

M/S.Ar Bachawat Trading Pvt vs The State Of Tamil Nadu on 28 April, 2023

Author: S.M.Subramaniam

Bench: S.M.Subramaniam

W.P.No.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.04.2023

CORAM

THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM

W.P.No.34737 of 2015

and

M.P.No.1 of 2015

and

W.M.P.No.20591 of 2016

M/s.AR Bachawat Trading Pvt., Ltd.,
Represented by Mr.Dinesh,
Authorised Signatory,
No.27/5, Erulappan Street,
Chennai – 600 079.

...

Vs.

1.The State of Tamil Nadu,
Represented by the Secretary,
Health & Family Welfare Department,
Fort St.George, Chennai.

2.The Commissioner,
Food and Safety,
5th Floor, DMS Building,
359, Anna Salai, DMS Campus,
Teynampet, Chennai – 600 006.

..Res

Prayer : Writ Petition filed Under Article 226 of the Constitution
to issue a Writ of Declaration, declaring that dealing, distributio
of the product HANS CHHAP tobacco, is legal and valid and the same

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

W.

not attract any ban or prohibition under the provisions of Foods and Standards Act, 2006 and the Rules and Regulations framed there read with notification dated 23.05.2013 of the respondents and therefore not liable for any seizure or any penal action for carrying on the business of dealing, distribution and sale of the product HANS CHHAP tobacco.

For Petitioner : Mr.Ravikumar Paul
Senior Counsel
For M/s.Paul and Paul

For Respondents : Mr.T.Arunkumar
Additional Government Pleader

ORDER

The Writ of Declaration has been instituted to declare that dealing, distribution and sale of the product HANS CHHAP tobacco, is legal and valid and the same does not attract any ban or prohibition under the provisions of Foods and Safety and Standards Act, 2006 and the Rules and Regulations framed thereunder read with notification dated 23.05.2013 of the respondents and therefore not liable for any seizure or any penal action for carrying on the business of dealing, distribution and sale of the product HANS CHHAP tobacco.

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2. The writ petitioner is a company incorporated under the provisions of the Companies Act, 1956. The company is involved in the business of dealing and selling of HANS CHHAP in various States including Tamil Nadu, Karnataka, etc. The petitioner is paying the tax duly. The product is nothing but a chewing tobacco as defined under Schedule 2 (P) of the Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 [hereinafter referred to as 'COTP Act'].

3. On 23.05.2013, the 2nd respondent issued instructions, prohibiting manufacture, storage, distribution or sale of gutkha and pan masala and any other food products containing tobacco or nicotine as ingredients, by whatsoever name is available in the market in the State of Tamil Nadu for a period of one year from the date of issue of the order. The validity of the order has further been extended subsequently.

4. The contention of the petitioners are that the Notification/instruction providing prohibition was only in respect of manufacture, sale of gutkha and pan masala or any other food products <https://www.mhc.tn.gov.in/judis> containing tobacco or nicotine, which is intended for human consumption. As far as the product dealt with by the petitioner namely HANS CHHAP, the same is not a food item in the first place and does not fall within the definition of food under Section 3(j) of the Food Safety and Standards Act, 2006 [hereinafter referred to as 'FSS Act']. Secondly, it is governed by a different Act namely COTP Act, and the sale of which is perfectly legal even within the State of Tamil Nadu with some restrictions as per the COTP Act. The restriction however was confined only to advertisement and sale of the tobacco products to the persons above 18 years, and

even under COTP Act, restrictions are imposed in the public interest.

5. The grievances of the writ petitioners are that under the guise of invoking powers under the provisions of FSS Act, read with the notifications dated 23.05.2013, the respondent officials time and again seized the product handled by the petitioner and destroyed the same. Thus, the petitioners are constrained to move the present writ petition.

6. It is brought to the notice of this Court that the issues raised in this writ petition are considered by the Hon'ble Division Bench of this Court in <https://www.mhc.tn.gov.in/judis> W.A.No.2093 of 2018 and the judgment was delivered on 20.01.2023.

7. The Hon'ble Division Bench framed five issues. The fourth issue raised is that, whether Tobacco or Tobacco products would fall within the definition of food under Section 3 (j) of the FSS Act. The fifth issue raised is that, whether the Commissioner, Food Safety is empowered to impose a total ban on the sale of Tobacco and Tobacco products by issuing successive notifications year on year.

