

M/S Tej Ram Dharman Paul Pvt Ltd vs / on 3 September, 2024

Author: G.Jayachandran

Bench: G.Jayachandran

Crl.O.P.No.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :12.08.204

Pronounced on :03.09.2024

Coram

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Crl.O.P.No.1242 of 2023

and

Crl.M.P.Nos.684 & 688 of 2023

1.M/s TEJ RAM DHARMAN PAUL PVT LTD.

(Manufacture Company)

Rep by Mr.ManmohankumarPunla, (Director)

House No.4, Ground Floor, BLK-JP,

Pitampura, New Delhi 110 034.

2.Mr.ManmohankumarPunia (Manufacture/Director)

M/s TEJ RAM DHARMAN PAUL PVT LTD.

House No.4, Ground Floor, BLK-JP,

Pitampura, New Delhi 110 034.

3.Mr.Deepaksharma (Manufacture/Director)

M/s TEJ RAM DHARMAN PAUL PVT LTD.

House No.4, Ground Floor, BLK-JP,

Pitampura, New Delhi 110 034.

.. Petitioners

/versus/

FOOD SARFETY OFFICER,

No.219, Race Course Road,

Coimbatore 641 018.

.. Respondent

<https://www.mhc.tn.gov.in/judis>

Crl.O.P.

Criminal Original Petition has been filed under Section
Cr.P.C., to call for the records pertaining to in the case S.T.C.No

2022 on the file of the Judicial Magistrate No.V, Coimbatore and qu same as illegal and devoid of merits.

For Petitioners :Mr.KJayabalan

For Respondent :Mr.S.Udaya Kumar
Govt. Advocate (Crl.Side)

ORDER

The complaint by the Food Safety Officer, Coimbatore, against one Raj Purohith Dinesh, the whole seller/stockiest of tobacco product along with the manufacturing company and its Directors, was taken cognizance by the Judicial Magistrate No.V, Coimbatore for the offences under Sections 58 and 59(1) of the Food Safety and Standards Act 2006.

2. The petitioners herein are the manufacturing company and its Directors. According to the petitioners, the tobacco products, which alleged to have been seized from the premises of the first accused, Raj Purohith <https://www.mhc.tn.gov.in/judis> Dinesh, on 13.11.2019, is not a food product to fall under the purview of Food Safety Act. Cool Lip Filter Tabbag (pre-packed condition) is a tobacco produced covered under The Cigarettes and Other Tobacco Products Act, 2003 (in short "COTPA Act 2003"). The first petitioner company, which is duly registered under the Companies Act holds valid license for manufacturing tobacco product under the name and style of M/s Tej Ram Dharam Paul Pvt. Ltd. It has obtained certificate from Central Board of Excise and Customs. The product was not sold by the petitioners herein, but it was stocked and sold by the first accused, by name Raj Purohith Dinesh, who alleged to have been sold the product in his rented premises at 212, HRK Line, R.G.Street, Coimbatore. Ban on the manufacture, storage, distribution or sale of gutkha, pan masala, flavoured tobacco and other such product, in the National capital has been quashed by the Delhi High Court in a batch of writ petitions. The manufacturing of tobacco products in Delhi is not prohibited. The first accused had procured the tobacco product, which are manufactured at Delhi and brought it to Tamil Nadu. Without establishing nexus between the manufacturer and the <https://www.mhc.tn.gov.in/judis> stockist, the complainant cannot prosecute the petitioners, who are the manufacturer and directors of the company. The complaint does not reveal that the petitioners supplied the seized product to the first accused. Without producing any material with regard to the alleged sale and supply of materials by A2, A3 and A4 to A1, the complaint cannot be sustained and it amounts to abuse of process of law.

3. The learned Government Advocate (Crl.Side) appearing for the respondent submitted that on 13.11.2019, on a specific information, a team of officers of Food Safety Department conducted a search of the premises rented out to Raj Purohith Dinesh. 54 Kg of Cool Lip Filter Tabbag was recovered from the said premises. The first accused Raj Purohith Dinesh confessed that he purchased the prohibited tobacco product through middle man and stored it to sell in retail. He did not possess any receipt. The sample drawn from the seized tobacco product was sent to the State Laboratory. On 04.01.2020 the opinion of the expert received, which opined as follows:-

<https://www.mhc.tn.gov.in/judis> Opinion I am of the opinion that the said sample is unsafe under Section 3(1)(zz) of Food Safety and Standards Act 2006 and also the sale is prohibited under Section 26(2) (iv) of Food Safety and Standards Act, 2006 and Regulation 2.3.4 of the Food Safety and Standards (Prohibition and Restriction on sale) Regulation 2011 and vide notification No.1418/ 2013/S8/FSSA, dated 23rd May 2019 of Commissioner of Food Safety and Drug Administration, Chennai, Tamil Nadu State, since the said sample contains Nicotine.

