption in public places, Section 6 bans smoking in homes and private motor vehicles in a manner to affect others, Section 10 bans advertising, promotion of or sponsorship or broadcasting of any program, news or information about tobacco products through any medium and, Section 11 provides for restriction on sale, distribution and display. A regulation has not been framed and implemented pursuant to Section 27 for the implementation of the objectives of the Act; tobacco products are being produced, sold, distributed and imported in contravention of Section 9; the Committee as referred to in Section 20 has not been active; and tobacco products are being advertised and disseminated in contravention of Section 10. These activities have violated the legislative intent and legal obligations and the rights also conferred by Section 6 of the Consumer Protection Act, 2054 (1998).

Thus, the writ petitioner prays for the issuance of mandamus with prohibition thereby requiring the Respondents to fully implement, or cause full implementation of, Section 9 of the Tobacco Products (Control and Regulation) Act, 2068 (2011), to import or cause to be

imported only those products which satisfy the criteria while importing or making clearance of tobacco products from the customs. Moreover, only those tobacco products of which packet contains mandatory pictures/graphics including that of lungs, mouth cancer, infant dying from indirect smoking and of which outside packaging and wrappers contain health warnings in the Nepali language are allowed to be imported, produced, sold and distributed since 2068/7/18 (November 4, 2011) in accordance with Sections 1(2) and 9 of the Act. However, no act or action has been carried out in pursuance of that mandatory legal provision. Thus, the Respondents should be required to import, or cause to be imported, only those tobacco products of which packets and wrappers do carry messages and warnings along with the said color pictures/graphics covering no less than 75 percent of the outside thereof, and to make a ban on any import, production and sale and distribution of tobacco products of which packets and wrappers do not carry such messages and warnings. Similarly, the Petition also prays that orders including mandamus be issued, thereby requiring the Respondents to frame and implement, or cause to be implemented, rules as referred to in Section 27, make, or cause to be made, representation of an institution being engaged in the concerned field in the Committee as referred to in Section 19 and the fund as referred to in Section 22, to immediately remove hoarding boards and advertisements in contrary to Section 10, to allocate, or cause to be allocated, sufficient budget for the inspector in accordance with Section 12 to perform the activities as mentioned in Chapter 4 of the Act, to post, or cause to be posted, notices as referred to in Section 5, to include, or cause to be included, the public road referred to in Section 2(a) of the Public Roads Act, 2031 (1974) in the definition of the public place contained in Section 3 of the Act, to amend, or cause

to be amended, Sections 2(6) and 4(i) and to perform, or cause to be performed the functions pursuant to Section 20.

An order was issued by this Court on 2068/7/23 (November 9, 2011) that a show cause notice be served on the Respondents to submit Affidavits responding to what happened in the matter and why the order prayed for by the petitioner should not be issued, within 15 days, excluding the time required for journey, from the date of receipt of the order, and that the matter be referred to the Bench upon the submission of the Affidavits or expiration of the time-limit as per the rules. Moreover, considering the pray for the issuance of an interim order, it seems that the Tobacco Products (Control and Regulation) Act, 2068 (2011) passed by the Legislature-Parliament was authenticated and published in the Nepal Gazette on 2068/1/26 (May 9, 2011) Section 9(1) of the Act has a legal provision that the manufacturers must clearly and visibly print, indicate and display in the Nepalese language, warning messages as specified by the Ministry, such matters as tobacco products are injurious to health, and colorful picture/graphic of harmful effect due to consumption of tobacco products in no less than 75 percent of outside packaging and Labelling of packets, wrappers, parcels of tobacco products. Similarly, sub-section (3) of that Section provides that no importer may import those tobacco products which do not satisfy the criteria as referred to in sub-section (1). It is mentioned in sub-section (2) of Section 1 of the Act that Section 9 of the Act shall come into force on the 180th day, and the other Sections, on the 91st day, after the date of authentication. However, as pleaded by the Petitioner, Section 9 of the Act has not come into force despite that a period of 180 days has matured on 2068/7/18 (November 4, 2011). Therefore, pursuant to Rule 41(1) of the Supreme Court Regulation, 2049 (1992), an interim order, which would remain in force pending another order, was issued thereby

requiring the Respondents to immediately implement sub-sections (1) and (3) of Section 9 of the Act and cause their subordinate bodies to implement the same, from the date of receipt of the order, and refrain from producing, selling, distributing and importing those tobacco and tobacco products which fail to satisfy the criteria set by Section 9(1) and (3) of the Tobacco Products (Control and Regulation) Act, 2068 (2011). It was also ordered that a notice be given to the Respondents, appointing the date of 2068/8/5 (November 21, 2011) for hearing and discussions on whether the interim order should continue or not.

On 2068/8/5 (November 21, 2011), this Court issued an order that, as it appeared that the date of 2068/7/4 (October 21, 2011) was appointed as the date for discussions as to an interim order in the Writ Petition, 068-WS-0022 filed on behalf of the Surya Nepal Pvt. Ltd., a Respondent in this matter, and the same would be referred to the Special Bench, it seems appropriate to deal with this petition along with that petition, the date of the said petition be also appointed for discussions on interim order in this instant petition as well, and the interim order issued on 2068/7/23 (November 9, 2011) be continued until that date and the matter be referred to the Bench.