8. With regard to these two issues, which all are relevant as far as the present writ petitions are concerned, the Hon'ble Division Bench in Paragraph 11.8 held as follows:

“11.8. A reading of the definition would show that it includes primary food as defined under Clause zk and does not include plants prior to harvesting. Clause zk of Section 2 of FSS Act, defines Primary Food as an article of food being a produce of agriculture or horticulture etc. Tobacco is essentially a product of agriculture and Section 3(j) of FSS Act includes Primary Food as defined under zk of FSS Act, therefore, even on the language used in Section 3(j) the irresistible conclusion is that Tobacco with or without <https://www.mhc.tn.gov.in/judis> additives will be a food product as defined under Section 3(j) of the Food Safety and Standards Act.”

9. In view of the above judgment, the Tobacco and its products are considered as a food within the definition of the FSS Act. The Hon'ble Division Bench of this Court concluded by stating that even from the language used in Section 3(j) of the FSS Act, the irresistible conclusion is that Tobacco with or without additives will be a food product as defined under Section 3(j) of the FSS Act.

10. The Hon'ble Division Bench of this Court has considered the scope of Section 18 of the FSS Act, but no issues were framed with reference to the procedures to be followed for the purpose of imposing ban by invoking Section 30 (2) (a) of FSS Act.

11. It is not made clear before this Court that the authorities competent of the Food Safety Department had followed the procedures as contemplated under Section 18 of the FSS Act. Power conferred on the authorities to impose ban under the Statute is not in dispute. But the manner <https://www.mhc.tn.gov.in/judis> in which the ban was imposed alone was considered as violative of the provisions of the Act, since the mandatory procedures contemplated were not followed by the authorities.

12. Paragraph 12.4 of the judgment of the Hon'ble Division Bench states as follows:

“12.4. A reading of the provision shows that a power is vested in the Commissioner of Food Safety to prohibit in the interest of public health, the manufacture, storage, distribution or sale of any food article, for the whole State or any Part thereof for such period, not exceeding one year. This power, in our considered opinion, as observed by the Delhi High Court, is a power to impose a ban for a temporary period considering public health. This is akin to imposing a ban on poultry products when there is outbreak of bird flu and situations of like nature. This provision, in our opinion, cannot be used for imposing a permanent ban that too by issuing successive notifications year on year. While dealing with the said question, the Delhi High Court has observed as follows:

224. In terms of Section 30(2)(a) of the FSSA, the power to prohibit conferred upon the Commissioner of Food Safety was limited and subjected to the product sought to be prohibited, <https://www.mhc.tn.gov.in/judis> being an article of food in the whole of the state or any area or part thereof upto a maximum period of one year. Thus, the power to prohibit so conferred was temporary in nature.

225. Perusal of Section 30(2)(a) of the FSSA exhibits various principles with regard to issuance of prohibition order by the Commissioner of Food Safety under the said provision, which are as follows: (a) the manufacture, sale, distribution and storage of a food article may be prohibited in the whole or a part of the State only in emergent circumstances in the interest of public; (b) the tenure of such a prohibitory order is temporary in nature and cannot exceed one (1) year in its entirety; (c) the issuance of order be passed/continued only after compliance of the principles of natural justice; and (d) the prohibition must indicate the name and brand name of the food business operator.

226. It is further a settled position of law that there is a requirement of giving a reasonable opportunity of being heard, in compliance of the principles of natural justice, before making an order, which would have adverse civil consequences for the parties affected.

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227. Section 18 of the FSSA lays down the general principles that have to be mandatorily followed in administration of the Act. In order for a prohibition to be exercised, alternative policies are to be evaluated; interested parties are to be consulted and risk analysis, risk assessment and risk management has to be ascertained; interested parties are consulted qua factors relevant for protection of health; and appropriate prevention/control options are selected, besides compliance of other principles as laid down under Section 18 of the FSSA. Moreover, the use of the word “shall” in Section 18 of the FSSA clearly demonstrates its mandatory nature of the procedure to be followed. Accordingly, the powers conferred upon the Commissioner of Food Safety have to be exercised

subject to compliance of mandatory principles as prescribed under Section 18 of the FSSA.

228. However, it is pertinent to mention that in the present case, no compliance under Section 30(2)(a) read with Section 18 of the FSSA has been undertaken before issuance of the impugned Notifications by Respondent No.1. At the outset, no risk analysis, risk assessment or risk management <https://www.mhc.tn.gov.in/judis> has been made in the present case. Further, there has been no reference to emergent circumstances which led to issuance/passing of the impugned Notifications. In fact, no opportunity of being heard has been provided to the stakeholders who would be adversely affected by such prohibitory order i.e., issuance of the impugned Notifications.”

13. Therefore, the Hon’ble Division Bench of this Court concluded by stating that the procedures as contemplated under Section 18 of the FSS Act had not been followed before imposing ban and thus, the notification is violative of the provisions of the FSS Act.