4. The show cause notice issued to the petitioners were received by them and in their reply, they have stated that they have not sold any prohibited tobacco product in Tamil Nadu.

5. Chewable tobacco product is declared as food substance, as per the judgment of this Court in W.P.(MD)No.778 of 2019. Therefore, the manufacturer and its two Directors were prosecuted along with his stockiest for the offence under Sections 58 and 59(i) of the Food Safety and Standards Act, 2006. The orders passed by the Delhi High Court permitting <https://www.mhc.tn.gov.in/judis> the petitioners to manufacture the tobacco product in Delhi will not give any coverage for them to sell their product in Tamil Nadu, where there is total ban on sale of chewable food product like gutkha, panmasala containing tobacco. The interpretation of the Delhi High Court that tobacco will not fall under the definition of the Food Substance, will not apply to chewable tobacco containing nicotine used to mix with other products like gutkha, panmasala, flavoured tobacco and other such products.

6. The Government Advocate (Crl.Side) also rely upon the Notification issued by the Government of Tamil Nadu on 23.05.2019 and submitted that Regulation 2.3.4 of the Tamil Nadu Food Safety and Standards (Prohibition and Restrictions on Sales) Regulation, 2011, prohibits, tobacco and nicotine shall not be used as ingredients in any food products as they are injurious to health. Cool Lib Filter Tabbag seized from the premises of the first accused admittedly manufactured by the first petitioner/2nd accused. The Hon'ble Division Bench of this Court in J.Anbazhagan v. The Union of Indian rep.by its Secretary to Government <https://www.mhc.tn.gov.in/judis> and others reported in [(2018) 3 CTC 449], applied harmonious interpretation of the COTPA Act 2003 and the Food Safety and Standards Act 2006 and held COTPA Act and FSS Act are not mutually executive. Relying upon the above Division Bench Judgment and referring the judgments of the other High Courts, this Court in Jeetmal Ramesh Kumar v. The Commissioner, Food Safety and Drug Administration Department, Chennai-6, in W.P(MD)No.778 of 2019, dated 14.02.2019, the prosecution been laid against the petitioners herein, who are the manufacturer and its Directors of the company, which has manufactured Cool Lib Filter Tabbag, which is the prohibited product in Tamil Nadu.

7. In response, the learned counsel appearing for the petitioners submitted that the prosecution having failed to establish nexus between the manufacturer and the stockiest cannot prosecute the petitioners herein. The manufacturing of tobacco product is not prohibited in New Delhi. Further, the manufacture and sale of tobacco products are governed by COTPA Act 2003, and not under FSSI Act.

<https://www.mhc.tn.gov.in/judis>

8. The point for consideration in this matter is, whether the chewable tobacco admittedly manufactured by the petitioners herein is a food product to be governed by FSSI Act and whether can the manufacturer be prosecuted for sale of their product in Tamil Nadu, in view of the ban order without establishing nexus between the manufacturer and the seller.

9. The learned counsel appearing for the petitioners apart from canvassing that tobacco product is governed by COTPA a Special Act hence prosecution under FSSI Act is not legally sustainable, also submitted that a product, which is permitted to be manufactured in one State, may be prohibited in another State. Transport of the product into the prohibited State clandestinely will per se not sufficient to prosecute the lawful manufacturer. The nexus between the person, who possess the prohibited product and the manufacturer ought to be specifically mentioned in the complaint.

<https://www.mhc.tn.gov.in/judis>

10. In the instant case, the seller himself has stated that he has purchased the prohibited tobacco product from unknown source. There is no evidence to show, the manufacturer has transported directly or through his agent, the tobacco product to Tamil Nadu. Hence, relying upon the judgments of this Court, where the manufacturer been exonerated for not disclosing the nexus between the stockiest and the manufacturer, the learned counsel appearing for the petitioners prays to quash the petition.

