

Kethaki Traders vs The State Of Telangana on 30 November, 2021

Author: Satish Chandra Sharma

Bench: Satish Chandra Sharma, A.Rajasheker Reddy

THE HON'BLE THE CHIEF JUSTICE SATISH CHANDRA SHARMA
AND
THE HON'BLE SRI JUSTICE A.RAJASHEKER REDDY

WP.Nos. 19928, 20022, 21277, 21314, 21344, 21352, 21362, 21523, 21545, 21547, 21555, 21569, 21831, 21886, 21899, 21914, 21939, 22297, 22310, 22322, 22325, 22330, 22333, 22349, 22369, 22376, 22388, 22390, 22392, 22416, 22423, 22425, 22432, 22447, 22480, 22482, 22498, 22507, 22560, 22569, 22573, 22586, 22635, 22708, 22728, 22732, 22762, 22764, 22785, 22808, 22846, 22850, 22868, 22895, 22897, 22898, 22930, 22941, 22969, 22983, 23000, 23036, 23058, 23069, 23128, 23132, 23182, 23186, 23209, 23257, 23284, 23286, 23292, 23321, 23350, 23358, 23476, 23490, 23528, 23599, 23629, 23633, 23802, 24088, 24273, 24285, 24467, 24475, 24591, 24698, 24927, 24929, 25049, 25073, 25074, 25083, 25114, 25124, 25131, 25203, 25206, 25267, 25272, 25305, 25472, 25558, 25702, 25713, 25740, 25898, 25905, 25933, 25984, 26196, 26368, 26467, 26570, 26618, 26738, 26972, 27044, 27138, 27279, 27364, 27406, 27459, 28100 and 28704 of 2021

COMMON ORDER:

(Per the Hon'ble the Chief Justice Satish Chandra Sharma) (1) Regard being had to the similitude in the controversy involved in the present cases, the writ petitions were analogously heard and by a common order, they are being disposed of by this Court.

(2) Facts of the Writ Petition No.19928 of 2021 are narrated hereunder.

The petitioner before this Court, which is a proprietorship firm engaged in the business of wholesale distribution and retailing of chewing/chewable tobacco products and cigarettes, has filed this present writ petition being aggrieved by the Notification No.505/FSS- 1/2021, dated 06.01.2021 issued by the respondent No.3/Commissioner of Food Safety, Telangana in exercise of powers conferred under Section 30 of the Food Safety and Standards Act, 2006 (hereinafter called 'FSS Act 2006'). The petitioner has challenged the impugned Notification on the ground that it is illegal, arbitrary, unconstitutional, ultra vires the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 (hereinafter called, 'COTPA 2003') and is in violation of principles of natural justice and is also in violation of Articles 14 and 19(1)(g) of the Constitution of India.

(3) The learned counsel for the petitioner stated before this Court that the petitioner's business is broadly concerned with pure tobacco and scented tobacco, which are marketed under the brand names Phoolchap (pure tobacco) and VI Tobacco (scented tobacco). (4) In the other connected matters, the petitioners are carrying on the business either of wholesale distribution or sale of pan masala mixed with tobacco and other allied products. The petitioners' contention is that the COTPA 2003 is a central legislation dealing exclusively with tobacco industry, traceable to Entry 52, List I of the Seventh Schedule of the Constitution of India and it provides a comprehensive legislation which governs the law on tobacco products and is occupying the field. It has been stated that the COTPA 2003 deals with tobacco products and therefore, the products mentioned in the impugned Notification issued under FSS Act 2006 are covered in the list of products specified in the Schedule of COTPA 2003.

(5) The petitioners further contended that the legislative policy in respect of tobacco products as evident from the provisions of COTPA 2003 is not to impose a complete ban on tobacco products and it certainly regulates and imposes restrictions on the trade and business with respect to advertising the products, smoking in public places and pictorial warnings on the ill-effects of consuming tobacco on packaging material of those products etc. It has been further contended that the legislative policy is to permit trade and business in tobacco products subject to reasonable restrictions. It has been further contended that the country's taxing statutes also permit trade and business in tobacco products and tax is levied under the Central Goods and Services Tax Act, 2017. Meaning thereby, the statute does not prohibit trade and business in tobacco products at all. (6) The petitioners further contended that the FSS Act 2006 is an Act that regulates food standards and the production, distribution and consumption of food. It is a general law that covers all aspects pertaining to food safety, traceable to Entry 18 of List III of the Seventh Schedule of the Constitution of India and the FSS Act 2006 does not define 'tobacco products' nor it provides any power for prohibition in the trade and business of such products. It has been further contended that COTPA 2003 being a special law pertaining to subject matter of 'tobacco products' and 'tobacco industry' that overrides the FSS Act 2006 which is a general law pertaining to 'food products and food safety' and therefore, the provisions of the FSS Act 2006 cannot impinge or encroach upon any subject matter, that is exclusively governed by the COTPA 2003.

(7) The petitioners further contended that the Regulations made under the FSS Act 2006 cannot travel beyond the field covered by the FSS Act 2006 and they cannot encroach upon the areas covered by the COTPA 2003. It has been further contended that in exercise of powers conferred under Section 92 of the FSS Act 2006, the Food Safety and Standards Authority of India has issued Regulations titled 'the Food Safety and Standards (Prohibition and Restrictions on Sales) Regulations, 2011 (hereinafter called, 'Food Safety Regulations, 2011'). The Regulation 2.3.4 of the said Regulations provides that tobacco and nicotine shall not be used as ingredients in any food stuffs and that the tobacco per se is not treated as food and therefore, the FSS Act 2006 nor the Food Safety Regulations, 2011 framed thereunder empowers the Authorities to impose a ban in respect of trade and business of tobacco.

(8) The petitioners further contended that the impugned Notification is ultra vires the FSS Act 2006 and is also contrary to COTPA 2003. It has been further contended that under the Food Safety and

Standards (Food Products Standards and Food Additives) Regulations, 2011, 'pan masala' is defined under Regulation 2.11.5 as 'the food generally taken as such or in conjunction with pan'. It lists out the substances that pan masala should be free from. The treatment of pure pan masala as food under the Regulations only implies that except to the extent specifically covered under the special law COTPA 2003, the provisions of the FSS Act 2006 and Rules/Regulations made thereunder govern pan masala. Insofar as the pan masala in combination with tobacco finds place in the Schedule of COTPA 2003 and the said product is outside the reach of the provisions of the FSS Act 2006. It has been further contended that the tobacco products mentioned in the impugned Notification are exclusively regulated by the COTPA 2003, they are not all covered by the FSS Act 2006 and therefore, the impugned Notification is ultra vires the FSS Act 2006 and the COTPA 2003. (9) The petitioners further contended that the respondent No.3/Commissioner of Food Safety, Telangana is jurisdictionally incompetent to issue any such Notification in exercise of powers conferred under Section 30(2) of the FSS Act 2006 as the products mentioned in the Notification are not covered by the FSS Act 2006 and they are covered under the Schedule appended to the COTPA 2003. It has been further contended that the impugned Notification deprives the petitioners and other connected persons of their valuable rights guaranteed under Article 19(1)(g) of the Constitution of India. (10) The petitioners further contended that earlier also, such Notifications were issued by the State Government and this Court has quashed the criminal proceedings by passing a detailed Judgment in Criminal Petition No.3731 of 2018 and batch, vide Judgment dated 27.08.2018 and therefore, no criminal proceedings can be initiated against the petitioners and against other persons who are involved in the trade of pan masala/tobacco. Reference has also been made to other Judgments delivered by the High Court of Andhra Pradesh in Criminal Petition No.5421 of 2019 and batch decided on 18.12.2019. The petitioners stated that apprehending criminal action on the basis of the Notification which is void ab initio, the petitioners approached this Court by filing a writ petition under Article 226 of the Constitution of India seeking protection of the fundamental rights guaranteed under Articles 14, 19(1)(g) and 21 of the Constitution of India. It has been further contended that in earlier years, similar Notifications were issued by the State Government and the interim orders have been granted in all matters. However, as the validity of the Notifications was only for a period of one year, the Notifications expired by efflux of time.

(11) The petitioners have raised various grounds before this Court for setting aside the impugned Notification. (12) It has been contended by the learned counsel for the petitioners that the COTPA 2003 is a comprehensive code and a special law dealing with all aspects of the tobacco products and tobacco industry, whereas the FSS Act 2006 deals with the broad area of food safety and standards. The FSS Act 2006 even though enacted subsequent to the COTPA 2003 does not either expressly or impliedly seek to override the COTPA 2003. Therefore, the application of the well settled principle that special law prevails over general law, even if the general law is subsequent, the COTPA 2003 will prevail over the FSS Act 2006 when it comes to regulation of tobacco products. Thus, the power conferred under Section 30(2) of the FSS Act 2006 does not extend to prohibit the tobacco products, which is the sole prerogative of the COTPA 2003.

