

M/S Jaiswal Products(Manufacturer) vs / on 3 September, 2024

Author: G.Jayachandran

Bench: G.Jayachandran

Crl.O.P.N

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :12.08.2024

Pronounced on :03.09.2024

Coram

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Crl.O.P.No.8080 of 2024

and

Crl.M.P.No.5889 of 2024

M/s Jaiswal Products(Manufacturer)
(Rep.by its Authorised Signatory Mr.Yakob)
G-82, Preet Vihar, Delhi 110 092.

.. Petitioner/
1st Accused

/versus/

The State of Tamil Nadu,
The Food Safety Officer,
Code No.418, Sathyamangalam Municipality and District
O/o Tamil Nadu Food Safety and Drug Administration,
District Government Head Hospital Complex,
Erode 638 009.

.. Respondent/
Complainant

1/31

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

Crl.O.P.

Criminal Original Petition has been filed under Section 133 Cr.P.C., to call for the record and quash the charge sheet in S.T.C.No.1130 of 2018 pending on the file of Judicial Magistrate, Sathyamangalam,

For Petitioner :Mr.D.Saikumaran and
Mr.L.Goutham Raj

For Respondent :Mr.P.Kumaresan, AAG-VII
Asst.by
Mr.S.Udaya Kumar
Govt.Advocate (Crl.Side)

ORDER

On 26.06.2018, the Food Safety Officer, having jurisdiction over Sathyamangalam Municipal Area, Erode District, inspected a shop owned by one L.Ravi, S/o Shanmugam, who was selling the food products without license under FSS Act. In the course of inspection, it was found that hans chhap tobacco has been manufactured by the petitioner and stocked without any purchase bill. Totally 8 pockets, each containing 300 grams of hans chhap tobacco was purchased for analysis and from it, samples were drawn. <https://www.mhc.tn.gov.in/judis> The drawn sample was tested by the State Laboratory and the report disclosed that it contains nicotine, an unsafe food.

2. For manufacturing the unsafe food and for selling the unsafe food, the complaint has been filed by the Food Safety Officer for offences under Sections 58, 59(i) and 63 of Food Safety and Standards Act 2006, against the manufacturer and the seller.

3. The complaint taken on file by the Judicial Magistrate, Sathyamangalam, Erode in S.T.C.No.1130 of 2018. The said complaint is impugned in Crl.O.P.No.8080 of 2024 by the petitioner, who is the manufacturer of the banned product.

The case of the petitioner:

4. The petitioner is a registered manufacturer under Excise Act and GST Act, carrying on the business in trading of tobacco under the name, "hans chhap tobacco". The complaint is based on the strength of an order <https://www.mhc.tn.gov.in/judis> passed by the State Government under FSS Act and Rules 2.3.4 of the Food Safety and Standards (Prohibition and Restrictions on Sales) Regulations Act, 2011. As a matter of fact, the tobacco does not fall within the definition of 'Food' to invoke the above provision. Therefore, initiating action under the Food Safety Act, itself is baseless and without any legal sanction.

5. On 25/03/2015, the Department of Food Safety, Government of NCT, Delhi issued a Notification in exercise of power under Section 30(2)(a) of Food Safety and Standards Act, 2006 (in short 'FSS' Act) prohibiting manufacture/storage/distribution/sale of tobacco, which is either flavoured,

scented or mixed with any of such additives, whether going by any name or form of gutka, pan masala, flavoured/scented tobacco, kharra or otherwise 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 consumer. This Notification was stayed by Delhi High Court in <https://www.mhc.tn.gov.in/judis> W.P.(C).No.3362/2015 M/s Suganthi Snuff king (P) Ltd and others -vs- Commissioner (Food Safety), Govt. of NCT, Delhi on the ground of competency to issue the notification impugned. Since then, there is no legal impediment for manufacturing or distributing or sale of chewing tobacco in Delhi. The petitioner herein also obtained interim stay of the above said Notification in W.P.(C).No.6018/2019 and W.P.(C)No.6019/2019.

6. The above writ petitions and batch of similar writ petitions came to be finally disposed by the Delhi High Court on 22/09/2022. The Learned Judge, held that Food Safety and Standards Act, 2006 (FSS Act) and Cigarette and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 (herein after referred as "COTPA") occupy different fields (i.e) FSS Act applies to food industry, while COTPA applies to tobacco industry. Therefore, tobacco cannot be construed as food within the meaning of FSS Act. Hence, declared that the Notification issued by the Food Safety Department is clear abuse of the power.