Chewable Tobacco, a food product:

11. As far as the State of Tamil Nadu, the Hon'ble Division Bench consisting of the Hon'ble Ms.Indira Banerjee, The Chief Justice and the Hon'ble Mr.Justice Abdul Quddhose in J.Anbazhagan v. The Union of India and others reported in [(2018)3 CTC 449] has categorically held that the chewable tobacco is a prohibited product and it will fall under the Food Safety Act. The relevant portion of the judgment is as under:-

80. In Dhariwal Industries Limited and another v.

<https://www.mhc.tn.gov.in/judis> State of Maharashtra and others, reported in (2013) 1 Mah LJ 461, a Single Bench of the Bombay High Court held:

"19. While the definition in the 1954 Act excluded drugs and water, the definition in the Food Safety Act, 2006 excludes animal feed, live animals, plants prior to harvesting, drugs and medicinal products, cosmetic, narcotic and psychotropic substance. Obviously, gutka and pan masala do not fall in any of these excluded categories. The expression "any substance which is intended for human consumption"

in FSS Act, 2006 is also wider than the expression "any article used as food or drink for human consumption" in PFA Act, 1954. It is also pertinent to note that the definition of food in the Act of 2006 specifically includes "chewing-gum" and any substance used into the food during its

manufacture, preparation or treatment. Hence, even if gutka or pan masala were not to be ingested inside the digestive system, any substance which goes into the mouth for human consumption is sufficient to be covered by definition of food just as chewing-gum may be kept in the mouth for some time and thereafter thrown out. Similarly gutka containing tobacco may be chewed for some time and then thrown out. Even if it does not enter into the digestive system, it would be covered by the definition of "food" which is in the widest possible terms. The definition of "food" under section 2(v) of the PFA Act was narrower than the definition of food under Food Safety Act, still the Supreme Court in Ghodawat case held that pan masala and gutka were "food" within the meaning of PFA Act. The very fact that the petitioners themselves had obtained licences under the PFA Act and have also obtained licences under the Food Safety Act, 2006 is sufficient to estop them from raising the contention that gutka and pan masala do not fall within the definition of "food" under the Food Safety Act, 2006."

<https://www.mhc.tn.gov.in/judis>

81. We agree with the view of the learned Single Bench of the Bombay High Court that gutkha and pan masala are food within the meaning of the Food Safety Act. Gutkha also being a tobacco product might be governed by the provisions of the COTA. COTA deals with regulation of cigarettes or other tobacco products. The Food Safety Act is not in conflict with the provisions of COTA in any manner. COTA does not deal with adulteration, though it may remotely touch upon misbranding.

82. It is well settled that the endeavour of the Court should be to harmonize two Acts seemingly in conflict. Of course, in this case there does not appear to be any conflict between COTA and the Food Safety Act. COTA is in addition to and not in derogation of other laws relating to food products. There is no non obstante clause in COTA which excludes the operation of other Acts.

84. There can be no doubt that a high level, fair and impartial enquiry should be conducted to effectively stop illegal manufacture, distribution and sale of gutkha and other forms of chewable tobacco in contravention of the provisions of the 2011 Regulations and the various notifications, referred to above, and also to identify and take action against those carrying on, aiding, abetting or otherwise in connivance with the illegal manufacture, distribution and sale of gutkha and other forms of chewable tobacco.

85. It is not necessary for us to adjudicate the correctness of the allegations made by the petitioner with regard to the involvement of the persons named in the petition. However, there are enough materials which substantiate the case of the petitioner that illegal business of manufacture and sale of gutkha and other forms of chewable tobacco spreads over different States in the country, including Tamil Nadu, which would <https://www.mhc.tn.gov.in/judis> perhaps not be possible but for the involvement of different officials and functionaries of the Central Government and different State Governments, including the State of Tamil Nadu. The manufacture and illegal sale requires thorough investigation.

12. Further, it is to be noted that the Government of India has issued a circular dated 17.08.2022, wherein it has clarified at the request of the Government of Tamil Nadu that 'tobacco' has not

excluded from the definition of 'food' as provided in Section 3(1)(i) of Food Safety and Standards Act, 2006. It is worth to extract the clarity letter of Union of India, which will throw enough light on the subject.

"Reference Govt.of Tamil Nadu's letter numbe 110033/2017/59/FSSAI, dated 25.05.2022 on the subject mentioned above and requesting FSSAI to issue directions to the laboratories to abide by the orders of Courts while analyzing the samples of banned tobacco products.

2.In this regard, it is carified that 'tobacco' has not been excluded from the definition of 'food' as provided in Sectio 3(1)(i) of Food Safety and Standards Act,2006, while Regulation 2.3.4 of the Food Products Standards (Prohibition, Restrictions and Sale) Regulations,2011 <https://www.mhc.tn.gov.in/judis> unambiguously provides that 'Tobacco' and 'Nicotine' shall not be used as ingredients in any food products.