(13) It has been further contended that the Rules, Regulations and Notifications should not only conform to the parent statute but also shall not be contrary to any other statute since subordinate legislation cannot violate a plenary legislation. The impugned Notification in banning trade or

business in tobacco products, imposes a prohibition which is beyond the limited extent of prohibition imposed under Section 6 of the COTPA 2003 (i.e., sale to persons under 18 years of age and in an area within 100 yards of an educational institution). (14) It has been further contended that if any prohibition on the trade or business of tobacco products is to be imposed in addition to what is covered under Section 6 of the COTPA 2003, the same can be done only by an amendment to the COTPA 2003. However, by issuing the impugned Notification, the respondent No.3/the Commissioner of Food Safety has added a new head of prohibition which is otherwise absent in the COTPA 2003, which has been done under the garb of exercising power under Section 30 of the FSS Act 2006. It is nothing but doing an act indirectly which is not permissible directly and Regulation 2.3.4 of the Food Safety Regulations, 2011 does not empower the respondent No.3/Commissioner of Food Safety to ban the products covered under the COTPA 2003. It has been further contended that the FSS Act 2006 cannot encroach upon the field covered by the COTPA 2003 and therefore, the Regulations made under the FSS Act 2006 cannot do the same, hence the prohibition under Regulation 2.3.4 can extend to any food which is consumed, except the products specifically covered under the COTPA 2003. It has been further argued that the exercise of power under Section 30 of the FSS Act 2006 and the Regulation 2.3.4 of the Food Safety Regulations, 2011 amounts to colourable exercise of power, which is impermissible. It has been further contended that Regulation 2.3.4 of the Food Safety Regulations, 2011 does not cover chewing tobacco. The said Regulation makes a dichotomy between 'tobacco' on one hand and 'food products' on the other hand, which implies that chewing/chewable tobacco products were never intended to be covered under the Food Safety Regulations, 2011. Thus, by no stretch of imagination, the impugned Notification covers chewing/chewable tobacco products. The issuance of the impugned Notification is a complete non-application of mind and the same violates the Article 14 of the Constitution of India. (15) The petitioners further contended that since the impugned Notification is ultra vires the FSS Act 2006 and the COTPA 2003, the restriction imposed on the petitioners' rights to carry on trade and business in chewing/chewable tobacco products has no legal basis. Meaning thereby, the prohibition imposed is without backing of law as mandated under Article 19(6) of the Constitution of India. Thus, the prohibition imposed by virtue of the impugned Notification is in violation of the petitioners' fundamental right to carry out trade and business under Article 19(1)(g) of the Constitution of India. The petitioners further contended that Section 6 of the COTPA 2003 imposes a complete ban in respect of extremely vulnerable or important subjects (i.e., to protect individuals under the age of 18 years and students and protect individuals from the harm of passive smoking), it imposes less onerous restrictions on the rest of the subjects limited to the manner in which tobacco products are advertised. The very fact that the respondent No.5/Union of India enacted the COTPA 2003 where prohibition is not imposed but restrictions are imposed on various facets of the trade in tobacco implies that there are less intrusive measures than complete prohibition. Unmindful of this well thought out legislative scheme and intent, the respondent No.3/the Commissioner of Food Safety has imposed a wholesale ban on trade/business in tobacco products. This does not stand the test of proportionality and as such, it is not a reasonable restriction within the meaning of Article 19(6) of the Constitution of India.

(16) The petitioners further contended that by virtue of the impugned Notification, the petitioners and other connected persons face an imminent threat of criminal proceedings being initiated by the Authorities concerned and are being arrested as is obvious from the various cases foisted in the

earlier years against them and other persons under the garb of implementation of similar Notifications. Even the entities and persons to whom the petitioners supply its products also face a threat. This is a direct infringement on the right to liberty guaranteed under Article 21 of the Constitution of India. The petitioners further contended that a complete ban on trade and business adversely affects the livelihood of the petitioners and other connected persons. (17) The petitioners further contended that the impugned Notification was issued without asking for the views of the persons engaged in the trade or business of the tobacco products and it is mandatory to grant opportunity of hearing to the affected stakeholders before passing an administrative order. Therefore, the issuance of the impugned Notification violates the principles of natural justice. The petitioners further contended that Section 31 of the FSS Act 2006 mandates every food business operator to obtain a license, such a requirement is not made applicable for the persons carrying on business in the products covered under the COTPA 2003. In fact, the same was clarified by the respondent No.6/Food Safety and Standard Authority of India by its letter dated 10.10.2012 to a query raised by a person engaged in the trade of such products in Delhi. Similar clarification has also been issued by the Food Safety Authority of Uttarakhand. The petitioners further contended that while the Food Safety Regulations, 2011 provide safety standards with respect to every type of food extending even to pan masala, they are absolutely silent in respect of chewing/chewable tobacco products in which the petitioners are engaged in. No standards for labelling or packaging chewing tobacco products are set out. Thus, it is crystal clear that those products were never contemplated within the meaning of 'food' under the FSS Act 2006. Thus, the Regulation making Authority under the FSS Act 2006 itself does not treat the above products as falling within the meaning of 'food'.

(18) The petitioners further contended that interpreting Section 30(2)(a) of the FSS Act 2006, the power to issue a Notification such as the impugned Notification would lead to a paradoxical situation where the respondent No.3/the Commissioner of Food Safety can issue a Notification in one area of the State and not in another, with respect to tobacco products, which is otherwise permitted. Similarly, the Commissioner of Food Safety of one State may issue a Notification banning tobacco products while that of another State may not and this situation exists in case of chewing/chewable tobacco products. The State of Telangana has issued the impugned Notification extending the ban to chewing tobacco and pure tobacco products, whereas the State of Karnataka and several other States have not issued similar Notifications. The petitioners further contended that the non-obstante clause under Section 89 of the FSS Act 2006 does not enable the authorities under the said statute to override the provisions of the COTPA 2003, since it is settled law that even a non-obstante clause in a subsequent general law cannot override a prior special law. The petitioners further contended that the prohibition that can be imposed under Section 30(2)(a) of the FSS Act 2006 can be for a maximum period of one year. This itself reflects that the power therein was given to be exercised under some emergent extraordinary circumstances and not in a routine manner. However, the respondent No.3/the Commissioner of Food Safety, Telangana by repeatedly issuing those Notifications year after year and ensuring that a product is banned in perpetually, is nothing but abusing the power conferred on it and it also amounts to colourable exercise of power.

(19) The petitioners have further contended that various writ petitions have been decided by different High Courts and the matter is pending before the Hon'ble Supreme Court and as the

Hon'ble Supreme Court is seized of the issue, the present petitions be decided after Judgment is delivered by the Hon'ble Supreme Court. However, the fact remains that in respect of the impugned Notification, no writ petition is pending before the Hon'ble Supreme Court and no order has been brought to the notice of this Court restraining this Court to decide the issue. On the contrary, there is an order passed by the Hon'ble Supreme Court in S.L.P.Nos.4879 and 5743 of 2021, dated 11.05.2021, directing this Court to decide the matters at an early date.