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

7. Though the above judgment dated 23/09/2022 was later set aside by the Division Bench of the Delhi High Court on 01/04/2023, the same is challenged before the Hon'ble Supreme Court in S.L.P.(C)Nos.5140- 5142/2023. The impugned judgment as well as the Notifications are stayed until further orders. Since on the date of seizure and as well as on the date of complaint, there was stay of the Notification issued by the Government of NCT, Delhi, the complaint laid against the petitioner for manufacturing and distributing their product is not sustainable. Without proper appreciation and understanding of the provision of law, the complaint been registered under the premises that tobacco is a food product and the petitioner has manufactured unsafe food product. On presumption and assumption that 'hans chhap tobacco' manufactured by the petitioner is a food product, they are prosecuted under the FSS Act, which is untenable under law and on facts.

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

8. The Learned Counsel for the petitioner contended that as far as the product of the petitioner, it is covered under COTPA Act. There is a clear distinction between the term 'tobacco' and 'food product'. Unless tobacco is mixed in a food product, the petitioner cannot be implicated for manufacturing unsafe food.

9. The Learned Counsel for the petitioner also brought to the notice of this Court, that the Government of Telangana, issued similar Notification prohibiting manufacture, storage, distribution, transportation and sale of gutka/panmasala containing 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., for a period of one year with effect from 10.01.2023. This Notification was stayed by the Hon'ble Supreme Court in Special Leave to Appeal(C) No.20441/2019, Sri Venkateshwara Traders v. State of Telangana. In many States in India, including Delhi, Andra Pradesh and Karnataka, there is no <https://www.mhc.tn.gov.in/judis> prohibition for manufacturing or selling chewing tobacco. In fact, they are duly registered under the GST Act and Excise Act, paying tax for their product, which is primarily tobacco and covered under COTPA and not under FSS Act.

10. The learned counsel appearing for the petitioner, referring few more orders passed by this court drawing similarity with the IMFL manufactured and sold in neighbouring Union Territory of Puducherry, which are transported clandestinely into Tamilnadu and sold illegally, contended that for such illegal sale at prohibited state, the manufacturers are not prosecuted. The liquor company which manufactures and sell in the territory which permits such manufacturing and sale, cannot be prosecuted for the mere presence of their product in the States where there is a prohibition.

11. There is no material to prove that the manufacturers directly or knowingly sell the product in the State where the sale of the product is <https://www.mhc.tn.gov.in/judis> lawfully prohibited. Therefore the complaint by the Food Safety Officer who has no competency and no evidence to link the seller at Tamilnadu with the manufacturer at Delhi, has to be quashed.

12. According to the Learned Counsel for the petitioner, the ban on manufacturing and sale of tobacco product itself is contrary to the fundamental right guaranteed under Article 14, 19(1)(g) and 21 of the Constitution of India. The issue whether the chewing tobacco falls under FSS Act or COTPA is subjudice before the Supreme Court in Dharampal Satyapal Limited -vs- Commissioner of Food Safety case. That apart, when there is no nexus between the seller from whom the product seized and the petitioner, the prosecution is liable to be quashed.

Case of the Respondent:

13. Thiru. P.Kumerasan, the Learned Additional Advocate General, submitted that, the petitioner by misleading the courts as if they are not manufacturing food products had obtained orders despite the fact that their <https://www.mhc.tn.gov.in/judis> product pouch itself declares that " do not swallow/use as ingredient in any food (not edible)."

14. The lab report of the samples drawn from the product invariably says, Hans Chaap tobacco contains nicotine between 1.3% and 2.34%, if used as ingredient in any food, is injurious to health. While sale of chewable tobacco is banned in Tamilnadu and the sample drawn declared as unsafe by the lab, the petitioner's company is liable to be prosecuted.

15. As far as the competency of the Food Safety Department to issue the prohibitory notification, the Division Bench of this Court in J.Anbalagan

-vs- Union of India (2018 (3) CTC 449) after harmonising the two Acts (ie) FSS Act and COTPA, has categorically held that chewable tobacco is a "food product". Further, the Government of India has

issued a clarificatory circular on 17/08/2022, wherein the judgement of the Hon'ble Supreme Court rendered in Godawat Pan Masala -vs- Union of India (AIR 2004 SC4057) declaring 'chewing tobacco' is 'food' is referred and laboratories in <https://www.mhc.tn.gov.in/judis> India are advised to analyse the samples of chewing tobacco and tobacco products and send their report to the Food Safety Departments of States/Union Territories.

