

Nagoorkani vs The Commissioner on 2 January, 2024

Author: G.R.Swaminathan

Bench: G.R.Swaminathan

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 22.12.2023

Pronounced on : 02.01.2024

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THE HON'BLE MR.JUSTICE G.R.SWAMINATHAN

WP(MD)Nos.30871 and 30873 of 2023

and

WMP(MD)Nos.26498 and 26507 of 2023

Nagoorkani

... Petitioner in WP(MD)No.30871

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...Petitioner in WP(MD)No.30873 o

Vs.

1.The Commissioner,
Tamil Nadu Food Safety and Drug
Administration,
DMS Campus, 5th Floor,
No.359, Annasalai, Tyanampet,
Chennai – 6.

2.The Designated Officer,
Tamil Nadu Food Safety and Drug
Administration Department,
Food Safety Wing, Trichy District.

... Respo

Common Prayer : Writ Petitions filed under Article 226 of the Constitution of India praying to issue a Writ of Mandamus to direct the respondents here to remove the seal put on the petitioner shop at situated at Thuvakudi, Thanjavur Main Road, Trichy District forthwith on the basis of the petitioner's representation dated 18.12.2023.

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

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in both cases : -

For Petitioners : Ms.B.Jameel Arasu

For Respondents : Mr.Veera Kathiravan,
Additional Advocate General assisted
Mr.K.Balasubramani,
Special Government Pleader for R1 and

COMMON ORDER

The writ petitioners are running petty shops. On 16.12.2023, the second respondent and a team of officials inspected their shops. According to the second respondent, the petitioners were keeping banned tobacco products for sale. The shops were also locked and sealed. Seeking removal of the seals, the present writ petitions came to be filed.

2.The learned counsel appearing for the petitioners reiterated all the contentions set out in the affidavits filed in support of the writ petitions and called upon this Court to grant relief as prayed for.

3.The learned Additional Advocate General submitted that the petitions deserve summary dismissal. He pointed out that sale of gutka and such other products is having a serious bearing on public health. He submitted that such <https://www.mhc.tn.gov.in/judis> acts constitute a menace to the society. The statutory provisions set out in the Food Safety and Standards Act, 2006 and the rules framed thereunder empower the designated officer to lock and seal the premises where the contraband is kept. He relied on the order dated 13.12.2023 made in WP No. 34737 of 2023 and 23.12.2020 made in WP(MD)No.14618 of 2020 etc., He called upon this Court to dismiss the writ petitions.

4.I carefully considered the rival contentions and went through the materials on record. Section 38 of the Food Safety and Standards Act, 2006 sets out the powers of Food Safety Officer. It is as follows :

“38. Powers of Food Safety Officer.

(1) The Food Safety Officer may – (a) take a sample – (i) of any food, or any substance, which appears to him to be intended for sale, or to have been sold for human consumption; or (ii) of any article of food or substance which is found by him on or in any such premises; which he has reason to believe that it may be required as evidence in proceedings under any of the provisions of this Act or of the regulations or orders made thereunder; or

(b) seize any article of food which appears to the Food Safety Officer to be in contravention of this Act or the regulations made thereunder; and

(c) keep it in the safe custody of the food business operator such article of food after taking a sample; and in both cases send the same for analysis to a Food Analyst for the local area within which such sample has been taken: Provided that where the Food Safety Officer keeps such <https://www.mhc.tn.gov.in/judis> article in the safe custody of the food business operator, he may require the food business operator to execute a bond for a sum of money equal to the value of such article with one or more sureties as the Food Safety Officer deems fit and the food business operator shall execute the bond accordingly.

(2) The Food Safety Officer may enter and inspect any place where the article of food is manufactured, or stored for sale, or stored for the manufacture of any other article of food, or exposed or exhibited for sale and where any adulterant is manufactured or kept, and take samples of such articles of food or adulterant for analysis.

(3) Where any sample is taken, its cost calculated at the rate at which the article is usually sold to the public shall be paid to the person from whom it is taken.

(4) Where any article of food seized under clause (b) of subsection (1) is of a perishable nature and the Food Safety Officer is satisfied that such article of food is so deteriorated that it is unfit for human consumption, the Food Safety Officer may, after giving notice in writing to the food business operator, cause the same to be destroyed.

(5) The Food Safety Officer shall, in exercising the powers of entry upon, and inspection of any place under this section, follow, as far as may be, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) relating to the search or inspection of a place by a police officer executing a search warrant issued under that Code.

(6) Any adulterant found in the possession of a manufacturer or distributor of, or dealer in, any article of food or <https://www.mhc.tn.gov.in/judis> in any of the premises occupied by him as such and for the possession of which he is unable to account to the satisfaction of the Food Safety Officer and any books of account or other documents found in his possession or control and which would be useful for, or relevant to, any investigation or proceeding under this Act, may be seized by the Food Safety Officer and a sample of such adulterant submitted for analysis to a Food Analyst:

Provided that no such books of account or other documents shall be seized by the Food Safety Officer except with the previous approval of the authority to which he is subordinate.

(7) Where the Food Safety Officer takes any action under clause (a) of sub-section (1), or sub-section (2), or sub-section (4) or sub-section (6), he shall, call one or more persons to be present at the time when such action is taken and take his or their

signatures.