(20) The learned counsel for the petitioners have placed reliance upon the following Judgments in respect of the contentions canvassed on behalf of the petitioners in the present petition as well as other connected matters. Ch.Tika Ramji v. State of U.P.¹, State of Madras v. Gannon Dunkerley², Calcutta Gas Company Limited v. State of West Bengal³, Ramavatar Budhaiprasad v. Assistant Sales Tax Officer, Akola⁴, Kannan Devan Hills Produce Company Limited v. State of Kerala⁵, Shah Ashu Jaiwant v. State of Maharashtra⁶, Ishwari Khetan Sugar Mills (Private) Limited v. State of U.P.⁷, D.C.Wadhwa v. State of Bihar⁸, Collector of Central Excise, Bombay-I v. M/s.Parle Exports⁹, India Cement Limited v. State of Tamil Nadu¹⁰, Synthetics & Chemicals Limited v. State of 1956 SCR 393 1959 SCR 379 1962 Supp (3) SCR 1 (1962) 1 SCR 279 (1972) 2 SCC 218 (1976) 2 SCC 99 (1980) 4 SCC 136 (1987) 1 SCC 378 (1989) 1 SCC 345 (1990) 1 SCC 12 U.P.¹¹, State of Andhra Pradesh v. McDowell & Co.,¹², SIEL Limited v. Union of India¹³, ITC Limited v. Agricultural Produce Market Committee¹⁴, S.Samuel, M.D., Harrisons Malayalam v. Union of India¹⁵, Gulati & Co., v. Commissioner of Sales Tax¹⁶, and Dharampal Satyapal Limited v. State of Assam¹⁷. (21) The respondent No.3/Commissioner of Food Safety, Telangana has filed a detailed counter affidavit and it has been stated that the petitioners are engaged in the wholesale business of the products like chewing tobacco. The products contain pure tobacco, flavoured tobacco and scented tobacco. It has been stated that the chewing tobacco products flavoured with some spices such as cardamom, menthol, clove etc., includes scented tobacco. This also includes edible perfumes and therefore, as per the FSS Act 2006, the spices and other edible perfumes added to the chewing tobacco comes under the definition of 'food'. It has been stated that the law of the land is very clear and the FSS Act 2006 read with Regulations framed thereunder provides that no food product shall contain tobacco and nicotine as ingredient. The stand of the respondent No.3 is that the petitioner while obtaining GST (1990) 1 SCC 109 (1996) 3 SCC 709 (1998) 7 SCC 26 (2002) 9 SCC 232 (2004) 1 SCC 256 (2014) 14 SCC 286 (2018) 2 Gauhati Law Reports 168 number and GST certificate has stated that he is doing business to sell unmanufactured tobacco, refuse tobacco, not stem or strippe, flue cured Virginia tobacco, but the petitioner is selling chewing tobacco products flavoured with some spices, such as cardamom, menthol, clove etc., scented tobacco comprising edible perfumes. In the other writ petitions, the petitioners are dealing with gutka or pan masala, which certainly contain tobacco. (22) It has been further stated that the Hon'ble Supreme Court in the case of Ankur Gutka v. Indian Asthma Care Society (SLP No.16308 of 2007, vide order dated 07.12.2010) has directed the learned Solicitor General of India to instruct concerned Ministries to approach National Institute of Public Health to undertake a comprehensive analysis and study of contents of gutka, tobacco, pan masala and similar articles manufactured in the country and harmful affects on human health. The Ministry of Health and Family Welfare, in the light of the directions issued by the Hon'ble Supreme Court, in consultation with the National Institute of Health and Family Welfare (NIHFW) constituted a Committee of Technical Experts and submitted a Report on the contents of gutka, tobacco, pan masala and other similar articles manufactured in the country as well as in respect of Areca-Nut or

Betel Quid or Supari. The Report includes the harmful affect on human body. As per the Report submitted by NIHFW, the term 'smokeless tobacco' includes large variety of commercially or non-commercially available products and mixtures that contain tobacco as the principal constituent and are used either orally (through the mouth) or nasally (through the nose) without combustion. As per the Report, three forms of smokeless tobacco, which are commonly used in India are as under:-

(1) Tobacco alone (with aroma and flavourings) - e.g. Creamy or dry snuff, Gudakhu, Gul, Mishri, Red tooth power.

(2) Betel quid with tobacco (includes areca nut, slaked lime, catechu and tobacco with spices) - e.g. Gutkha.

(3) Tobacco with other components (lime, sodium bicarbonate, ash) - e.g. Khaini, Zarda, Maras, Naswar.

(23) The respondent No.3 has further stated that as per the NIHFW Health Report, there are as many as 3095 chemical components in smokeless tobacco products and out of them, 28 are proven carcinogen. The major and most abundant group of carcinogens is the tobacco -

specific N-nitrosamines (TSNA) and no safe level of this chemical has been ascribed so far. The other carcinogens reportedly present in smokeless tobacco include volatile N-nitrosamines, certain volatile aldehydes, poly-nuclear aromatic hydrocarbons, certain lactones, urethane, metals and radioactive polonium. The Report also reveals that high level of Nitrosamines is present in the branded Indian smokeless tobacco products. The Laboratory Reports also establish that the smokeless tobacco available in India contains substantive quantities of two potent carcinogens (nitrosamines and benzo-a-pyrene) and heavy metals. The presence of high levels of heavy metals (Lead, Cadmium, Chromium, Arsenic and Nickel) is also reported. The Report establishes that the tobacco and other tobacco related products cause oral, esophageal, stomach, pancreatic, throat and renal cancers. It also causes periodontal diseases, hypertension and cardiovascular diseases, nervous system diseases, metabolic abnormalities. It also affects reproductive organs in men and women and is also responsible for pre- term and low birth babies. The Expert Committee in its Report dated 23.09.1997 recommended prohibition of consumption of pan masala/gutka/chewing tobacco as the ingredient in any food items as they are injurious to public health and the Central Committee of Food Standards in its Meeting dated 26th and 27th of November, 1997 unanimously resolved to ban use of chewing tobacco in pan masala/gutka. It has been further stated that Global Audit Tobacco Survey of India is the Global Standard for systematic monitoring of audit tobacco use (smoking and smokeless) in the country and the survey conducted in the year 2016-17 by the International Institute for Population Sciences (IIPS), Mumbai reveals that almost 27 crores of adults in India used tobacco in some form or the other. Among them, 20 crores use only smokeless tobacco products.

(24) It has been brought to the notice of this Court that tobacco is a prominent risk factor for 6 to 8 leading causes of death and almost 40% of the Non Communicable Diseases (NCD) including

cancers, cardiovascular diseases and lung disorders are directly attributable to tobacco use. The number of deaths every year in India which is attributable to tobacco use is almost 14 lakhs and 50% of cancers in males and 20% cancers in females can be directly attributed to tobacco use (ICMR Study). According to the World Health Organization (WHO) Global Report on "Tobacco Attributable Mortality, 2012", 7% of all deaths (for ages 30 and over) in India are attributable to tobacco use. It has been further brought to the notice of this Court that a study titled "Economic Burden of Tobacco Related Diseases in India" (2014) commissioned by the Ministry of Health and Family Welfare, the total economic costs attributable to tobacco use from all diseases in India in the year 2011 for persons aged 35 to 69 years amounted to Rs.1,04,500/- crores. The estimated cost was 1.16% of the GDP and was 12% more than the combined state and central government expenditures on health in 2011-12. (25) The respondent No.3 further stated that the FSS Act 2006 is enacted with the objective to consolidate the laws relating to food and for laying down standards for articles of food and to regulate their manufacture, storage, distribution, sale and import, to ensure availability of safe and wholesome food for human consumption and for matters connected therewith or incidental thereto. The respondent No.3 has dealt with the salient provisions of the FSS Act 2006 and the definition of the word 'food' is defined under Section 3(j) of the FSS Act 2006. It has been further stated that the Gutkas including tobacco and tobacco certainly fall within the definition of 'food' as it is intended for human consumption. It has been further stated that the Hon'ble Supreme Court in the case of State of Tamil Nadu v. R.Krishnamurthy¹⁸ has held that a product be classified as 'food' in case it is used for human consumption or in preparing human food. The respondent (1980) 1 SCC 167 No.3 has further brought to the notice of this Court that the Hon'ble Supreme Court in the case of Godawat Pan Masala Products I.P., Limited v. Union of India¹⁹ has held that gutka, pan masala and supari are food articles. Further, the Allahabad High Court in the case of Manohar Lal v. State of U.P., (Criminal Revision No.318 of 1982) and in the case of Khedan Lal and Sons v. State of U.P.,²⁰ relying on the decision of the Hon'ble Supreme Court in the case of R.Krishnamurthy (supra), has held that 'chewing tobacco' is an article of food.

(26) The respondent No.3 has further stated that the Food Safety Regulations, 2011 was notified on 01.08.2011 in exercise of powers conferred under Section 92 read with Section 26 of the FSS Act 2006 and Regulation 2.3.4 of the Food Safety Regulations, 2011 prohibit the use of tobacco and nicotine in all food products. It has been further stated that the FSS Act 2006 also defines the word 'ingredient' and 'food additive' and tobacco is certainly an additive, which is commonly sold under various brand names.

