

# **S.M.Mohammed Ibrahim And Company ... vs The Designated Officer on 17 August, 2021**

**Author: Senthilkumar Ramamoorthy**

**Bench: Senthilkumar Ramamoorthy**

W.P(MD)No.269

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 17.08.2021

CORAM

THE HONOURABLE MR.JUSTICE SENTHILKUMAR RAMAMOORTHY

W.P(MD)No.2695 of 2021

and

W.M.P(MD)No.2219 of 2021

S.M.Mohammed Ibrahim and Company Private Limited,  
Represented by its Managing Director  
S.M.M.Jamal Mohamed,  
3854, South 2nd Street,  
Pudukottai.

... Petitioner

Vs.

1.The Designated Officer,  
Office of the Designated Officer,  
Department of Food Safety and Drug Administration,  
Dindigul.

2,The Food Analyst,  
Food Analysis Laboratory,  
Department of Food Safety and Drug Administration,  
Palayamkottai.

... Respondents

Prayer : Writ Petition filed under Article 226 of the Constitution of  
praying this Court to issue a Writ of Certiorari, to call for the record  
relating to Letter R.No.1246/2020 (2), dated 13.10.2020 issued by the  
respondent and Report No.0266/2020-21 in D,Dis.No.1119/A2/2020, dated  
07.10.2020 issued by the second respondent and quash the same as arbit  
and illegal.

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

1/10

For Petitioner : Mr.Joseph Prabakar  
For Respondents : Mr.R.Baskaran for R1 & R2  
Standing Counsel for State

ORDER

The petitioner challenges the communication dated 07.10.2020 of the second respondent and the subsequent notice dated 13.10.2020.

2. The petitioner is a trader of unmanufactured tobacco under the name Kalaiman. A sample of the petitioner's product was collected by the Food Safety Officer and tested at the Food Analysis Laboratory, Dindigul. Based on such test, a report was submitted by the Food Analyst on 07.10.2020. Such report sets out the contents of the petitioner's product. With regard to nicotine, the report indicates the presence thereof to the extent of 0.68%. As regards saccharin, sugar, sodium chloride and starch, the report indicates either the presence or the absence thereof. On the basis of such analysis, the Food Analyst also set out his opinion. The opinion is of particular relevance for this case and is, therefore, set out below:-

“I am of the opinion that the said sample is Unsafe under Section 3(1)(zz) of Food Safety and Standards Act, 2006 and also the sale is prohibited under Section 26(2)(iv) of Food <https://www.mhc.tn.gov.in/judis/> Safety and Standards Act, 2006 and Regulation 2.3.4 of the Food Safety and Standards (Prohibition and Restrictions on Sales) Regulation, 2011 and vide Notification No. 1418/2013/S12/FSSA dt.23 May 2020 of Commissioner of Food Safety and Drug Administration, Chennai, Tamil Nadu, since the said sample Nicotine”.

3. Pursuant thereto, by communication dated 13.10.2020, the petitioner was informed that he could appeal against the report of the Food Analyst within a period of thirty (30) days from the date of receipt thereof. The present Writ Petition is filed in the said facts and circumstances.

4. The principal contentions of the petitioner are that unmanufactured tobacco does not contain either food additives as defined under Section 3(1)(k) of the Food Safety and Standards Act, 2006 (the Food Safety Act) or ingredients as defined in Section 3(1)(y) thereof. Consequently, it is contended that it does not amount to “unsafe food” as defined in Section 3(1)(zz) thereof. By drawing reference to Section 3(1)(zz) (v), it is contended that unless a substance or an ingredient, which is not permitted, is added to an article of food, it cannot be termed as unsafe food as per the definition in Section 3(1)(zz).

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

5. With regard to the notification dated 23.05.2020, which is also adverted to in the impugned communication of 07.10.2020, the contention is that the said notification is targeted at gutkha and pan masala. In addition, the contention is that the said notification prohibits the use of tobacco and nicotine as ingredients in food products. As regards unmanufactured tobacco, which is sold by the petitioner, nicotine is not added as an ingredient thereof although traces of nicotine may be naturally found in the product. The petitioner also relies upon directions issued by the Government on 20.08.2014. By referring to the said directions, it is pointed out that the Food Safety Officers were cautioned against exceeding their jurisdiction and also instructed that farmers involved in growing tobacco and persons in associated activities do not come within the purview of the Food Safety Act. Besides, it was pointed out that the law only prohibits products that contain tobacco and nicotine as ingredients.

6. On the above basis, the petitioner contends that the impugned report and notice are entirely without jurisdiction inasmuch as they go beyond the scope of the Food Safety Act, the regulations made thereunder and even the notification dated 23.05.2020.