An application was made to this Court by Santa Lal Banda, among others, for a leave to be involved in the proceedings of this instant Writ Petition on the ground of Rule 42(2) of the Supreme Court Regulation, 2049 (1992). Similarly, an application was made to this Court by Sanjeev Keshav, a director of, and authorized by, the Surya Nepal Pvt. Ltd. for a leave to be involved in the case involving the rights and interest of the Company.

Similarly, an application was made to this Court by President Beni Prasad Timilsina, on behalf of the Nepal Multinational Company Labor Union, the authorized trade union of the workers and employees

serving in the Surya Nepal Pvt. Ltd, for a leave to be involved in the proceedings of this case because their rights and interests are involved in the matter of the instant Writ Petition, 068-WO-0383.

The Affidavit submitted on behalf of the Respondent, Government of Nepal, Ministry of Finance, reads that the Writ Petitioner has failed to clearly mention in the petition that which acts should have been carried out by the Ministry in relation to the writ petition filed to have full compliance with the provisions contained in the Tobacco Products (Control and Regulation) Act, 2068 (2011) in regard to import, production, sale and distribution of tobacco products. Pursuant to the interim order issued by the esteemed Supreme Court for imposing a ban on imports of tobacco products failing to satisfy the standards, correspondences had already been made by that Ministry to the concerned body for the implementation of the order. The writ petition is, therefore, dismissible.

The Affidavit submitted on behalf of the Respondent Department of Customs, reads that so far as the issue raised by the Writ Petitioners that the Department of Customs and Customs Offices there under failed to fully implement Sections 1(2) and 9 of the Tobacco Products (Control and Regulation) Act, 2068 (2011) is concerned, the said Act was published in Gazette of 2068/1/26 (May 9, 2011) by the Government of Nepal, and the Department of Customs has already issued a circular No. 068/69, Ref.No. 526 dated 2068/8/4 (November 20, 2011), to all of its subordinate Customs Offices for the implementation of the Act. So, the plea that the Department of Customs failed to fully comply with the Act is baseless and fictitious. Thus, the Writ Petition should be dismissed. It was submitted that the main Customs Offices were already instructed to implement the interim order issued by the Supreme Court in the matter of Writ Petition filed by the Nepal Cancer Relief Society, in relation to the

Tobacco Products (Control and Regulation) Act, 2068 (2011) and that full compliance with the prevailing Acts, Rules and Directives would be carried out, and caused to be carried out.

The Affidavit submitted on behalf of the Government of Nepal, Ministry of Law and Justice, reads that being the matter of implementation of the Tobacco Products (Control and Regulation) Act, 2068 (2011) not under the jurisdiction of the Ministry, pursuant to the Government of Nepal (Allocation of Business) Rules, 2064 (2007), the Writ Petition filed naming the Ministry as a Respondent was, therefore, meaningless. So far as the petition for an order requiring the framing and implementation of the rules in accordance with Section 27 for the implementation of the objective of the Act is concerned, the Ministry would provide approval for the same upon receipt of a request, if any, from the concerned body. The present Writ Petition should, therefore, be quashed.

The Affidavit submitted by the Respondent National Health Education, Information and Communication Center reads that all Sections of the Tobacco Products (Control and Regulation) Act, 2068 (2011), aimed to reduce, control and regulate imports, production, sale and distribution and consumption of tobacco products, in realization of the fact that smoking and consumption of tobacco products is highly injurious to human health, have already been in force; the Ministry and its subordinate bodies have been active in the effective implementation of the Act in tune with its objective. In the course of implementation, various awareness programs were conducted at the community, district and regional levels, inspectors were designated, policy formulation community formed, and in respect of pre-examination of warning pictures/graphics and messages, permission obtained from Thailand, Singapore and European Union to use warning pictures and messages. Information was already sent to the industries

on 2068/2/30 (June 13, 2011) to keep them in a ready position for the printing and Labelling of warning pictures/graphics and messages. Production, distribution and broadcasting of educational materials have been carried out in order to educate general consumers and people about negative effects of, and diseases from, tobacco products. In pursuance of Section 9 of the Act requiring the Ministry to specify warning messages, the Directives for Printing and Labelling of Warning Messages and Graphics, 2068 (2011) have been issued and warning messages and pictures/graphics already specified. Moreover, drafting of regulation to be made under the Act has also been initiated. In a situation where legal provisions have already been in place since 2068/7/18 (November 4, 2011), banning the production, sale and distribution and purchase of tobacco products which fail to carry warning messages and pictures, the order as sought should not be issued; and the instant Writ Petition should, therefore, be dismissed.

The Affidavits submitted severally by Respondents Government of Nepal, Minister for Health and Population and the Ministry of Health and Population read, inter alia, that all Sections of the Tobacco Products (Control and Regulation) Act, 2068 (2011), aimed to reduce, control and regulate imports, production, sale and distribution and consumption of tobacco products, in realization of the fact that smoking and consumption of tobacco products is highly injurious to human health, have already been in force; the Ministry and its subordinate bodies have remained active in the effective implementation of the Act in tune with its objective. In order to achieve a successful implementation of the Act, various awareness programs have been conducted, inspectors designated, policy formulation committee formed, warning messages and pictures/graphics required to be specified by the Ministry pursuant to Section 9 of the Act already specified, and drafting of regulation to be

framed under the Act also initiated. As provided for in Section 9 of the Act, the Directives on warning messages and pictures/graphics, already approved on 2068/7/18 (November 4, 2011), have come into force. The instant Writ Petition should, therefore, be dismissed.