(27) The respondent No.3 has brought to the notice of this Court that the Hon'ble Supreme Court in (2004) 7 SCC 68 1980 CriLJ 1346 S.L.P.No.16308 of 2007, vide order dated 03.04.2013 directed the Secretaries, Health Department of all States/Union Territories to file affidavits of total compliance of the ban imposed on manufacturing and sale of gutka and pan masala with tobacco and/or nicotine. It has been further stated that in the light of the aforesaid order passed by the Hon'ble Supreme Court, all the State Governments/Union Territories have issued necessary orders/Notifications under Regulation 2.3.4 or under Section 30 of the FSS Act 2006 banning the sale of gutka and pan masala (containing tobacco or nicotine). (28) The respondent No.3 has further stated that in order to circumvent the ban on the sale of gutka, the manufacturers are selling pan masala (without tobacco) with flavoured chewing tobacco in separate sachets but often conjoint and

sold together by the same vendors from the same premises, so that consumers can buy the pan masala and flavoured chewing tobacco and mix them both and consume the same. It has been further stated that instead of earlier 'ready to consume mixes', chewing tobacco companies are selling gutka in twin packs to be mixed as one. Reference has also been drawn towards the order passed by the Hon'ble Supreme Court in the case of Central Areca-nut Marketing Corporation v. Union of India (Transfer Case Civil No.1 of 2010, dated 23.09.2016) directing the Authorities to ensure total ban and its compliance on manufacturing and sale of gutka and pan masala with tobacco and/or nicotine. The respondents have further stated that in the light of the Order passed by the Hon'ble Supreme Court, the letter dated 05.12.2016 was issued by the Ministry of Health requesting all the State Governments/Union Territories to pass necessary orders to ensure that the Order passed by the Hon'ble Supreme Court has been complied with. (29) The respondent No.3 has further stated that the COTPA 2003 is an Act enacted to discourage the use of tobacco with great emphasis on protection of children and young people from being addicted to the use of tobacco and prohibits smoking in public places, sale of tobacco products to minors and within 100 yards of any educational institution, direct and indirect advertisement, promotion and sponsorship of tobacco products and mandates display of pictorial health warnings on tobacco product packages. The respondent No.3 has further stated that the petitioners' arguments on the subject that there is a conflict between the COTPA 2003 and the FSS Act 2006 is misconstrued and they occupy different fields altogether. The respondent No.3 has placed reliance upon the judgments of the Hon'ble Supreme Court in Ajay Kumar Banerjee v. Umed Singh²¹, Khoday Distilleries Limited v. State of Karnataka²², P.N.Krishnalal v. State of Kerala²³, S.Prakash v. K.M.Kurian²⁴, Allahabad Bank v. Canara Bank²⁵, and Kerala Bar Hotels Association v. State of Kerala (Civil Appeal No.4157 of 2015, dated 29.12.2015), Centre for Public Interest Litigation v. Union of India (W.P. (C) No.681 of 2004, dated 22.10.2013), State of Maharashtra v. Sayyed Subhan (Criminal No.1195 of 2018, dated 20.09.2018), the High Court of Jharkhand at Ranchi in the case of Fariyaad Foundation v. Government of Jharkhand (W.P. (PIL) No.954 of 2019), the High Court of Madhya Pradesh, Indore Bench in the case of Amarchand Upadhyay v. Union of India (W.P.No.10998 of 2012), the High Court of Patna in the case of Lal Babu Yadav v. the State of Bihar (WP (Civil) No.10297 of 2012, dated 10.07.2012) and the High Court of Bombay in the case of M/s.Dhariwal Industries Limited v. the State of Maharashtra (W.P.No.1631 of 2012 and other connected matters).

(30) The respondent No.3 in the light of the various Judgments of the Hon'ble Supreme Court and some High Courts referred above has stated that the Notification issued by the State Government has been issued strictly AIR 1984 SC 1130 (1995) 1 SCC 574 1995 Supp (2) SCC 187 AIR 1999 SC 2094 AIR 2000 SC 1535 in consonance with the statutory provisions governing the field under the FSS Act 2006 and the gutka containing tobacco and tobacco are great threat to the public health. It is having a grave negative impact on public health and therefore, the State Government has rightly imposed reasonable restrictions in the matter of manufacture, distribution, storage, transport and sale of gutka or pan masala, which contains tobacco and nicotine as ingredients and chewing tobacco products like chap tobacco, khaini, kharra, scented/flavoured tobacco. The respondent No.3 has further stated that the petitioners have not been able to make out any case before this Court and the restriction imposed by the State is a reasonable restriction and does not warrant any interference. (31) The respondent No.6/Food Safety and Standards Authority of India has also filed a detailed counter affidavit and it has been stated that the FSS Act 2006 was enacted by the

Parliament for laying down scientifically based standards for articles of food and to regulate their manufacture, storage, distribution, sale and import and to ensure availability of safe and wholesome food for human consumption. It has been further stated that Section 92 of the FSS Act 2006 empowers the authority to make regulations with the previous approval of the Central Government and after previous publication to carry out the objects of the FSS Act 2006 and in exercise of powers conferred, the Authority notified the Food Safety Regulations, 2011. The Regulations provide for prohibition and restrictions on sale of certain products. It has been further stated that as per the Food Safety Regulations, 2011, the product should not contain any substance which is injurious to health and tobacco and nicotine shall not be used as an ingredient in any food product and therefore, as reasonable restrictions have been imposed in the interest of public at large, the question of interference by this Court in respect of the impugned Notification does not arise. It has been further stated that the Food Safety Regulations, 2011 have been issued in accordance with law in exercise of powers conferred under Section 92 read with Section 16 of the FSS Act 2006 and the Regulations provide for no anti-caking agent shall be used in any food except where anti-caking agent is specifically permitted. As per the Food Safety Regulations, 2011 use of anti-caking agent in pan masala is not permitted. (32) The respondent No.6 has also stated that as per the mandate of Section 89 of the FSS Act 2006, the Act has the overriding effect on all legislations including the COTPA 2003 and the former takes precedence over the latter Act. The respondent No.6 has also placed reliance upon the definition clause, which defines 'food' and it has been argued vehemently that pan masala with tobacco and tobacco certainly fall under the definition of 'food' as they are intended for human consumption. The respondent No.6 has also placed reliance upon the Judgments of the Hon'ble Supreme Court in the case of P.K.Tejaani v. M.R.Dange²⁶, R.Krishnamurthy (supra), Krishan Gopal Sharma v. Government of NCT of Delhi²⁷, Godawat Pan Masala Products I.P. Limited (supra), Laxmikant v. Union of India²⁸ and the Judgment of the High Court of Kerala in W.P.No.12352 of 2012 and other connected matters. (33) The respondent No.6 has also brought to the notice of this Court that Minutes of the Expert Committee constituted by the Ministry of Health and Family Welfare which has recommended a complete ban on gutka containing tobacco/tobacco products/tobacco. It has been stated that large number of people are dying out of cancer and the action taken by the State Government is in consonance with the directions issued by the Hon'ble Supreme Court from time to time. Therefore, a prayer has been made for dismissal of the writ petitions. (1974) 1 SCC 167 (1996) 4 SCC 513 (1997) 4 SCC 739 (34) Heard the learned counsel for the parties and perused the record. The writ petitions are being disposed of at admission stage with the consent of the parties. (35) The petitioners before this Court are aggrieved by Notification No.505/FSS-1/2021, dated 06.01.2021 issued by the respondent No.3/Commissioner of Food Safety, Telangana in exercise of powers conferred under Section 30 of the FSS Act 2006. The Notification dated 06.01.2021 is reproduced as under:-

"GOVERNMENT OF TELANGANA Office of the Commissioner of Food Safety, Directorate Institute of Preventive Medicine, Public Health Labs, Food (Health) Administration, Telangana State, Narayanaguda, Hyderabad - 500 029.

Food Safety and Standards - Imposition of Act, 2006 prohibition u/s 30(2) of the said Act on manufacture, storage, distribution, transportation and sale of Gutka/Pan masala which contains tobacco and nicotine as ingredients and Chewing Tobacco

products like chop tobacco, pure tobacco, Khaini, Kharra, Scented tobacco/Flavoured tobacco or by whatever name locally it is called packed in sachets/pouches/package in the entire State of Telangana - Orders - Issued.

Ref: 1. Food Safety and Standards Act, 2006.

2. Regulations 2.3.4 of FSS (Prohibition and Restriction on Sales) Regulations 2011.

3. G.O.Ms.No.01 of Health, Medical & Family Welfare (C2) Dept., dated 04.01.2016.

*** The Government of India has enacted Food Safety and Standards Act 2006 (FSS Act) to regulate and monitor the manufacturing, processing, packing, storage, transport, distribution, sale of any food or food ingredient, so as to ensure availability of safe and wholesome food for human consumption.

Whereas section 3(1)(j) of FSS Act 2006 defines that "Food" means any substance, whether processed, partially processed or unprocessed, which is intended for human consumption and includes primary food, to the extent defined in clause 3 (ZK) genetically modified or engineered food or food containing such ingredients, infant food, packaged drinking water, alcoholic drink, chewing gum, and any substance, including water used into the food during its manufacture, preparation or treatment but does not include any animal feed, live animals unless they are prepared or processed for placing on the market for human consumption, plants prior to harvesting, drugs and medicinal products, cosmetics, narcotic or psychotropic substances.