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

7. On the contrary, Mr.R.Baskaran, learned counsel for the State, points out that any product containing nicotine was banned by exercising powers under Section 26(2)(iv) of the Food Safety Act. By drawing reference to Notification dated 23.05.2020, he points out that the ban period has been extended thereby for a period of one year from 23.05.2020. Consequently, he states that the petitioner's products were seized during such ban period. In addition, by drawing reference to the counter-affidavit, he submits that the ban would apply to any food product which contains tobacco or nicotine. In effect, it is stated that if tobacco or nicotine is ingested through the mouth, it is considered as food and is within the scope and ambit of the prohibition.

8. Upon considering the rival contentions, the first aspect that should be noticed is that the Food Safety Act provides for an appeal against the report of the Food Analyst. Section 46(4) of the Food Safety Act provides as under “46.Functions of Food Analysts:-

1...

2....

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

3...

4. An appeal against the report of the Food Analyst shall lie before the Designated Officer who shall, if he so decides, refer the matter to the referral food laboratory as notified by the food authority for opinion.”

9. In view of the existence of a statutory remedy, the Court in exercise of judicial review under Article 226 of the Constitution would be reluctant to interfere unless the petitioner demonstrates that the facts and circumstances warrant interference notwithstanding the existence of a statutory remedy. The Court interferes when principles of natural justice are violated, when fundamental rights are infringed and the like. The contentions of the petitioner in this case should be tested against the above backdrop.

10. As stated earlier, the principal contention of the petitioner is that unmanufactured tobacco does not contain food additives or ingredients. Consequently, it is stated that such unmanufactured tobacco cannot be classified as unsafe food. Section 26(2) sets out five circumstances under which the manufacture, storage, sale or distribution of food is not permitted. <https://www.mhc.tn.gov.in/judis/> One such circumstance is when food is unsafe and another is when the relevant food product is prohibited by the food authority or the Central Government or the State Government in the interest of public health.

11. Therefore, even without examining whether the food is unsafe, it becomes necessary to examine whether there is a prohibition. The notification dated 23.05.2020 reads, in relevant part, as under:

“NOW THEREFORE, in exercise of the powers conferred by Clause (a) of Sub-Section (2) of Section 30 of the Food Safety and Standards Act, 2006 (Central Act 34 of 2006), the Commissioner of Food Safety of the State of Tamil Nadu, in the interest of public health, hereby prohibits the manufacture, storage, transport, distribution or sale of all food products chewable or otherwise which is either flavoured or scented or mixed with any of the said additives, and whether going by the name or form of gutkha, pan masala or scented food products or chewable food products by whatsoever name called, whether packaged or unpackaged and / or sold as one product or though packaged as separate products, sold or distributed in such a manner so as to easily facilitate mixing by the consumer and any other food products containing tobacco and /or nicotine <https://www.mhc.tn.gov.in/judis/> as ingredients by whatsoever name it is available in the whole of the State of Tamil Nadu for a further period of one year with effect from 23.05.2020.”

12. In the light of the aforesaid prohibition, the question that arises for consideration in the context of this case is whether it can be said that the impugned notices were issued ex facie without jurisdiction. The Prohibitory Order uses the expansive words “and any other food products containing tobacco and / or nicotine as ingredients”. In view thereof, it cannot be said that the impugned notices were issued ex facie without jurisdiction. The petitioner contends that the prohibition would apply only if nicotine is contained as an ingredient. This contention would have to be tested by the statutory authority after referring the sample for subsequent analysis, if deemed necessary, In any event, as stated above, it certainly cannot be concluded that the impugned notices were issued ex facie without jurisdiction so as to warrant interference at this stage in judicial review.

13. For the reasons aforesaid, W.P.(MD).No.2695 of 2021 is disposed of by leaving it open to the petitioner to challenge the impugned communications by way of a statutory appeal under the Food

Safety and <https://www.mhc.tn.gov.in/judis/> Standards Act, 2006. There will be no order as to costs. Consequently, W.M.P.(MD).No.2219 of 2021 is closed.

17.08.

Index : Yes / No  
Internet : Yes/ No  
tsg

NOTE: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the

responsibility of the advocate/litigant concerned. To

1.The Designated Officer, Office of the Designated Officer, Department of Food Safety and Drug Administration, Dindigul, 2,The Food Analyst, Food Analysis Laboratory, Department of Food Safety and Drug Administration, Palayamkottai.

<https://www.mhc.tn.gov.in/judis/> SENTHILKUMAR RAMAMOORTHY, J.

tsg 17.08.2021 <https://www.mhc.tn.gov.in/judis/>