16. The petitioner being the manufacturer of the product prohibited for sale in Tamilnadu, bound to explain how their product found way to Tamilnadu. They are supposed to provide the details about their distribution of the product with sales invoice containing batch number, date of manufacturing and expiry date etc., to show that they distributed the products only to the State where there is no prohibition. Strangely, in all these cases, the petitioner have not disclosed any of these details to the Food Safety Officers who issued show cause notice before launching prosecution. Huge quantity of banned product found across the State cannot be construed as sold or transported to Tamilnadu without the connivence of the manufacturers. The product of the petitioner seized from the sellers in Tamilnadu cannot be without nexus. Anything contrary has to be proved by the petitioner in the course of trial.

<https://www.mhc.tn.gov.in/judis> Analysis and Finding:-

17. The tobacco is a natural product, which contains nicotine. Nicotine is a stimulant and anxiolytic. It is also a highly addictive chemical compound. A prime cause for cancer. Tobacco is either used for smoking or chewing. In Olden days, dried tobacco leaves were used to be soaked in jaggery water to reduce bitterness and make it palatable. However, presently, chewing tobacco are processed mechanically and nicotine extracts are added for high performance. Lab test indicates that nicotine in smokeless tobacco products naturally will contain 0.8mg/g to 50.0mg/g. Whereas chewing tobacco sold in market range from 1.3% to 4.6%.

18. Based on the scientific reports regarding injurious nature of tobacco with nicotine, legislation been passed in respect of regulating cigarettes and other tobacco products as well as the tobacco product containing nicotine used as an ingredient for food products. Ban orders passed by various States in exercise of the power under Regulation 2.3.4 of <https://www.mhc.tn.gov.in/judis> Food Safety and Standards (Prohibition and Restructuibs on Sales) Regulations, 2011.

19. In Ankur Gutkha v. Indian Asthama Care Society & Ors in Special Leave to Appeal (Civil)No.16308 of 2007, dated 03.04.2013, it was brought to the notice of the Hon'ble Supreme Court that to flout the ban on manufacturing gutkha and pan masala with tobacco or/and nicotine, the manufacturers have devised a subterfuge for selling gutkha and pan masala in separate pouches. Taking note of the above fact, vide order dated 03.04.2013, the Hon'ble Supreme Court directed the States and Union Territories to file affidavit 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.

20. In reverence to the Hon'ble Supreme Court direction, the State of Tamil nadu issued Notification on 23.05.2013, which reads as under:-

"ORDER:

<https://www.mhc.tn.gov.in/judis> WHEREAS regulation 2.3.4 of the Food Safety and Standards (Prohibition and Restrictions on Sales) Regulations, 2011, made by the Food Safety and Standards Authority of India in exercise of the powers conferred by clause (i) of Sub-Section (2) of Section 92, read with Section 26 of the Food Safety and Standards Act, 2006(Central Act 34 of 2006) provides that tobacco and nicotine shall not be used as ingredients in any food products, as they are injurious to health.

AND WHEREAS, gutkha and panmasala are food products in which tobacco and nicotine are widely used as ingredients now a days;

AND WHEREAS, it is expedient to prohibit gutkha and panamasla in the State of Tamil Nadu, being food products in which tobacco and nicotine are widely used as ingredients;

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, distribution or sale of gutkha and panmasala and any other food products containing tobacco or nicotine as ingredients, by whatsoever name it is available in the market, in the whole of the State of Tamil Nadu for a period of one year from the date of issue of this order".
<https://www.mhc.tn.gov.in/judis>

21. The above prohibitory order has been renewed year by year and the latest Notification issued on 23.05.2024 will be in force upto 23.05.2025.

22. Taking into consideration of the subsequent direction of the Hon'ble Supreme Court vide its order dated 23.09.2016, the prohibitory Notification was issued on 23.05.2018, which reads as below:

"THE COMMISSIONER OF FOOD SAFETY AND DRUG ADMINISTRATION,
TAMIL NADU STATE BAN OF MANUFACTURE, STORAGE, TRANSPORT,
DISTRIBUTION OR SALE OF CHEWABLE FOOD PRODUCTS, GUTKHA,
PANMASALA CONTAINING TOBACCO AND NICOTINE AS "INGREDIENTS" IN
THE STATE OF TAMIL NADU FOR A PERIOD OF ONE YEAR FROM 23rd MAY
2018 UNDER THE FOOD SAFETY AND DRUG ADMINISTRATION ORDER.