The Hon'ble Supreme Court of India in Godawat Pan Masala v. UoI (2004) 7 SCC 68, while dealing case on prohibition on sale of Gutka in the States on 02.08.2004 vide Civil Appeal No.4674 of 2004 (SLP (C) No.24449 of 2002) held that Gutka or panmasala having tobacco or nicotine are food items. Gutka/Panmasala which contain tobacco and nicotine as ingredients and Chewing Tobacco products like Chap Tobacco, Pure Tobacco, Khaini, Kharra, Scented Tobacco/Flavoured Tobacco packed in pouches/sachets/containers etc., or by whatever name it is called inherently falls within the definition of "food" as defined under Section 3(1)(j) of the FSS Act, 2006.

Scientific Reports/opinions of ICMR (Indian Council of Medical Research) and NIHFW (National Institute of Health and Family Welfare) demonstrate the extremely harmful effects of consumption of Gutka/ Panmasala/ Chewing Tobacco such as Cancers (Oral) pre-malignant lesions/conditions) - Oesophageal Cancer, Stomach Cancer, Pancreatic Cancer, Throat (pharynx and larynx) cancer, renal cancer, Non cancerous - deterioration of Oral-dental health, Hypertension & Cardiovascular diseases, Consumption of such products is injurious to health.

As per section 18(1)(a) of the FSS Act 2006, it is the Government's endeavour to achieve an appropriate level of protection of human life and health.

Whereas regulation 2.3.4 of FSS (Prohibition and restriction on sales) Regulations 2011 made under the FSS Act 2006 mandates that tobacco and nicotine shall not be used as ingredients in any food products.

Whereas the Commissioner of Food Safety has the power coupled with duty to prohibit in the interest of public health, the manufacture, storage, transportation, distribution, sale of any articles of food, either in whole of the state or any area or part thereof for such period, not exceeding one year as per clause (a) of sub-section (2) of Section 30 of FSS Act, 2006.

Accordingly the following notification will be published in the Extraordinary issue of the Telangana State Gazette.

NOTIFICATION Notification No.505/FSS-1/2021 : In exercise of the powers conferred under clause (a) of Sub-section (2) of Section 30 of Food Safety and Standards Act, 2006 read with 2.3.4 of Food Safety and Standards (Prohibition and Restriction on Sales) Regulation 2011 and in the interest of public health, the Commissioner of Food Safety, Telangana State hereby prohibits the manufacture, storage, distribution, transportation and sale of Gutka/Pan masala which contains tobacco and nicotine, as ingredients and chewing Tobacco products like chap Tobacco, Pure tobacco, Khaini, Kharra, Scented tobacco/flavoured tobacco packed in pouches/sachets/ containers etc., or by whatever name it is called in the entire State of Telangana for a period of one year with effect from 10th January, 2021."

(36) The petitioners have challenged the impugned Notification on the ground that it is illegal, unconstitutional and ultra vires the COTPA 2003 and is also in violation of natural justice and fair play. The undisputed facts of the case reveal that the Notification imposes prohibition of manufacture, storage, distribution, transportation and sale of gutka/pan masala which contains tobacco and nicotine as ingredients and chewing tobacco products like chap tobacco, pure tobacco, khaini, kharra, scented tobacco/flavoured tobacco or by whatever name locally it is called, packed in sachets/pouches/ packages in the entire State of Telangana. Meaning thereby, the sachets/pouches containing scented tobacco/tobacco and/or pan masala, which contain tobacco and nicotine are the subject matter of the Notification.

(37) It is an undisputed fact that the tobacco is the main cause of cancer and the statistics pertaining to tobacco related mortality and cancer are detailed as under:-

"Global According to the World Health Organisation (WHO), tobacco kills more than 8 million people each year.

More than 7 million of those deaths are the result of direct tobacco use while around 1.2 million are the result of non- smokers being exposed to second-hand smoke. National

- According to the National Health Mission under the Ministry of Health and Family Welfare, Government of India, mortality due to tobacco in India is established at upwards of 13.5 lakhs (Report on Global Adult Tobacco Survey GAT 2, 2016-17). If the current trend continues and

effective steps are not taken to control tobacco consumption, it is estimated that by the year 2020, tobacco use will account for 13% of all deaths in India every year.

- According to Cancer Statistics, 2020: Report for National Cancer Registry Programmes, India, based on population-based cancer registries (PBCR) data, almost one-third of the cancers were known to be associated with the use of tobacco in India. India State-level Disease Burden Initiative cancer collaborators estimated that tobacco use was the highest contributing risk factor for cancer in India.

- Available estimates in India show that smoking- attributable annual deaths were about 930,000, while the smokeless tobacco (SLT) attributable annual deaths were about 350,000, together accounting for about 12,80,000 deaths per year or approximately 3500 deaths every day. (According to Jha P, Jacob B, Gajalakshmi V et al, A Nationally Representative Case-Control Study of Smoking and Death in India. New England Journal of Medicine, 2008; 358 and Sinha DN, Palipudi KM, Gupta PC, et al. Smokeless tobacco use: a meta-analysis of risk and attributable mortality estimates for India. Indian J Cancer. 2014; 51 Suppl 1: S73-77).

- As per the WHO Global Report (2012) on "Mortality attributable to tobacco", 7% of all deaths (for ages 30 and over) in India are attributable to tobacco. Telangana

- The age adjusted mortality rate (AAMR) of Hyderabad District - reported for 2014-16 - is 4.8 per 100,00 males and 2.0 per 100,000 females. Also, the relative proportion of cancer sites associated with the use of Tobacco in Hyderabad is 42.2% in males and 13.5% in females. (According to ICMR-NCDIR, Report on Sites of Cancer Associated with Tobacco use in India-Findings from the National Cancer Registry Programme, 2021, Bengaluru, India)

- As per ICMR-NCDIR, Profile of Cancer and Related factors - Telangana (2021), the prevalence of current tobacco use (smoking and/or smokeless) in adults over 15 years of age (for 2016) is as follows:

Total - 17.8% Males - 25.9% Females - 9.8%"

National Family Health Survey - 5 (2019-2021)

- The recent survey conducted by NFHS-5 reveals that the tobacco usage among males across India was 38%, in rural areas accounting for 42.7% of users. The urban users of tobacco among men and women accounted for 28.8% and 5.4% respectively. The usage of tobacco is resulting in various kinds of cancers like breast cancers, cervical cancers and cancers of other organs.

(38) The relevant statutory provisions under the FSS Act 2006, which are necessary for proper adjudication of the present writ petitions, are reproduced as under:-

"3 (i) "extraneous matter" means any matter contained in an article of food which may be carried from the raw materials, packaging materials or process systems used for its manufacture or which is added to it, but such matter does not render such article of food unsafe;

3 (j) "food" means any substance, whether processed, partially processed or unprocessed, which is intended for human consumption and includes primary food, to the extent defined in clause 3 (ZK) genetically modified or engineered food or food containing such ingredients, infant food, packaged drinking water, alcoholic drink, chewing gum, and any substance, including water used into the food during its manufacture, preparation or treatment but does not include any animal feed, live animals unless they are prepared or processed for placing on the market for human consumption, plants prior to harvesting, drugs and medicinal products, cosmetics, narcotic or psychotropic substances.

Provided that the Central Government may declare, by notification in the Official Gazette, any other article as food for the purposes of this Act having regards to its use, nature, substance or quality.

3 (k) "food additive" means any substance not normally consumed as a food by itself or used as a typical ingredient of the food, whether or not it has nutritive value, the intentional additional of which to food for a technological (including organoleptic) purpose in the manufacture, processing, preparation, treatment, packing, packaging, transport or holding of such food results, or may be reasonably expected to result (directly or indirectly), in it or its by-products becoming a component of or otherwise affecting the characteristics of such food but does not include "contaminants" or substances added to food for maintaining or improving nutritional qualities;

3 (y) "ingredient" means any substance, including a food additive used in the manufacture or preparation of food and present in the Final product, possibly in a modified form;

3 (zc) "manufacture" means a process or adoption or any treatment for conversion of ingredients into an article of food, which includes any sub-process, incidental or ancillary to the manufacture of an article of food;

3 (zd) "manufacturer" means a person engaged in the business of manufacturing any article of food for sale and includes any person who obtains such article from another person and packs and labels it for sale or only labels it for such purposes;

3 (zk) "primary food" means an article of food, being a produce of agriculture or horticulture or animal husbandry and dairying or aquaculture in its natural form, resulting from the growing, raising, cultivation, picking, harvesting, collection or catching in the hands of a person other than a farmer or fisherman;

16 (1) Duties and functions of Food Authority.- (1) It shall be the duty of the Food Authority to regulate and monitor the manufacture, processing, distribution, sale and import of food so as to ensure safe and wholesome food.