The Affidavit submitted on behalf of the Government of Nepal, Council of Ministers reads, inter alia, that the Government of Nepal, Council of Ministers, is very conscious and committed towards protection and promotion of fundamental right of the citizen to live a healthy life, by controlling and regulating tobacco products. Since smoking and tobacco consumption is highly injurious to human health and smoking and tobacco consumption also have negative impact on economic, social and cultural aspects of the human life, the Tobacco Products (Control and Regulation) Act, 2068 (2011) has been enacted by the Legislature-Parliament, with a view to mitigating, controlling and regulating import, production, sale, distribution and consumption of tobacco products, in order to enhance health, convenience and economic interests of the public generally. Directives have also been issued from time to time by the Council of Ministers to the concerned bodies and officials of the Government of Nepal for the effective implementation of the Act. Monitoring, supervising and directing will be made further effective in the future. The Ministry of Health and Population has also completed, with priority, such activities including the conducting of various awareness programs at the community, district and regional levels, designation of inspectors, formation of policy formulation committee pursuant to Section 19 and preparation of a draft of regulation as required to be performed pursuant to the Act. The petitioner's plea that nothing has been done in the course of implementation of the Act is not true. All provisions of the Act will be implemented effectively from the time set forth in the Act. The instant Writ Petition should, therefore, be dismissed.

Applications were made to this Court on 2068/8/22 (December 8, 2011) severally by Thakur Shahi, Rajendra Prasad Pradhan and Badri Thapa, requesting for a leave to be involved in the petition proceedings pursuant to Rule 42(2) of the Supreme Court Regulation, 2049 (1992) because they are chronic sufferers of cancer from consumption of tobacco and tobacco products.

The Affidavit submitted on behalf of the Government of Nepal, Ministry of Industries reads, inter alia, that the Ministry has been named as a Respondent without any ground and reason and without clearly indicating any such acts by the Ministry as have violated the rights of the Petitioner. The Tobacco Products (Control and Regulation) Act, 2068 (2011) has already come into force. Given that the Ministry has no role in the context of commencement of the Act, the instant Writ Petition should, therefore, be dismissed in regard to the Ministry.

The Affidavit submitted on behalf of the Janakpur Cigarette Factory Limited reads that the Factory had remained closed then. If the company was to subsequently produce, sell and distribute cigarettes, all provisions of the Act would be followed. The organization has been complying with all provisions as referred to in Section 10 of the Tobacco Products (Control and Regulation) Act, 2068 (2011). The instant Writ Petition should, therefore, be dismissed.

On 2068/8/22 (December 8, 2011), it was ordered by this Court that the instant Writ Petition be expeditiously referred as per the rules for full hearing after the submission of Affidavits by the rest Respondents or after the expiration of the period for the submission of Affidavits since it appears that most of the Respondents have submitted their Affidavits in respect of an interim order.

The Affidavit submitted to this Court on behalf of the Surya Nepal Private Limited reads, inter alia, that the Respondent company

has been complying with all the provisions, except Section 9, of the Tobacco Products (Control and Regulation) Act, 2068 (2011), within the prescribed time limit. A Writ Petition was filed in the Court on 2068/7/29 (November 15, 2011) to have declared, pursuant to Article 107(1), void Sections 1(2) and 9 of the Tobacco Products (Control and Regulation) Act, 2068 (2011) and the Directives for Printing and Labelling of Warning Message and Graphics in the Boxes, Packets, Wrappers, Cartons, Parcels and Packaging of Tobacco Products issued by the Government of Nepal, Ministry of Health and Population on 2068/7/18 (November 4, 2011) since the said Sections and Directives are unconstitutional under Articles 12(3)(f), 13, 19 and 24(9) of the Interim Constitution of Nepal, 2063 (2007). That Writ was then sub judice. The Company had already complied with those provisions contained in the Tobacco Products (Control and Regulation) Act, 2068 (2011) which could be implemented. Provisions contained in Sections 9 and 1(2) of the Act were contrary to the spirit and intent of the WHO Framework Convention on Tobacco Control. Printing of warning messages and pictures/graphics is justified with reason and rationale. Since the instant petition plea is invalid and illegal, it was prayed that the Writ Petition should be dismissed.

In the instant Writ Petition referred to the Bench upon being enlisted in the cause-list as per the rules, learned Senior Advocate Mr. Harihar Dahal, Advocates Mr. Jyoti Baniya, Mr. Punya Prasad Dangal and Mr. Jagannath Mishra, appearing for the Petitioner, argued that the Tobacco Products (Control and Regulation) Act, 2068 (2011), enacted by the Legislature, was authenticated on 2068/1/26 (May 9, 2011). As provided, Section 9 of the Act would come into force on the 180th day and the other Sections on the 91st day, after the date of authentication. The "Directives for Printing and Labelling of Warning Messages and Graphics in the Boxes, Packets, Wrappers, Cartons,

Parcels and Packaging of Tobacco Products, 2068 (2011)" were issued by the Government of Nepal, Ministry of Health and Population on 2068/7/18 (November 4, 2011), in exercise of the powers conferred by Section 9 of the Act. Legal provisions contained in the Tobacco Products (Control and Regulation) Act, 2068 (2011) and the Directives issued by the Ministry of Health should be implemented immediately and effectively. To that end, the State should also constitute necessary mechanisms and protect the health of its citizens. The order as sought by the Petitioner should, therefore, be issued.