(No. 1418/2013/S8/FSSA) No. VI(1)/184(a)/2018.

WHEREAS, Regulation 2.3.4 of the Food Safety and Standards (Prohibition and Restrictions on Sales) Regulations, 2011 made by the Food Safety and Standards Authority of India in exercise of the powers conferred by clause (i) of subsection (2) of Section 92 read with Section <https://www.mhc.tn.gov.in/judis> 26 of Food Safety and Standards Act, 2006 (Central Act 34 of 2006) prohibit as tobacco and nicotine

shall not be used as ingredients in any food products, as they are injurious to health:

AND WHEREAS, any article of food as defined in Section 3 (1) (j) of Food Safety and Standards Act 2006;

AND WHEREAS, "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 as per Section 3 (1) (y) of Food Safety and Standards Act 2006, Rule 1.2.1 of the Food Safety and Standards (Prohibition and Restrictions on Sales) Regulations, 2011;

AND WHEREAS, food containing tobacco and nicotine as "ingredient" are widely used now-a-days which are easily available in different brand names for sale in the market. For which school students, children, younger, coolies and hard labourers are affected and caused injurious to their health;

AND WHEREAS, Gutkha and Panmasala are food products in which tobacco and nicotine are widely used as ingredients now-a-days:

AND WHEREAS, it is expedient to prohibit Gutkha and Panmasala in the State of Tamil Nadu, being food products in which tobacco and nicotine are widely used as ingredients;

<https://www.mhc.tn.gov.in/judis> AND WHEREAS, consumption of the above such products will endanger human health and well being and whereas, if consumption of these food articles is allowed without prohibition the well being of current and future generation will be compromised and hence it has to be prohibited.

The Hon'ble Supreme Court of India in Central ARECANUT Marketing Corporation and Others Vs. Union Of India (Transfer case (c) 1 of 2010) in its order dated 23-09-2016 observed that to circumvent the ban on the sale of Gutkha, the manufacturers are selling panmasala (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. Hence, instead of the earlier "ready to consume mixes", chewing tobacco companies are selling Gutkha in twin packs to be mixed as one".

The Hon'ble Supreme Court of India in view of the above has directed the concerned statutory authorities to comply with the above mandate of law of regulation 2.3.4 and directed the secretaries, health department of all the states and union territories to ensure total compliance of the ban imposed on manufacturing and sale of Gutkha and panmasala with tobacco and/or nicotine.

<https://www.mhc.tn.gov.in/judis> On compliance of the directions given by the Hon'ble Supreme Court of India, in its interim order dated 23-09-2016 in Transfer Case (Civil) No. 1/2010, The FSSAI's issued a letter dated 5th October 2016 and 9th October, 2017 vide file No.13(25)2017/Tobacco Issues/RCD/FSSAI, The Secretary Department Health and Family Welfare, Government of India issued a letter dated 5th December 2016 vide D.O.No.16019/2/2014-PH-I, and in pursuance of regulation 2.3.4 of the Food Safety and Standards (Prohibition and Restrictions on Sales) Regulation, 2011, manufacture, storage, transport, distribution or sale of all food products chewable or otherwise, which is either flavoured, scented or mixed with any of the said additives, and whether going by the name or form of gutkha, panmasala, flavoured or scented chewable food products, by whatsoever names 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 which contains tobacco and/or nicotine as ingredients.

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 <https://www.mhc.tn.gov.in/judis> 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, panmasala, flavoured 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 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 23-05-2018."

23. It is also relevant to place on records that the Government of India through its Health and Family Welfare Department, issued a Circular dated 05.12.2016 to all the Chief Secretaries of the States and Union Territories, except Bihar, Karnataka, Mizoram, Madayapradesh and Kerala, to issue necessary orders in complaine to the Hon'ble Supreme Court order dated 23.09.2016. In that communication, the Government of India had reinforced the need to ban chewing tobacco product as follows:-

<https://www.mhc.tn.gov.in/judis> "Tobacco use is the foremost preventable cause of death and disease globally as well as in India. As per the Global Audit Tobacco Survey - India (GATS) 2010, smokeless tobacco/chewing forms are the most prevalent forms with 206 million Indians using it. As such the consequent burden of mortality and morbidity due to consumption of smokeless tobacco is very high in India. Available evidence suggests that India shares the maximum burden of oral cancer in the World.