18(1)(a) General principles to be followed in administration of Act.- The Central Government, the State Governments, the Food Authority and other agencies, as the case may be, while implementing the provisions of this Act shall be guided by the following principles, namely.-

(1) (a) endeavour to achieve an appropriate level of protection of human life and health and the protection of consumers' interests, including fair practices in all kinds of food trade with reference to food safety standards and practices;

26. Responsibilities of the food business operator.-

(1) Every food business operator shall ensure that the articles of food satisfy the requirements of this Act and the rules and regulations made thereunder at all stages of production, processing, import, distribution and sale within the businesses under his control.

(2) No food business operator shall himself or by an person on his behalf manufacture, store, sell or distribute any article of food -

(i) which is unsafe;

(ii) to (v) xxxxx

30. Commissioner of Food Safety of the State.- (1) The State Government shall appoint the Commissioner of Food Safety for the State for efficient implementation of food safety and standards and other requirements laid down under this Act and the rules and regulations made thereunder.

(2) The Commissioner of Food Safety shall perform all or any of the following functions, namely:-

(a) prohibit in the interest of public health, the manufacture, storage, distribution or sale of any article of food, either in the whole of the State or any area or part thereof for such period, not exceeding one year, as may be specified in the order notified in this behalf in the Official Gazette;

(b) carry out survey of the industrial units engaged in the manufacture or processing of food in the State to find out compliance by such units of the standards notified by the Food Authority for various articles of food;

(c) conduct or organise training programmes for the personnel of the office of the

Commissioner of Food Safety and, on a wider scale, for different segments of food chain for generating awareness on food safety;

(d) ensure an efficient and uniform implementation of the standards and other requirements as specified and also ensure a high standard of objectivity, accountability, practicability, transparency and credibility;

(e) sanction prosecution for offences punishable with imprisonment under this Act;

(f) such other functions as the State Government may, in consultation with the Food Authority, prescribe.

(3) The Commissioner of food Safety may, by Order, delegate, subject to such conditions and restrictions as may be specified in the Order, such of his powers and functions under this Act (except the power to appoint Designated Officer, Food Safety Officer and Food Analyst) as he may deem necessary or expedient to any officer subordinate to him.

97. Repeal and savings.- (1) With effect from such date as the Central Government may appoint in this behalf, the enactment and orders specified in the Second Schedule shall stand repealed:

Provided that such repeal shall not affect-

(i) the previous operations of the enactment and orders under repeal or anything duly done or suffered thereunder; or

(ii) any right, privilege, obligation or liability acquired, accrued or incurred under any of the enactment or Orders under repeal; or

(iii) any penalty, forfeiture or punishment incurred in respect of any offences committed against the enactment and Orders under repeal; or

(iv) any investigation or remedy in respect of any such penalty, forfeiture or punishment and any such investigation, legal proceedings or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed, as if this Act had not been passed:

(2) If there is any other law for the time being in force in any State, corresponding to this Act, the same shall upon the commencement of this Act, stand repealed and in such case, the provisions of section 6 of the General Clauses Act, 1897 (10 of 1897) shall apply as if such provisions of the State law had been repealed. (3) Notwithstanding the repeal of the aforesaid enactment and Orders, the licenses issued under any such enactment or Order, which are in force on the date of commencement of this Act, shall continue to be in force till the date of their expiry for

all purposes, as if they had been issued under the provisions of this Act or the rules or regulations made thereunder.

(4) Notwithstanding anything contained in any other law for the time being in force, no court shall take cognizance of an offence under the repealed Act or Orders after the expiry of a period of three years from the date of the commencement of this Act."

(39) The aforesaid statutory provisions make it very clear that 'food' as defined under Section 3(j) of FSS Act 2006, means any substance, whether processed, partially processed or unprocessed, which is intended for human consumption and includes primary food, to the extent defined in clause 3 (ZK) genetically modified or engineered food or food containing such ingredients, infant food, packaged drinking water, alcoholic drink, chewing gum, and any substance, including water used into the food during its manufacture, preparation or treatment but does not include any animal feed, live animals unless they are prepared or processed for placing on the market for human consumption, plants prior to harvesting, drugs and medicinal products, cosmetics, narcotic or psychotropic substances. Keeping in view the aforesaid definition of 'food', which is a very wide and exhaustive definition and includes any substance whether processed, partially processed or unprocessed, which is intended for human consumption, certainly includes smokeless tobacco products like gutka, pan masala, kharra, khaini or any other similar product like chewing tobacco/flavoured tobacco within the definition of 'food' under the FSS Act 2006.

(40) The Hon'ble Supreme Court in the case of R.Krishnamurthy (supra) has held that all that is required to classify a product as 'food' is that it has to be used commonly for human consumption or in preparation of human food. Not only this, the Hon'ble Supreme Court in the case of Godawat Pan Masala Products (supra) has held that gutka, pan masala and supari as food articles. The Allahabad High Court in the case of Manohar Lal v. State of U.P., (Criminal Revision No.318 of 1982) and in the case of Khedan Lal and Sons (supra) has held that 'chewing tobacco' is an article of food.

(41) The Food Safety Regulations, 2011 was notified on 01.08.2011 in exercise of powers conferred under Section 92 read with Section 26 of the FSS Act 2006 and Regulation 2.3.4 of the said Regulations expressly prohibits use of tobacco and nicotine in all food products and the same is reproduced as under.

"2.3.4 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."

(42) Not only this, the FSS Act 2006 defined 'ingredient' and 'food additive' and therefore, gutka/pan masala which contains tobacco and other kinds of tobacco products like chap tobacco, pure tobacco, khaini, kharra, scented tobacco or flavoured tobacco do fall within the definition of 'food'.

(43) The Hon'ble Supreme Court in S.L.P. No.16308 of 2007, dated 03.04.2013 has passed the following order.

"Ms. Indira Jaisingh, learned Additional Solicitor General invited the Court's attention to notifications issued by the Government of 23 States and the Administrators of 5 Union Territories for imposing complete ban on Gutkha and Pan Masala with tobacco and/or nicotine and then stated that notwithstanding the ban, the manufacturers have devised a subterfuge for selling Gutkha and Pan Masala in separate pouches and in this manner the ban is being flouted.

Ms. Indira Jaisingh also placed before the Court xerox copy of D.P.No.P.16012/12/11-Part I dated 27.08.2012 sent by the Special Secretary, Ministry of Health and Family Welfare, Government of India to the Chief Secretaries of all the States except the States of Madhya Pradesh, Kerala, Bihar, Rajasthan, Maharashtra, Haryana, Chattisgarh and Jharkhand and submitted that the Court may call upon the remaining States and Union Territories to issue necessary notifications.

In view of the statement made by the learned Additional Solicitor General, we order issue of notice to the Chief Secretaries of the States and the Administrators of the Union Territories which have so far not issued notification in terms of 2006 Act to apprise this Court with the reasons as to why they have not taken action pursuant to letter dated 27.08.2012.

We also direct the Secretaries, Health Department of all the 23 States and 5 Union Territories to file their affidavits within four weeks on the issue of total compliance of the ban imposed on manufacturing and sale of Gutkha and Pan Masala with tobacco and/or nicotine.

Put up on 03.05.2013.

The Registry is directed to send copies of this order to the Chief Secretaries and the Secretaries, Health Department as also the Administrators of Union Territories, Secretaries of the Central and State Pollution Control Board. Copies be also sent to the Commissioners of 9 Municipal Corporations named hereinabove. The copies of order be sent by fax within four days from today."

(44) The aforesaid order makes it very clear that the Secretaries, Health Department of all States/Union Territories were directed to report compliance of complete ban in respect of manufacturing and sale of gutka and pan masala with tobacco and/or nicotine. (45) Various States and Union Territories have issued necessary orders/notifications under Regulation 2.3.4 of the Food Safety Regulations, 2011 read with Section 30 of the FSS Act 2006 banning sale of gutka and pan masala (containing tobacco or nicotine). It is unfortunate that in spite of issuance of such notifications, in order to circumvent the ban of sale of gutka, the manufacturers are selling pan masala (without tobacco) with flavoured chewing tobacco in separate sachets and they are sold

together by the same vendor in the same premises so that the consumer can buy pan masala and the flavoured chewing tobacco, mix them and consume them. They are being sold in twin packs to be mixed as one. (46) Learned counsel for the petitioners has argued before this Court that there is a conflict between the COTPA 2003 and the FSS Act 2006 and no impugned Notification could have been issued under the FSS Act 2006. The arguments canvassed by the learned counsel for the petitioners are misplaced. The COTPA 2003 has been enacted with an aim and object to prohibit the advertisement of, and to provide for the regulation of trade and commerce in, and production, supply and distribution of, cigarettes and other tobacco products with an aim to discourage the use or consumption of tobacco. The object for the FSS Act 2006 is to ensure safe and wholesome food for the people. The primary concern and purpose of the FSS Act 2006 is that promotion of public health and protection of the right to life of the citizens of the country and the purpose, aim and the object of the Food Safety Regulations, 2011 is to ensure safety/health of citizens of this country by prohibiting any article of food which are injurious to the health of general public. It is an undisputed fact that tobacco products which are subject matter of the impugned Notification are injurious to general health of the public.