14. The question arises in such circumstances, whether the authorities competent are bound to follow the procedures as contemplated under the FSS Act and thereafter, impose prohibition, if required in the interest of public and to protect the “public health” as mandated under the Constitution and under the provisions of the FSS Act.

15. In this context, Article 47 directive principles of State Policy enumerated in the Constitution stipulates that “The State shall regard the <https://www.mhc.tn.gov.in/judis> raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health”.

16. Therefore, it is the liability on the part of the State to protect the public health and if necessary, to impose prohibition on the consumption of certain drugs or intoxicating products, which all are injurious to public health. Thus, the power to impose prohibition under the Act is not in dispute. However, such power is to be exercised by following the procedures as contemplated. The due process has already been contemplated under Section 18 of the FSS Act and therefore, the Courts have to find out, whether the due process contemplated has been followed or not, while imposing the prohibition of certain food products, which all are injurious to public health and to protect the public health.

17. The learned Senior Counsel appearing on behalf of the petitioners also reiterated that such procedures were not followed and therefore, the <https://www.mhc.tn.gov.in/judis> notification is in violation of the provisions of the FSS Act.

18. The learned Additional Government Pleader appearing on behalf of the respondents made a submission that under Regulation 2.3.4 of Food Safety and Standards (Prohibition and Restrictions on Sales) Regulations, 2011, which states “Product not to contain any substance which may be injurious to health: Tobacco and nicotine shall not be used as ingredients in any food products.”

19. Dr.M.Jegadish Chandra Bose, M.B.B.S., Designated Officer, Food Safety Department, Tiruvallur District under the FSS Act, who is present before this Court, states that raw Tobacco contains insignificant traces of nicotine and in the products manufactured by the petitioners, the authorities found the presence of 1.8% of nicotine. The manufacturers are adding nicotine powder in the Tobacco for the purpose of more intoxication, which is injurious to public health.

20. Therefore, the State thought fit to impose prohibition of such products, where nicotine powders are added along with the Tobacco, which <https://www.mhc.tn.gov.in/judis> is more injurious to public health and such Chewing Tobacco, if allowed to be placed in the market, the same would cause serious and irreparable health implications in the society. Thus, the State in its duty to protect the public health and after analysing the nature of products manufactured by the petitioners, imposed the ban.

21. Thus, the State is well within its powers to impose prohibition of such products, which all are injurious to public health. However, before imposing ban, the procedures as contemplated under the Act is to be followed by making necessary assessments, including scientific analysis. Right to Practice profession or carry on any occupation or trade is a Fundamental Right under Article 19 (1) (g) of the Constitution of India. However, the said right is subject to Article 19 (3), which enumerates the nature of restrictions that can be imposed by the State upon the above right of the citizen. Thus, any restriction or prohibition on the trade or business shall be imposed by following the due process of law. The State cannot impose prohibition without following the procedures as it would cause infringement of the rights of the manufacturers and traders and therefore, the importance of the due process contemplated under the Statute at no <https://www.mhc.tn.gov.in/judis> circumstances be compromised by the authorities, while taking decisions.

22. Let us now consider the procedures as contemplated under Section 18 (2) of the FSS Act, which reads as under:

“18. General Principles to be followed in administration of Act.

(1).....

(2) The Food Authority shall, while framing regulations or specifying standards under this Act–

(a) take into account–

(i) prevalent practices and conditions in the country including agricultural practices and handling, storage and transport conditions; and

(ii) international standards and practices, where international standards or practices exist or are in the process of being formulated, unless it is of opinion that taking into account of such prevalent practices and conditions or international standards or

practices or any particular part thereof would not be an effective or appropriate means for securing the objectives of such regulations or where there is a scientific justification or where they would result in a different level of protection from the one determined as appropriate in the country;

(b) determine food standards on the basis of <https://www.mhc.tn.gov.in/judis> risk analysis except where it is of opinion that such analysis is not appropriate to the circumstances or the nature of the case;

(c) undertake risk assessment based on the available scientific evidence and in an independent, objective and transparent manner;

(d) ensure that there is open and transparent public consultation, directly or through representative bodies including all levels of panchayats, during the preparation, evaluation and revision of regulations, except where it is of opinion that there is an urgency concerning food safety or public health to make or amend the regulations in which case such consultation may be dispensed with:

Provided that such regulations shall be in force for not more than six months;

(e) ensure protection of the interests of consumers and shall provide a basis for consumers to make informed choices in relation to the foods they consume;

(f) ensure prevention of–

(i) fraudulent, deceptive or unfair trade practices which may mislead or harm the consumer; and

(ii) unsafe or contaminated or sub-

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

23. Section 18 (2) (a) (i) of the FSS Act stipulates that “The Food Authority has to take into account (i) prevalent practices and conditions in the country including agricultural practices and handling, storage and transport conditions; and (ii) international standards and practices, where international standards or practices exist or are in the process of being formulated.”