3.The Hon'ble Supreme Court of Inida in Godawat Pan Masala vs. Union of India, (AIR 2004 SC 4057) held that Pan Masala having tobacco or Gutkha are food. High Courts in cantena of cases have held that 'Chewing Tobacco' is food'. The law declared by the Hon'ble Supreme Court of India shall be binding on all Courts within the territory of India as per Article 141 of the Constitution of India. Therefore, all labs, including referral labs, are advised to analyse the samples of chewing tobacco and tobacco products to and submit report to the food safety departments of States/UTs as per the procedure prescribed."

13. The above clarity letter though is addressed to the State Forensic Laboratory and Central Laboratory, the information conveyed by the Union of India through this letter is that, chewable tobacco will fall within the definition of food.

14. The next question remains to answer is whether the complaint discloses nexus between the stockiest and manufacturer. <https://www.mhc.tn.gov.in/judis>

15.The petitioner claims that in view of the interim order of the Delhi High Court order, they are entitled to manufacture Cool Lib Filter Tabbaq, but his product having travelled all the way from Delhi to Coimbatore, the manufacturer cannot claim ignorance, how the product came to Tamil Nadu. Raj Purohith(A1) from whom the product seized has exercised his right of silence about the source from which he has procured the banned product. The manufacturer taking advantage of the silence of the first accused cannot get protection from prosecution.

16. At the cost of repetition, it is emphasised that the Food Safety and Standards(Prohibition and Restriction on Sales) Regulation 2011, the use of tobacco with nicotine is prohibited to be used as ingredient in any food product. The chewable tobacco taken into mouth directly or mixed with any other product, get into saliva and thus, become a food. It is immaterial whether the consumer swallow the saliva or spit it out. The petitioner herein being the manufacturer of the product, the sale of which is prohibited in <https://www.mhc.tn.gov.in/judis> Tamil Nadu ,when issued show

cause notice ought to have disclosed the food safety officer the particulars regarding to whom he supplied the seized product, by disclosing the lot number/code number/batch number and the invoice details. Having failed to disclose these particulars presumption of knowledge has to be drawn. Hence, the prosecution against the petitioner cannot be questioned.

17. Under Section 482 of Cr.P.C., the veracity and credibility of the information collected by the complainant in the course of investigation, regarding manufacture, distribution and sale cannot be looked in depth. The complaint need not disclose the nexus between the manufacturer and the stockiest. Having manufactured the tobacco product, they have a duty to explain that they have not supplied the material to the person from whom A1 got it. The very fact that the seized product was manufactured by the petitioner is prima facie sufficient to prosecute the petitioners. To discharge the burden that they had sold the product only to a person in the State where sale of chewing tobacco is permitted and taken all the measures to ensure <https://www.mhc.tn.gov.in/judis> that his product does not clandestinely taken to Tamil Nadu, where the sale of tobacco product is prohibited. This can be established only in the due course of trial

18. In the considered view of this Court, Regulation 2.3.4 as well as the explanation given by the Union of India, dated 17.08.2022, makes it very clear that the tobacco product shall not be used as an ingredient in any food product. In the instant case, 54 kgs of Cool Lib Filter Tabbag contains nicotine is seized. As per the analysis report, it is unsafe for consumption. After clarification issued by the Union of India on 17.08.2022, the manufacturer of chewable tobacco cannot still claim that it is not a food as defined under the Food Safety and Standards Act, 2006. The interim protection granted by the Hon'ble Supreme Court for manufacturing tobacco product cannot be construed as the license for the manufacturer to sell the chewable tobacco in the State where the sale/stocking of such chewable tobacco containing nicotine is prohibited. The prohibitory order passed by the Government of Tamil Nadu vide G.O.No.132, Health and Family <https://www.mhc.tn.gov.in/judis> Welfare Department, dated 23.05.2013 been extended time to time. This Notification enable the Food Safety Officer the prosecution for manufacturing of the product, which has entered into the State of Tamil Nadu.

19. As a result, this Criminal Original Petition is dismissed. Consequently, connected Miscellaneous Petitions are closed.

03.09.2024 Index:yes Neutral Citation:yes/no ari To:

1.The Judicial Magistrate No.V, Coimbatore.

2.FOOD SAFETY OFFICER, No.219, Race Course Road, Coimbatore 641 018.

3.The Public Prosecutor, High Court, Madras.

<https://www.mhc.tn.gov.in/judis> DR.G.JAYACHANDRAN,J.

ari delivery order made in and Crl.M.P.Nos.684 & 688 of 2023 03.09.2024
<https://www.mhc.tn.gov.in/judis>