Learned Joint Attorney Mr. Kiran Poudel appearing for the Respondent Government of Nepal, Office of the Prime Minister and Council of Ministers, among others, argued, inter alia, that the Tobacco Products (Control and Regulation) Act, 2068 (2011), enacted by the Legislature-Parliament, was authenticated on 2068/1/26 (May 9, 2011). For the effective implementation of the provisions contained in the Act, the Government of Nepal had already issued the Tobacco Products (Control and Regulation) Rules, 2068 (2012) and the "Directives for Printing and Labelling of Warning Messages and Graphics in the Boxes, Packets, Wrappers, Cartons, Parcels and Packaging of Tobacco Products, 2068 (2011). The Petitioner's plea that nothing has been done in the course of implementation of the Act is meaningless. The instant Writ Petition should, therefore, be dismissed.

Similarly, learned Senior Advocates Mr. Badri Bahadur Karki, Mr. Shyam Prasad Kharel and Mr. Anil Kumar Sinha and Advocates Mr. Til Bikram Pandey, Mr. Anup Uprety and Mr. Samir Sharma, among others, appearing for the Respondent Surya Nepal Pvt. Ltd. have argued that provision in Section 9 of the Tobacco Products (Control and Regulation) Act, 2068 (2011) to the effect that any outside packaging and Labelling of tobacco products should carry health warnings and messages, covering at least 75 percent of the principal

display areas is contrary to Article 11 (1)(b) of the WHO Framework Convention on Tobacco Control. Moreover, the provision on commencement of Section 9 on the 180th day after the date of authentication of the Act is not practical. An additional time of 18 months is required for such commencement. In addition, if warning messages occupied 75 percent of total outer part of a packet of tobacco product, the remaining 25 percent space will not be sufficient to describe the particulars specified by Section 9 of the Consumer Protection Act, 2054 (1998), contain the sticker as referred to in the Excise Duty Act, 2058 (2002) and the trademark symbol as referred to in the Trademark Act, 2022 (1965). So, there is no possibility of the execution of law. This kind of legal provision could not be considered as constitutional. Similarly, the plea of the Petitioners to consider a public road as a public place was also not practical. Since the implementation of the provisions of the Act is impossible, impractical and unjustifiable, the instant Writ Petition should be dismissed.

Upon hearing the pleadings made by the said learned legal practitioners and studying all documents including the petition contained in the case file, it appears that decision should be made as to whether or not the order as sought by the petitioner may be issued.

2. Let us consider towards decision. The main Petition plea reads, inter alia, that: the Tobacco Product (Control and Regulation) Act, 2068 (2011) was authenticated on 2068/1/26 (May 9, 2011); and pursuant to Section 1(2) all the Sections of the Act except Section 9 will come into force on the 91st day and Section 9 on the 180th day, after the date of authentication of the Act. Section 9 of the Act provides that the manufacturers must clearly and visibly print and indicate, in the Nepalese language, warning messages as specified by the Ministry, including matters such as that tobacco products are injurious to health, and colorful picture/graphic of harmful effect due to consumption of

tobacco products, in no less than 75 percent of outside packaging and Labelling of packets, wrappers, parcels of tobacco products. Similarly, it is also provided that no importer may import those tobacco products which fail to satisfy those criteria. However, the Respondents have failed to carry out any act in pursuance of these provisions. Therefore, the Petitioner prays for the issuance of mandamus and prohibition, thereby requiring the Respondents not to import those tobacco products of which packets and wrappers do not carry warning messages and pictures/graphics covering no less than 75 percent of the outside thereof, and to stop import, if any, of such products at the customs and ban any sale and distribution thereof. The Affidavits submitted by the Respondent Government of Nepal, Ministry of Health and Population, among others, read that in the course of effective implementation of the Tobacco Products (Control and Regulation) Act, 2068 (2011), the Ministry has approved and enforced the Directives for Printing and Labelling of Warning Message and Graphics in the Boxes, Packets, Wrappers, Cartons, Parcels and Packaging of Tobacco Products, 2068 (2011). The drafting of a regulation under the Tobacco Products (Control and Regulation) Act, 2068 (2011) is in progress. The Ministry and its subordinate agencies are active in the implementation of the Act in tune with its objectives. So, the instant Writ Petition should be dismissed.

3. Article 12(1) of the Interim Constitution of Nepal, 2063 (2007) guarantees to every person the right to life with dignity; and clause (2) of the same Article guarantees that no person shall be deprived of his or her personal liberty save in accordance with law. In order to ensure the right to life, no act which may, directly or indirectly, undermine this right should be carried out.