(47) Learned counsel for the petitioners have argued before this Court that there is a conflict between the FSS Act 2006 and COTPA 2003. Section 89 of the FSS Act 2006 makes it very clear that it has overriding effect of all the legislations including the COTPA 2003. The FSS Act 2006 has been enacted later to the COTPA 2003 and therefore, the FSS Act 2006 will prevail over the COTPA 2003. The law laid on the aforesaid issue is no longer res integra. The Hon'ble Supreme Court in Allahabad Bank (supra), Anay Kumar Banerjee (supra) and S.Prakash (supra) has held as under:-

"a. Where two Central Acts appear to be seemingly in conflict with each other, the endeavour of Court should be to harmonize the two Acts seemingly in conflict.

b. Where there is a direct conflict (repugnancy) between two special Acts, both being special laws, the following rules shall apply:

(i) The later Act will prevail over the earlier Act.

(ii) If there is a provision in one of the Acts giving overriding effect then that Act will prevail.

(iii) A later Act, even if it is a general Act, can prevail over an earlier special Act, in the case of a repugnancy if there is no express provision to the contrary in the earlier special Act."

(48) The Hon'ble Supreme Court in the case of R.Krishnamurthy (supra) has held as under:-

"7. According to the definition of "food" which we have extracted above, for the purposes of the Act, any article used as food or drink for human consumption and any article which ordinarily enters into or is used in the composition or preparation of human food is "food". It is not necessary that it is intended for human

consumption or for preparation of human food. It is also irrelevant that it is described or exhibited as intended for some other use. It is enough if the article is generally or commonly used for human consumption or in the preparation of human food. It is notorious that there are, unfortunately, in our vast country, large segments of population, who, living as they do, far beneath ordinary subsistence level, are ready to consume that which may otherwise be thought as not fit for human consumption. In order to keep body and soul together, they are often tempted to buy and use as food, articles which are adulterated and even unfit for human consumption but which are sold at inviting prices, under the pretence or without pretence that they are intended to be used for purposes other than human consumption. It is to prevent the exploitation and self- destruction of these poor, ignorant and illiterate persons that the definition of "food" is couched in such terms as not to take into account whether an article is intended for human consumption or not. In order to be "food" for the purposes of the Act, an article need not be "fit" for human consumption; it need not be described or exhibited as intended for human consumption; it may even be otherwise described or exhibited; it need not even be necessarily intended for human consumption; it is enough if it is generally or commonly used for human consumption or in the preparation of human food. Where an article is generally or commonly not used for human consumption or in the preparation of human food but for some other purpose, notwithstanding that it may be capable of being used, on rare occasions, for human consumption or in the preparation of human food, it may be said, depending on the facts and circumstances of the case, that it is not "food". In such a case the question whether it is intended for human consumption or in the preparation of human food may become material. But where the article is one which is generally or commonly used for human consumption or in the preparation of human food, there can be no question but that the article is "food". Gingerly oil, mixed or not with groundnut oil or some other oil, whether described or exhibited as an article of food for human consumption or as an article for external use only is "food" within the meaning of the definition contained in Section 2(v) of the Act."

(49) Keeping in view the aforesaid definition, the articles mentioned in the impugned Notification are certainly included within the definition of 'food' and this Court does not find any reason to interfere with the impugned Notification.

(50) Learned counsel for the petitioners has placed heavy reliance upon the Judgment delivered in the case of Godawat Pan Masala Products (supra). However, the said Judgment was delivered prior to enactment of the FSS Act 2006 and the Regulations made thereunder. The definition of 'food' under the Prevention of Food Adulteration Act, 1954 and the FSS Act 2006 are reproduced as under:-

"Definition of 'food' under the Prevention of Food Adulteration Act, 1954:

2(v) "food" means any article used as food or drink for human consumption other than drugs and water and includes-

(a) any article which ordinarily enters into, or is used in the composition or preparation of, human food,

(b) any flavouring matter or condiments, and

(c) any other article which the Central Government may, having regard to its use, nature, substance or quality, declare, by notification in the Official Gazette, as food for the purposes of this Act.

Definition of 'food' under the FSS Act 2006:-

"3 (j) any substance, whether processed, partially processed or unprocessed, which is intended for human consumption and includes primary food, to the extent defined in clause 3 (ZK) genetically modified or engineered food or food containing such ingredients, infant food, packaged drinking water, alcoholic drink, chewing gum, and any substance, including water used into the food during its manufacture, preparation or treatment but does not include any animal feed, live animals unless they are prepared or processed for placing on the market for human consumption, plants prior to harvesting, drugs and medicinal products, cosmetics, narcotic or psychotropic substances;

Provided that the Central Government may declare, by notification in the Official Gazette, any other article as food for the purposes of this Act having regards to its use, nature, substance or quality."

(51) The definition of 'food' under the FSS Act 2006 is a very wide and exhaustive definition and as per the definition under the FSS Act 2006, any substance, which is intended for human consumption is included in the definition of 'food'. Not only this, even in the case of Godawat Pan Masala Products (supra), the Hon'ble Supreme Court has held that pan masala or gutka to be covered under the definition of 'food'. However, only on a limited issue of jurisdiction, it was held that the power of prohibition is only vested with the Central Government and not with the State Food and Health Authorities. The definition of 'food' has witnessed a sea change and keeping in view Section 89 of the FSS Act 2006, as the FSS Act 2006 is having overriding effect over the other statutes, the respondent No.3/ Commissioner of Food Safety, Telangana was well within his competence to issue the impugned Notification banning the food items which are subject matter of the Notification. The Hon'ble Supreme Court in the case of Laxmikant (supra), held as under:-

"10. Therefore, the International Conference held in collaboration with the World Health Organisation was of the opinion that the ban on use of tobacco in toothpaste and toothpowder should totally be imposed since it is prone to cancer. Under these circumstances, the view taken by the Government of India imposing total prohibition

on the use of tobacco in the preparation of toothpowder and toothpaste is well justified in the public interest covered by Article 19(6) of the Constitution, though it offends the right to carry on trade guaranteed under Article 19(1) of the Constitution. The imposition of total ban is in the public interest."

(52) In the aforesaid case, total ban on use of tobacco in toothpaste and toothpowder was upheld by the Hon'ble Supreme Court even though offended the right to carry on trade guaranteed under Article 19(1) of the Constitution of India as the imposition of ban was on public interest. (53) The matter relating to imposition of restrictions on sale of pan masala containing tobacco and other tobacco products was considered by the Bombay High Court in the case of M/s.Dhariwal Industries Limited (supra). A prayer was also made to declare Regulation 2.3.4 and Regulation 3.1.7 of the Food Safety Regulations, 2011 as ultra vires and a prayer was also made for granting an interim relief. Various grounds were raised before the Division Bench of the Bombay High Court for grant of stay and the Bombay High Court in paragraph 61 has held as under:-

"61. After taking into consideration the provisions of Prevention of Food Adulteration Act, 1954 and the Rules thereunder, Food Safety and Standard Act, 2006, the Regulations made thereunder, the Cigarettes Act, 2003, the judgment of the Supreme Court in Ghodawat case and the material on record, and after considering the rival submissions and the decisions cited at the Bar, we are of the view that this is not a fit case for granting any of the interim reliefs prayed for by the petitioners. Hence, prayer for interim stay against the implementation of the impugned statutory order dated 19th July 2021 issued by the Food Safety Commissioner, Maharashtra State in public interest in exercise of the power conferred by Section 30(2)(a) of the Food Safety and Standards Act, 2006 is rejected."

(54) No interim relief was granted in respect of the Regulations. Challenges were made throughout India and various orders have been passed by the State of Telangana by which a prayer for grant of interim relief was rejected. The Bombay High Court in its recent Judgment in the case of Mohammad Yamin Naeem Mohammad v. State of Maharashtra²⁹, in similar circumstances, has exhaustively dealt with legislative competence of the State and the restrictions imposed by the State Government. Paragraphs 40 to 45 of the said Judgment are reproduced as under:-

"40. A lot has been said about COPTA, holding the field as against the FSSA. In this regard, it is material to note, that COPTA was enacted on 18/5/2003, in which Section 3 (p) defines "tobacco products" to mean the products specified in the schedule. The schedule at Serial No. 8, specifies Pan Masala or any chewing material having tobacco as one of its ingredients (by whatever named called) and at Serial No. 8 specifies Gutkha. To understand basic difference between the provisions of COPTA and FSSA, it is necessary to consider what is 2021 SCC OnLine Bom 26 contemplated by Sections 5, 6 and 7 of COTPA, which for ready reference are reproduced as under:--

5. Prohibition of advertisement of cigarettes and other tobacco products.-

(1) No person engaged in, or purported to be engaged in the production, supply or distribution of cigarettes or any other tobacco products shall advertise and no person having control over a medium shall cause to be advertised cigarettes or any other tobacco products through that medium and no person shall take part in any advertisement which directly or indirectly suggests or promotes the use or consumption of cigarettes or any other tobacco products.