24. In this context, if at all a Tobacco product or manufacturing of Tobacco product by adopting different procedures, warrants prohibition or not is to be determined with reference to the Standards, which all are contemplated under Section 18 (2) of the FSS Act.

25. It is stipulated that International Standards and practices, the level of nicotine, which is added along with the product and whether it affects the public health, whether it is injurious or not is to be determined by way of scientific methods and only thereafter, the Food Authority has to form an

opinion that the particular product is to be prohibited or not. <https://www.mhc.tn.gov.in/judis>

26. In the present cases, no such determination had been done by the competent authorities and based on the lab report, they formed an opinion that the manufacturers mixed more quantity of nicotine, which is injurious to public health.

27. Such general opinion if allowed to be a basis for prohibiting a product, then it will lead to infringement of right to trade. Therefore, the procedures, the material factors and the other criteria as contemplated under Section 18 (2) of the FSS Act are to be scrupulously followed by the authorities for the purpose of forming a final opinion and for the purpose of imposing ban of nicotine or Tobacco products. Since the procedures contemplated were not followed, the Hon'ble Division Bench of this Court also quashed the Notification. However, there is no bar for the competent authorities to follow the procedures as contemplated under Section 18 of the FSS Act and thereafter, impose prohibition under the Act.

28. The contention of the learned Additional Government Pleader that Regulation 2.3.4 of the Food Safety and Standards (Prohibition and Restrictions on Sales) Regulations, 2011, which states that "Product not to <https://www.mhc.tn.gov.in/judis> contain any substance which may be injurious to health: Tobacco and nicotine shall not be used as ingredients in any food products" must be read along with Section 18 of the FSS Act and the Regulation cannot override the effect of the procedures otherwise contemplated under the Statute. Thus, the Regulations, which all are framed pursuant to the provisions of the FSS Act cannot have any overriding effect of diluting the procedures, which all are contemplated under the FSS Act and even as per the regulation, the usage of Tobacco and Nicotine, whether it is injurious to public health or not is to be determined by following the procedures under Section 18 of the FSS Act.

29. Thus, the contention of the learned Additional Government Pleader relying on the Regulations are untenable and such Regulations must be read along with the provisions of the FSS Act for the purpose of imposing prohibition or ban any products.

30. It is brought to the notice of this Court that the above referred Hon'ble Division Bench judgment in the case of Jayavilas Tobacco Traders LLP & another vs. State of Tamil Nadu dated 20.01.2023 in W.A.No.2093 <https://www.mhc.tn.gov.in/judis> of 2018 has been stayed on 25.04.2023. Therefore, based on the said Division Bench judgment, the impugned Notification cannot be quashed by this Court. Pursuant to the interim orders of the Apex Court of India, the impugned ban notification continued to be in force and thus, the same cannot be quashed. However, there is no impediment for the respondents to follow the procedures as contemplated under Section 18 (2) of the FSS Act along with the Regulations and conduct scientific analysis with reference to the standards, which all are to be maintained in selling Tobacco and its products and thereafter, pass appropriate orders afresh, imposing prohibition or ban or otherwise. The Division Bench judgment denuded to loose its status as precedent. However, the authorities are bound to follow the procedures as contemplated under Section 18 (2) of the FSS Act along with the Regulations and thereafter take decision in the interest of public health. Public health being an integral part of Article 21 of the Constitution of India, the State is obligated to protect the public health of the citizen and if any tobacco product is found to be

injurious to public health, then the State is justified in imposing ban on such Tobacco products, which all are harmful, if consumed by humans.

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31. With the above directions, the writ petition stands disposed of. No costs. Consequently, connected miscellaneous petitions are closed.

28.04.2023 Index : Yes Speaking order Neutral Citation:Yes kak To

1.The Secretary, State of Tamil Nadu, Health & Family Welfare Department, Fort St.George, Chennai.

2.The Commissioner, Food and Safety, 5th Floor, DMS Building, 359, Anna Salai, DMS Campus, Teynampet, Chennai – 600 006.

<https://www.mhc.tn.gov.in/judis> S.M.SUBRAMANIAM, J.

kak (1/2) 28.04.2023 <https://www.mhc.tn.gov.in/judis>