4. Smoking and consumption of tobacco products cause mouth, gums, trachea, teeth and lungs, stomach, kidney, pancreas,

large intestine, urinary bladder and uterus cancer. Moreover, it increases the risk of diseases such as heart and blood vessel related disease, blindness, gum inflammation, cough and asthma, pneumonia, nerves decay, chronic diseases of respiratory system, impotence and increment in infertility, tiredness, insomnia and indigestion and mood disorder. There is a possibility of the birth of disabled and dead infant if a pregnant woman smokes or consumes tobacco products.

5. The tobacco companies mix chocolate, sugar, vanilla, herbs and spices in cigarette, betel, spices, *gutka* in order to tempt tobacco consumers. Even though they are not injurious to health, there is a fear that they could help tobacco consumers develop tobacco addiction. Consumption of tobacco, *khaini* and *gutka* cause mouth and stomach cancer, and also invites diseases related to blood vessels of heart, deficiency of disease resistance, blood cancer and impotency. Lime mixed in *khaini* causes mouth and stomach ulcer and consumption of *gutka* and other tobacco products causes problems of high blood pressure, nerves decay, diabetes, mental stress, anxiety, fear and apathy. Elements like tar, ennnitroso, nicotine benzopyrene found in tobacco smoke are considered as major catalysts of cancer.

6. It has been found by several researches that an individual who smokes and consumes tobacco products reduces his or her life by one day in a week or smoking reduces an average of 14 years of human life. According to a study conducted by the National Institute on Drug Abuse (NIDA), America, nicotine has the same capacity of quickly developing addiction as narcotics like heroin or cocaine has; as a result, youths get addicted to tobacco consumption. Since human beings may, knowingly or unknowingly, get addicted to smoking, it is a duty of the State to raise awareness against smoking, carry out public dissemination in a manner to depress smoking, cause tobacco companies to compulsorily display a warning message that tobacco

product is injurious to health and colorful pictures/graphics that carry a message of dangerous effect resulted from the consumption of tobacco product on the outer side of a box, wrapper, packet and packaging of parcel and label of tobacco products and ban its use in public places.

7. Such messages printed in the packets of tobacco products help many users to be aware about their health. Having seen such pictures/graphics, a tobacco product consumer will set in mind that he or she should not smoke and try to get out of such addiction sooner or later. Moreover, it discourages youths to get indulged in smoking. Seeing such picture/graphic, no one will be ready to consume cigarette or tobacco for the first time. Thus, it is inevitable that the State should also take positive and concrete steps in the field of public health. It is an obligation of the State to identify and effectively control the matters which have negative effects in public health and make available effective health services to its citizens. Otherwise, it is certain that the fundamental rights of the citizens set forth in the Constitution will get not only unimplemented but also violated.

8. That consumption of tobacco products causes negative effects in public health is a matter of science. Public health means a matter of fundamental right of an individual as well as people, and protection of public health is also an issue of state obligation. As public health is a right that is also related to the enforcement of several rights of an individual including the right to life, problems due to consumption of tobacco products do have effects on and implications to other fundamental rights as well. Thus, it becomes an obligation of the State to make and enforce laws in exercise of the legislative powers and frame necessary rules and to have effective regulation thereof through government mechanisms, as to whether such laws have been implemented. If such steps are not taken on behalf of the

State, it is to consider that the State machinery is not proactive towards protection of the right to life guaranteed by the Constitution to the citizens.

9. Similarly, Article 16 of the Interim Constitution of Nepal, 2063 (2007) has conferred every person with the right to live in a healthy environment and the right to health. Smoke from smoking by one person affects other persons and ultimately pollutes the environment. So, it creates such a situation that the fundamental right of non-smoking persons to live in a healthy environment gets violated by the smokers. The notion that the right to life incorporates also the right to clean and healthy environment given that clean and healthy environment is a part and parcel of the totality of life has already been adopted by this Court in the case of *Surya Prasad Sharma Dhungel Vs. Godavari Marble Industries Pvt. Ltd. et.al.* (Nepal Law Journal, Golden Jubilee, Special Edition, 2052 (1995), pg.168).

10. Given that it is the main obligation of the State to protect the constitutionally guaranteed fundamental rights, the State itself must perform such acts as to guarantee the right of all citizens to live in a clean environment. It is the State that is obliged to carry out activities which may range from banning the matters including production and transportation of the tobacco products to controlling public dissemination, advertising and sponsorship of such products. Similarly, directive principles and policies of the State under Part 4 of the Constitution also include effective implementation of policies and programs of the State in the fields of healthy environment and public health.

11. The WHO Framework Convention on Tobacco Control (FCTC), adopted by the 56th World Health Assembly of the World Health Organization in 2003, had already been ratified formally by

Nepal on 2063/7/21 (November 7, 2006). The preamble of the Convention, reflecting the concern about the devastating worldwide health, social, economic and environmental consequences of tobacco consumption and exposure to tobacco smoke, expresses a serious concern about the increase in the worldwide consumption and production of cigarettes and other tobacco products particularly in developing countries, as well as about the burden this places on families, on the poor, and on national health systems and recognizes the need for an international cooperation, coordination and participation to control the same.

12. In relation to the present issue, Article 11(1) (b) of the WHO Framework Convention on Tobacco Control (FCTC) is relevant, which provides that: each unit packet and package of tobacco products and any outside packaging and Labelling of such products also carry health warnings describing the harmful effects of tobacco use, and may include other appropriate messages. These warnings and messages:

- (i) Shall be approved by the competent national authority,
- (ii) Shall be rotating,
- (iii) Shall be large, clear, visible and legible,
- (iv) Should be 50% or more of the principal display areas but shall be no less than 30% of the principal display areas,
- (v) May be in the form of or include graphics or pictograms.