(2) No person, for any direct or indirect pecuniary benefit, shall--

(a) display, cause to display, or permit or authorise to display any advertisement of cigarettes or any other tobacco product; or

(b) sell or cause to sell, or permit or authorise to sell a film or video tape containing advertisement of cigarettes or any other tobacco product; or

(c) distribute, cause to distribute, or permit or authorise to distribute to the public any leaflet, hand-bill or document which is or which contains an advertisement of cigarettes or any other tobacco product; or

(d) erect, exhibit, fix or retain upon or over any land, building, wall, hoarding, frame, post or structure or upon or in any vehicle or shall display in any manner whatsoever in any place any advertisement of cigarettes or any other tobacco product:

Provided that this sub-section shall not apply in relation to--

(a) an advertisement of cigarettes or any other tobacco product in or on a package containing cigarettes or any other tobacco product;

(b) advertisement of cigarettes or any other tobacco product which is displayed at the entrance or inside a warehouse or a shop where cigarettes and any other tobacco products are offered for distribution or sale. (3) No person, shall, under a contract or otherwise promote or agree to promote the use or consumption of--

(a) cigarettes or any other tobacco product; or

(b) any trade mark or brand name of cigarettes or any other tobacco product in exchange for a sponsorship, gift, prize or scholarship given or agreed to be given by another person.

6. Prohibition on sale of cigarette or other tobacco products to a person below the age of eighteen years and in particular area.-No person shall sell, offer for sale, or permit sale of, cigarette or any other tobacco product- (a) to any person who is under eighteen years of age, and (b) in an area within a radius of one hundred yards of any educational institution.

7. Restrictions on trade and commerce in, and production, supply and distribution of cigarettes and other tobacco products.- (1) No person shall, directly or indirectly, produce, supply or distribute cigarettes or any other tobacco products unless every package of cigarettes or any other tobacco products produced, supplied or distributed by him bears thereon, or on its label [such specified warning including a pictorial warning as may be prescribed.

(2) No person shall carry on trade or commerce in cigarettes or any other tobacco products unless every package of cigarettes or any other tobacco products sold, supplied or distributed by him bears thereon, or on its label, the specified warning.

(3) No person shall import cigarettes or any other tobacco products for distribution or supply for a valuable consideration or for sale in India unless every package of cigarettes or any other tobacco products so imported by him bears thereon, or on its label, the specified warning.

(4) The specified warning shall appear on not less than one of the largest panels of the package in which cigarettes or any other tobacco products have been packed for distribution, sale or supply for a valuable consideration.

(5) No person shall, directly or indirectly, produce, supply or distribute cigarettes or any other tobacco products unless every package of cigarettes or any other tobacco products produced, supplied or distributed by him indicates thereon, or on its label, the nicotine and tar contents on each cigarette or as the case may be on other tobacco products along with the maximum permissible limits thereof:

Provided that the nicotine and tar contents shall not exceed the maximum permissible quantity thereof as may be prescribed by rules made under this Act.

41. It would thus be apparent that Section 5 deals with prohibition of advertisement of cigarettes and other tobacco products; Section 6 deals with prohibition on sale to person below the age of 18 years and in particular area;

Section 7 deals with restrictions on trade and commerce in, production, supply and distribution of cigarettes and other products, unless every package bears the specified warning; Section 8 provides the manner in which specified warning shall be made; Section 9 provides the language of the warning; Section 10 provides size of letters and figures of the warning; Section 11 provides the testing laboratory for nicotine and tar contents; Section 13 provides for the power to seize, whereas Section 14 provides for confiscation; Section 15 speaks of an option to pay cost in lieu of confiscation; Section 17 provides for adjudication; Section 18 provides for an opportunity based upon the principles of natural justice; Section 18 provides for an appeal. The other provisions provide for punishment and forfeiture. What is material to be noted is that COPTA has not been given any overriding effect upon any other law, holding the field or which may be enacted. The regulatory mechanism in COPTA is restricted to ensuring that the sale, storage, distribution, of cigarettes and other tobacco products is not without the warning label and is to persons above the restricted age and to discourage the use of tobacco. COPTA does not deal with the long term effects

of smoking and consumption of tobacco and other products on the health of citizens.

42. As against this, the FSSA is a more comprehensive Act, dealing with the larger issue of Safety and Standards of Food in the country and in view of Regulation 2.3.4, prohibiting use of tobacco and nicotine as ingredients in any food products in the Food Safety and Standards (Prohibition and Restrictions On Sales) Regulations, 2011; by including Pan Masala in Regulation 2.11.5, Anti-caking agents in Regulation 3.1.7 in the Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011, has included tobacco and tobacco products, including Gutkha and Pan Masala within the definition of food as enumerated in Section 3 (j) of the FSSA.

43. In fact, in *Raju Laxman Pachapure v. The State of Karnataka*, [(2012) 2 FAC 378] itself, relied upon by Mr. Bhangde, learned Senior Counsel for the petitioners, the Court, while considering the provisions of the Prevention of Food Adulteration Act, 1954, the harbinger of the FSSA, in juxtaposition with those of COPTA, placing reliance upon the judgment in *Godawat Pan Masala* (supra) noticed the difference between the two enactments, as under:

"25. It is true the Apex Court in *Godawat Pan Masala's* case held that mere traces of magnesium carbonate formed during consumption of product along with lime cannot be banned, but in the instant case anticaking agent viz., magnesium carbonate is not found during consumption but the analytical report discloses that magnesium carbonate is contained in the very sample which, in our considered opinion may be either externally added or present in the raw materials. Whatsoever the case may be, the report discloses that there is usage of anticaking agent viz., magnesium carbonate in the food article in question namely gutka. That apart Supreme Court in the very same decision held that the provisions of PFA Rules framed and directions issued thereunder cannot be said as not applicable merely because licence is contemplated for manufacture of gutka under the Cigarettes and other Tobacco Products (Prohibition of Trade and Commerce, Production, Supply and Distribution) Act, 2003. The PFA Act was legislated for the prevention of adulteration of food whereas Cigarettes and other Tobacco Products (Prohibition of Trade and Commerce, Production, Supply and Distribution) Act, 2003 is intended to prohibit advertising and to regulate the trade and as such there is no conflict between the legislative objects between the two enactments."

(emphasis supplied)

44. Section 89 of the FSSA being material is reproduced as under:

"89. Overriding effect of this Act over all other food related laws.-- The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."

(emphasis supplied)

45. It is thus material to note that Section 89 of the FSSA, gives the provisions of the FSSA, an overriding effect on all other food related laws. Once it is held that tobacco and other products, fall within the definition of food as enumerated in Section 3 (j) of the FSSA, the overriding effect of Section 89 of the FSSA, would make the FSSA hold the field instead of COPTA. *Joshy K.V. v. State of Kerala, Rep. by the Secretary to the Department of Health and Welfare, Government Secretariat, Thiruvananthapuram* [(2013) 1 KLJ 428], *Omkar Agency, through its Proprietor v. the Food Safety and Standards Authority of India* [2016 SCC OnLine Pat 9231] and *Sanjay Anjay Stores v. the Union of India*, [2017 SCC OnLine Cal 16323], which take a contrary view, according to us, do not lay down the correct law.

(55) The Division Bench of the Bombay High Court has dealt with all the issues, similar to the issues raised in the present writ petitions. In the considered opinion of this Court, the question of interference by this Court in respect of Notification which is bound to save human lives cannot be faulted with in any manner. The entire globe is facing COVID-19 pandemic and the death rate on account of gutka/pan masala and other tobacco products is more than the deaths which are taking place on account of pandemic. The people are suffering from cancer and other diseases and the restriction imposed is in larger public interest and is a reasonable restriction and in no way offends the right to carry on trade guaranteed under the Constitution.

(56) In the light of the aforesaid, this Court does not find any reason to interfere with the impugned Notification and resultantly, the writ petitions are dismissed. Miscellaneous petitions, if any pending, shall stand dismissed. There shall be no order as to costs.

----- SATISH CHANDRA SHARMA, CJ

A.RAJASHEKER REDDY, J 30.11.2021 Pln Note: LR copy be marked.

(By Order) Pln