The Food Safety Standards Authority of India (FSSAI) has issued the Food Safety and Standards (Prohibition and Restrictions on Sales) Regulations, 2011, dated 1st August, 2011 in exercise of power conferred under the Food Safety & Standards Act, 2006. Regulation 2.3.4 thereof says that tobacco and nicotine shall not be used as ingredients in any food products. Thus, Regulation 2.3.4 bans sale of all food products where tobacco is present as ingredient in the final product, whether going by the name of gutka, pan masala or zarda.

However, to circumvent the ban on the sale of gutka, the manufacturers are selling pan masala (without tobacco) with flavoured chewing tobacco in separate sachets. Often these sachets are 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 and consume the same. Hence, instead of the earlier "ready to consume mixes", chewing tobacco companies are selling gutka in twin packs to be mixed as one."

24. As far as the State of Tamil Nadu, despite ban on manufacturing/stock/sale of chewing tobacco product with nicotine was in force, the sale of the banned product was prevalent and omnipresence. The then Member of Legislative Assembly of the opposition party filed a PIL to direct the Government to take necessary steps to eradicate the banned product and to order CBI enquiry. In the said Writ Petition, in *J.Anbazhagan v. The Union of India and others* in W.P.No.19335 of 2017 dated 26.04.2018, the Hon'ble Division Bench of this Court issued the below direction:-

"142. Investigation by a centralized agency like the CBI would be more comprehensive and cover all aspects of the illegal manufacture, import, supply, distribution and sale of banned chewable tobacco items, including the detection of all those involved in such illegal import, manufacture, supply, distribution and sale, as also the detection of corruption and complicity of public servants and/or government servants in this regard. As observed <https://www.mhc.tn.gov.in/judis> above, there is no conflict between CBI investigation and investigation by the State machinery. Investigation can be carried out more effectively with the CBI and the Vigilance Department working in cooperation.

143. The underground gutkha business is a crime against society which needs to be curbed. We, therefore, deem it appropriate to direct the CBI to investigate into all aspects of the offence of illegal manufacture, import, supply, distribution and sale of gutkha and other forms of chewable tobacco which are banned in the State of Tamil Nadu and the Union Territory of Puducherry, including detection of and action against those involved in the offence as aforesaid, whether directly or indirectly, by aiding abetting the offence or interfering with attempts to curb the offence.

144. This order is, in our view, not only imperative to stop the menace of the surreptitious sale of gutkha and chewable forms of tobacco which pose a health hazard to people in general and in particular the youth and to punish the guilty, but also to instil faith of the people in the fairness and impartiality of the investigation.

We see no reason for the State to view the entrustment of investigation to the CBI as an affront to the efficiency or efficacy of its own investigation system and we make it absolutely clear that this direction is not to be construed as any definite finding of this Court of the complicity of <https://www.mhc.tn.gov.in/judis> any constitutional functionary or of any specific official of the State Government".

25. Whiles, in a subsequent case, Designated Officer, the Food Safety and Drugs Control Dept. Office of the Food Safety and Standard Authority, 38, II Floor, Collectorate Building, Villupuram District 605 602 vs. Jayavilas Tobacco Traders LLP rep.by its Partner, Mr.A.Prabaharan reported in [2023/MHC/259], the Division Bench of this Court considering the judgment in J. Anbazhagan case (cited supra) held that:-

"11.7. In the light of the above pronouncement of a Division Bench of this Court which is binding on us, we are not persuaded to accept the contention of the learned Senior Counsel for the petitioner and the respondent in the Writ Appeal that Tobacco without any additives cannot fall within the meaning of Food as defined under Section 3(j) of the FSS Act. In fine, we conclude that Tobacco with or without any additives would fall within the definition of food under Section 3(j) of FSS Act. We have already extracted the definition as found in Section 3(j) of FSS Act, the definition in our opinion is wide enough to include Tobacco.

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

26. At the same time, the Hon'ble Division Bench has expressed its doubt regarding power of the executive to issue Notification periodically imposing an almost permanent ban on tobacco product with nicotine used as an ingredient to any food product. Therefore, quashed the ban Notification on the ground that it is in excessive power conferred under Section 30(2)(a) of the Food Safety and Standards Act.

27. This portion of the Hon'ble Division Bench order is stayed by the Hon'ble Supreme Court in State of Tamil Nadu v. Jayavilas Tobacco <https://www.mhc.tn.gov.in/judis> Traders LLP & Anr in Special Leave to Appeal (C)Nos. 5140-5142 of 2023, dated 25.04.2023.