In the context where Nepal has already ratified this Convention, it has to be observed and implemented as of law pursuant to Section 9 of Nepal Treaty Act, 2047 (1990).

13. It appears that, in a mandamus case of Petitioner Advocate Prakashmani Sharma et.al. vs. respondent Government of Nepal, Ministry of Environment and Technology et.al. Writ No.3822 of 2062 (2005), in relation to tobacco products and smoking control, the following mandamus was issued by this Court on 2063/2/30 (June 13, 2006), ordering the Respondents to:

- (1) Prohibit smoking in public places including indoor and outdoor service providing offices, agencies, hospitals, educational institutes, public gathering places and buildings,
- (2) Decide, without delay, to prohibit advertising of smoking substances through printing and communication media, as well,
- (3) Design and launch such programs as to raise public awareness about harmful effects caused by smoking and consumption of tobacco products and discourage consumption of such products,
- (4) Take initiative towards enactment of necessary law prohibiting smoking in public places, within a year of receipt of this order.

14. It appears that, in view of the said directive order, the Legislature-Parliament has enacted the Tobacco Products (Control and Regulation) Act, 2068 (2011). The object of the Tobacco Products (Control and Regulation) Act, 2068 (2011), as mentioned in its preamble is-"to make legal provisions to reduce, control and regulate production, sales and distribution and consumption of tobacco products and to control such activities, in order to enhance health, convenience and economic interest of the general public, since smoking and tobacco consumption are highly injurious to human

health and also have negative impacts on economic, social and cultural activities of human beings".

15. In pursuance of the legal provision contained in Section 27 of the Tobacco Products (Control and Regulation) Act, 2068 (2011) that the Government of Nepal may frame necessary rules for the accomplishment of the objective of the Act, on 2069/1/25 (May 7, 2012) the Government of Nepal framed and issued the Tobacco Products (Control and Regulation) Rules, 2068 (2012).

16. Sub-section (2) of Section 1 of the Tobacco Products (Control and Regulation) Act, 2068 (2011) provides: "Section 9 of this Act shall come into force on the 180th day and the other Sections on the 91st day, after the date of authentication". Similarly, the provision of Section 9 is as follows:

"9. Warning messages and graphics to be mentioned:

- (1) The manufacturers must clearly and visibly print and indicate, in the Nepalese language, warning messages as specified by the Ministry, including matters such as that tobacco products are injurious to health, and colorful picture/graphic of harmful effect due to consumption of tobacco products, in no less than 75 percent of outside packaging and Labelling of packets, wrappers, parcels of tobacco products.
- (2) The Ministry may, from time to time, add warning messages, signs and marks as referred to in sub-section (1).
- (3) No importer shall import any tobacco products which fail to meet the criteria as referred to in sub-section (1)".

17. The Tobacco Products (Control and Regulation) Act, 2068 (2011) was authenticated on 2068/1/26 (May 9, 2011). So, pursuant to

the said legal provision, it seems that the provision of Section 9 of the Act would commence on the 180th day after the date of authentication of the Act or on 2068/7/18 (November 4, 2011) and the other Sections of the Act on the 91st day or on 2068/4/27 (August 12, 2011).

18. Pursuant to Section 3 of the Tobacco Products (Control and Regulation) Act, 2068 (2011), public places include governmental bodies, institutions or offices, educational institutes, libraries, training and health related institutions, airports, air services and public motor vehicles, child welfare homes, child care centers, elderly homes, orphanage, children parks and clubs, public toilets, work places of industries and factories, cinema halls, cultural centers and theatres, hotels, motels, resorts, restaurants, bars, dining halls, canteens, lodges, boys or girls hostels and guest houses, stadiums, covered halls, gymnasiums, swimming pool houses, departmental stores and mini markets, pilgrimage and religious sites, public bus stands and ticketing counters. Section 4 of the Act bans smoking or consumption of tobacco products in such public places. Furthermore, Section 6 of the Act provides that no person shall so smoke in a private house or motor vehicle as to affect others.

19. Section 8 of the Act provides that the manufactures shall, prior to sale and distribution of tobacco products; furnish with the Ministry the details of the quantity of nicotine, hazardous constituents contained in such products as well as other necessary matters. Similarly, Section 9(1) provides that the manufacturers must clearly and visibly print and indicate, in the Nepalese language, warning messages as specified by the Ministry, including matters such as that tobacco products are injurious to health, and colorful picture/graphic of harmful effect due to consumption of tobacco products, in no less than 75 percent of outside packaging and Labelling of packets, wrappers, parcels of tobacco products.

20. Section 10 of the Act provides that no person including the manufacturer shall advertise or promote, or broadcast or sponsor any program, news or information about, tobacco products through newspapers and electronic media such as radio, television, FM, internet and email, interaction programs, hoarding boards, wall paintings, logos, signs, writings, audio-visuals, marks or other means.

21. Similarly, Section 11 of the Act prohibits the sale and distribution of tobacco products to and by a person under the age of 18 years and a pregnant woman and the distribution of free tobacco products to such person and woman. It also bans sale and distribution of tobacco products from any house or shop that is within a periphery of at least 100 meters from any educational and health institution, child welfare home, child care center, elderly home and such other public place as specified by the Government of Nepal upon a notification in the Nepal Gazette.

22. In view of the legal provision that the Ministry of Health would specify warning messages and color pictures/graphics of harmful effects of consumption of tobacco products, as referred to in Section 9(1) of the Tobacco Products (Control and Regulation) Act, 2068 (2011), the Government of Nepal, Ministry of Health and Population issued "Directives for Printing and Labelling of Warning Messages and Graphics in the Boxes, Packets, Wrappers, Cartons, Parcels and Packaging of Tobacco Products, 2068 (2011)" on 2068/7/18 (November 4, 2011). Section 3 of the Directives provides that the manufacturer shall print and label the following warning message and graphics in the font, size, area, color, format and quality as specified below in at least 75 percent space covering the principal area - upper front and back of the total outer portion of each box, packet, wrapper, carton, parcel and packaging of tobacco products.

- (1) The message and graphic to be printed in the box, packet and wrappers of cigarette: message to be printed in relation to graphics, font of message, size of font of message, background color of message and quantity of color, graphic, quality of graphic along with the design of the message and graphic to be printed in the 30 stick box, packet and wrapper of cigarettes and the design of the message and graphic to be printed in the 10 stick box, packet and wrapper of cigarettes,
- (2) The message and graphic to be printed in the box, packet and wrappers of *bidi*,
- (3) The message and graphic to be printed in the box, packet and wrappers of tobacco products such as *Surti*, *Khaini*, *Gutkha* (leaf tobacco, chewing tobacco, snuff etc),
- (4) The message and graphics to be printed in the box, packet and wrappers of tobacco products is found prescribed by specifying the criteria.

23. In pursuance of Section 27 of the Tobacco Products (Control and Regulation) Act, 2068 (2011), which provides that the Government of Nepal may frame necessary rules for the accomplishment of the objectives of the Act, the Government of Nepal has enforced the Tobacco Products (Control and Regulation) Rules, 2068 (2012) since 2069/1/25 (May 7, 2012).

24. Rule 9 of the Tobacco Products (Control and Regulation) Rules, 2068 (2011) provides for procedures to add or change warning messages and sign marks. Similarly, Rule 11(1) requires the seller to so post a notice board describing the following details at the entrance of his or her sales room that the notice can be easily seen and read:

Further, Rule 11(1) of the Rules provides that the seller shall display at the entrance of his or her sales counter a notice describing the following details in such a manner that it can be easily seen and read:

- (a) No tobacco product shall be sold to a person under the age of 18 years nor shall such a person be engaged in the sale thereof,
- (b) No tobacco product shall be sold to a pregnant woman nor shall such a woman be engaged in the sale thereof.

25. Section 12 of the Tobacco Products (Control and Regulation) Act, 2068 (2011) provides that the Government of Nepal may designate any officer level employee as an inspector to inspect whether or not smoking and tobacco consumption have been carried out in public places and whether or not the manufacturers or managers have fulfilled such obligations as required to be fulfilled under this Act; and Rule 15 of the Rules details the functions, duties and powers of the inspector. Similarly, Rule 18 also provides that the Government of Nepal shall credit to the Health Tax Fund at least 25 percent of the total amount of excise tax on smoking and tobacco products as levied by the Financial Act.

26. As, in the interlinked certiorari-mandamus case of the petitioner Managing Director Kehsab Lal, on behalf of Surya Nepal Pvt. Ltd., et.al. vs. the Government of Nepal, Council of Ministers, Office of the Prime Minister and Council of Ministers, et.al, Writ No. 068-WO-0022, an interim order was issued by this Court on 2068/8/1 (November 17, 2011) in the name of the respondents, the Tobacco Products (Control and Regulation) Act, 2068 (2011), Directives for Printing and Labelling of Warning Message and Graphics in the Boxes, Packets, Wrappers, Cartons, Parcels and Packaging of Tobacco Products, 2068 (2011) and the Tobacco Products (Control and

Regulation) Rules, 2068 (2012) have not yet come into force despite their enactment and formulation.

27. In considering the plea made by the legal practitioners appearing for the Petitioners in the course of pleadings that in spite of the legal provision that, pursuant to Section 1(2) of the Tobacco Products (Control and Regulation) Act, 2068 (2011), Section 9 is to come into force on the 180th day of the date of authentication and the other Sections on the 91st day, the commencement of the Act has been inhibited by the interim order issued by this Court on 2068/8/1 (November 17, 2011), and that the industries and entrepreneurs should, therefore, be provided with time from the date of order in this instant petition, in a situation where the Tobacco Products (Control and Regulation) Act, 2068 (2011) was passed by the Legislature-Parliament and also authenticated on 2068/1/26 (May 9, 2011) but warning provisions could not be made in consonance with the provisions set forth in the Act even after the expiration of two years after the coming into force of the Act; the argument made for the provision of additional time limit does not, therefore, seem to be rational.