28. For ease reference, the relevant portion of the Hon'ble Division Bench of this Court and the interim order of the Hon'ble Supreme Court is extracted below:-

(i) Designated Officer, the Food Safety and Drugs Control Dept. Office of the Food Safety and Standard Authority vs. Jayavilas Tobacco Traders LLP rep. by its Partner, Mr. A. Prabakaran reported in [2023/MHC/259], "13. We are therefore constrained to conclude that the successive notifications issued by the Commissioner of Food Safety relying upon Regulation 2.3.4 are not within the powers of the Commissioner and the Commissioner, Food Safety has exceeded its powers in issuing such successive notifications. We therefore quash the notifications on the ground that they are in excess of the powers of the Commissioner, Food Safety."

(ii) State of Tamil Nadu v. Jayavilas Tobacco Traders LLP & Anr in <https://www.mhc.tn.gov.in/judis> Special Leave to Appeal (C) Nos. 5140-5142 of 2023, dated 25.04.2023, "we are of the view that the petitioner has made out a case for the grant of interim relief."

There will be a stay of the impugned judgment dated 20.01.2023 insofar as it is contained in paragraph 13 of the impugned judgment.

We, however, would make it clear that in case the respondents have a case that their acts or operations are not covered by the notification issued under Section 30(2)(a) of the Food Safety and Standards Act, 2006, they may seek redress in the appropriate forum."

29. Two Division Bench of this Court in (1) J. Anbazhagan case (cited supra) and (2) The Designated Officer, the Food Safety & Drugs Control Department (cited supra), had consistently held that the tobacco with or without any additives is a "food product" as defined under Section 3(j) of Food Safety and Standards Act.

30. Thus, from the line of judgments discussed above, there can be no doubt regarding the power of the Government to issue Notification to ban <https://www.mhc.tn.gov.in/judis> tobacco product with nicotine used as an ingredient to any food.

31. The manufacturer of the banned product is liable to face the prosecution since their product which is a chewable tobacco with nicotine is a food and the Hon'ble Supreme Court in its interim order dated 25.04.2023 has given liberty to the respondent (chewing tobacco manufacturers) to seek redressal before the appropriate forum if they have a case that their acts or operations are not covered by the Notification issued under Section 30(2) of the FSS Act.

32. The next question to answer is whether there is nexus between the manufacturer and the person, from whom the banned product seized.

33. It is pertinent to note that soon after the seizure, the manufacturer been put to notice by the Food Safety Officer regarding the seizure and called for his explanation. Being the manufacturer of the product, the <https://www.mhc.tn.gov.in/judis> petitioner has the exclusive knowledge and information about the manner in which the product was cleared from their manufacturing unit. Being a registered dealer under GST and Excise Act, they are supposed to maintain register for their product including Batch No./Lot No./Code invoice number for the sale etc. These informations

which are within the exclusive knowledge of the manufacturer were not disclosed, when the Food Safety Officer sought for explanation through a show cause notice. Without disclosing the information, which are within his exclusive knowledge, he cannot take a plea that there is no nexus between them(manufacturer and stockist).

34. Section 109 of the Bharatiya Sakshya Adhiniyan, 2023(106 of the Indian Evidence Act, 1872) reads as below:-

"109. Burden of proving fact especially within knowledge:- When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

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

35. In all these cases, the manufacturer, who is supposed to disclose about the detail to whom they sold the product, had kept silent and the silence leads to statutory presumption that the product was knowingly distributed in a State, where there is a ban.

36. As permitted by the Hon'ble Supreme Court in the interim order dated 25.04.2023, before the appropriate forum (i.e.) before the trial Court, the petitioner can place all the documents either to prove that the product does not contain tobacco or nicotine and/ or prove that they have not sold the product to the person or dealer in Tamil Nadu either directly or through their agent. Being purely a question of fact, the criminal prosecution against this petitioner cannot be quashed.

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

37. As a result, this Criminal Original Petition stands dismissed. Consequently, connected Miscellaneous Petition is closed.

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

1.The Judicial Magistrate, Sathyamangalam, Erode

2. The Food Safety Officer, Code No.418, Sathyamangalam Municipality and District O/o Tamil Nadu Food Safety and Drug Administration, District Government Head Hospital Complex, Erode 638 009.

3.The Public Prosecutor, High Court, Madras.

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

ari Delivery Order made in and 03.09.2024 <https://www.mhc.tn.gov.in/judis>