28. Laws are expected to commence on the specified day. No exception can be made in the case of the present Act. It appears that the petitioners have taken the interim order issued in respect of the instant petition as the postponement of law and perceived that they could continue manufacturing as earlier. Holding goods according to the consumption of goods already manufactured at the time of commencement of the Act is one thing but the perception that manufacturing of tobacco products could be carried on as earlier contrary to the Act even after declaration of the coming into force of the Act is not lawful and just. It cannot also be interpreted that the interim order has provided such permission. The interim order issued

by this Court has only stopped the implementation pending the final settlement of the case. It is not a permission to violate laws.

29. It is expected that the petitioner entrepreneurs themselves know negative impacts of tobacco products. So, it is the entrepreneurs who can make the highest contribution to the effective implementation of the Act and Rules. The Tobacco Products (Control and Regulation) Act, 2068 (2011) has come into force since 2068/4/27 (August 12, 2011) upon being authenticated on 2068/1/26 (May 9, 2011); and more than a two-year period has already elapsed since the filing of the present writ petition on 2068/7/22 (November 8, 2011), but an attempt has been made to carry on the production and marketing of manufactured products as if the Act were never enacted, which seems to be a mala fide profit-oriented perspective. All manufactured products should have been cleared within the time specified by law from the notified date of commencement of the Act and production should have been started in consonance with the new statutory provisions. Thus, deferring the date of commencement of the Act after any date of filing of the case or of issuance of interim order or of making judgment on the case does not seem to be just. Hence, since such a long period has elapsed after the coming into force of the Act, the petitioners should have furnished positive response that laws could be implemented as preparation was over on their part. But they could not.

30. In considering the plea made by the legal practitioners appearing for the respondent Surya Nepal Pvt. Ltd. that provision in Section 9 of the Tobacco Products (Control and Regulation) Act, 2068 (2011) to the effect that any outside packaging and Labelling of tobacco products should carry health warnings and messages, which should cover at least 75 percent of the principal display areas was contrary to Article 11(1) (b) of the Framework Convention on Tobacco

Control provides that a manufacturer must display health warning messages or pictures covering 50 percent or more of any outside packaging and Labelling of tobacco products, and that such messages and pictures must not be less than 30 percent of the principal display areas; and Section 9 of the Tobacco Products (Control and Regulation) Act, 2068 (2011) provides that health messages or pictures must cover 75 percent of any outside packaging and Labelling of tobacco products, which is more than 50% as mentioned in the Convention. So, it cannot be said that the provision of Section 9 is inconsistent with the provision of the Convention. States have different practices in relation to the percentage of the part for warning message and pictures. For example, Uruguay and Sri Lanka have a provision that such messages must cover 80 percent part of the packet of tobacco products whereas Australia and Canada have a provision that such messages must cover 75 percent. So, the issue of coverage percentage of printing warning messages and pictures is not an issue of jurisprudence or any principle rather it is a concern of the need of nations. The Bench cannot, therefore, agree with the plea by the legal practitioners appearing for the Respondent Surya Nepal Pvt. Ltd.

31. Smoking and consumption of tobacco products is highly injurious to human health and the State has to guarantee the general people's right to live in clean environment. So, the State should show its readiness to perform its obligation, by effectively implementing the Tobacco Products (Control and Regulation) Act, 2068 (2011), the Directives for Printing and Labelling of Warning Messages and Graphics in the Boxes, Packets, Wrappers, Cartons, Parcels and Packaging of Tobacco Products issued by the Ministry of Health and the Tobacco Products (Control and Regulation) Rules, 2068 (2011), which directly affect the health of general public.

32. An order of mandamus is, therefore, hereby issued to the Respondents to immediately implement, and cause to be implemented, the above-mentioned constitutional provisions, principles laid down by this Court, the Tobacco Products (Control and Regulation) Act, 2068 (2011) made in consonance with the spirit and essence of the international Convention on Tobacco Control, the Directives for Printing and Labelling of Warning Messages and Graphics in the Boxes, Packets, Wrappers, Cartons, Parcels and Packaging of Tobacco Products, 2068 (2011) issued by the Ministry of Health and the Tobacco Products (Control and Regulation) Rules, 2068 (2012), and remove the manufactured tobacco products in contravention thereof from the market without delay. It is ordered that a copy of the present Order be given to the Office of the Attorney General and the case-file be delivered as per the rule after crossing off the diary record.

We concur with the above decision.

J.Tarka Raj Bhatta

J. Gyanendra Bahadur Karki

Done at this day of 14th Push, 2070 (29th December, 2013)

Bench Officer: Hari Koirala

Translated by: Dilli Ghimire



It is the primary duty of the government to protect and pay attention to take care of such heritages having historical, religious, cultural, environmental as well as archeological importance.

Supreme Court, Division Bench

Acting Rt. Hon'ble Chief Justice Damodar Prasad Sharma

Hon'ble Justice Prakash Osti

Date of Issue: 2070/10/21/3

069-WO-0971

Subject: Certiorari, Mandamus

Petitioner: Advocate Deepak Bikram Mishra, Kathmandu District, Sitapaila Village Development Committee Ward No. 5 et.al.

Vs.

Respondents: Office of the Prime Minister and Council of Ministers, Singhadurbar Kathmandu and et.al.

- **While widening roads or constructing any physical infrastructure at any site having historical, religious, cultural and environmental importance, the promoter has to submit Environment Impact Assessment Report or Preliminary**