(8) Where any books of account or other documents are seized under sub-section (6), the Food Safety Officer shall, within a period not exceeding thirty days from the date of seizure, return the same to the person from whom they were seized after copies thereof or extracts there from as certified by that person in such manner as may be prescribed by the Central Government have been taken: Provided that where such person refuses to so certify and a prosecution has been instituted against him under this Act, such books of account or other documents shall be returned to him only after copies thereof and extracts there from as certified by the court have been taken.

(9) When any adulterant is seized under sub-section (6), the burden of proving that such adulterant is not meant for purposes <https://www.mhc.tn.gov.in/judis> of adulteration shall be on the person from whose possession such adulterant was seized.

(10) The Commissioner of Food Safety may from time to time issue guidelines with regard to exercise of powers of the Food Safety Officer, which shall be binding: Provided that the powers of such Food Safety Officer may also be revoked for a specified period by the Commissioner of Food Safety.” It is relevant to note that the provisions in the Act do not empower the official concerned to seal the premises where the contraband has been allegedly kept.

The power to seal is conferred by Rule 2.1.3..4 (i) of the Food Safety and Standard Rules, 2011. The said provision reads as follows :

“4.Powers and Duties: (i) Without prejudice to the powers conferred on him under section 38 of the Act, where the Food Safety Officer is of the opinion or he has reason(s) to be recorded in writing that in the given situation it is not possible to comply with the provision of section 38 (1) (c) or the proviso to section 38(1) for reasons like non availability of the Food Business Operator, the Food Safety Officer may seize the adulterant or food which is unsafe or sub-standard or mis- branded or containing extraneous matter, may seal the premises for investigation after taking a sample of such adulterant or food for analysis.” <https://www.mhc.tn.gov.in/judis> Section 91 of the Act empowers the Central Government to make rules. The 2011 Rules have been issued only pursuant to the said power. Section 91 of the Act is as follows :

“91.Power of Central Government to make rules. (1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:-

(a) salary, terms and conditions of service of Chairperson and Members other than ex officio Members under subsection (2) and the manner of subscribing to an oath of office and secrecy under sub-section (3) of section 7;

(b) qualifications of Food Safety Officer under sub-section (1) of section 37;

(c) the manner of taking the extract of documents seized under sub-clause (8) of section 38;

(d) determination of cases for referring to appropriate courts and time-frame for such determination under sub-section (4) of section 42;

(e) qualifications of Food Analysts under section 45;

(f) the manner of sending sample for analysis and details of the procedure to be followed in this regard under subsection (1) of section 47;

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(g) the procedure to be followed in adjudication of cases under sub-section (1) of section 68;

(h) qualifications, terms of office, resignation and removal of Presiding Officer under sub-section (4), the procedure of appeal and powers of Tribunal under sub-section (5) of section 70;

(i) any other matter relating to procedure and powers of Tribunal under clause (g) of sub-section (2) of section 71;

(j) the fee to be paid for preferring an appeal to the High Court under subsection (1) of section 76;

(k) form and time of preparing budget under sub-section (1) of section 81;

(l) form and statement of accounts under sub-section (1) of section 83; (m) the form and time for preparing annual report by Food Authority under sub-section (1) of section 84; and

(n) any other matter which is required to be, or may be, prescribed or in respect of which provision is to be made by rules by the Central Government.”

5. Section 91(2) of the Act nowhere empowers the authorities under the Act to seal the business premises. Therefore, Rule 2.1.3..4(i) will have to be justified only in terms of Section 91(1) of the Act. It is well settled that a subordinate legislation must conform to the provisions of the parent statute. The rules can never travel beyond the provisions set out in the Act. Section 91(1) envisages framing of rules for the purpose of carrying out the provisions <https://www.mhc.tn.gov.in/judis> of the Act. This power cannot be exercised in such a way as to bring into existence substantive rights or obligations or disabilities not contemplated by the parent Act itself. In *Laghu Udhyog Bharti* it has

been held that when the Act confers rule making power for carrying out purposes of the Act, rules cannot be so framed as not to carry out purposes of the Act or be in conflict with same. The legal effect of the formula is to confer a plenary power on the delegate to make rules subject to the overall requirement that the rules made ought to have a nexus with the purpose of the Act (MP Jain & SN Jain on Principles of Administrative Law 7th edition – Amita Dhanda).

6. Rule 2.1.3..4(i) refers to Section 38 of the Act. Section 38 of the Act empowers the Food Safety Officer to take a sample and seize any article of food that appears to be in contravention of the Act or the regulations made thereunder. The Food Safety Officer can also keep the seized food article in the safe custody of the Food Business Operator after taking a sample. The Food Business Operator may also be required to execute a bond for a sum of money equal to the value of the seized article with one or more sureties. Only if the Food Safety Officer is of the opinion that Section 38(1)(c) or the proviso to Section 38(1) could not be complied with, the premises can be sealed. The Rule itself contemplates one such situation. If the Food Business Operator is <https://www.mhc.tn.gov.in/judis> not available, then, the seized article cannot be kept in his safe custody. It is only under such circumstances sealing is permissible. The second respondent has not complied with the statutory requirement set out in the Rule. The power of sealing is a drastic one and it cannot be expansively construed. This is all the more so because in the parent Act, there is no provision for sealing. The Rules have been framed only to carry out the provisions of the Act. Section 38 (1)(c) of the Act refers to the safe custody of the seized article. Sealing can be done only if the mode set out in the parent Act cannot be fulfilled. Rule 2.1.3..4 should be understood in the light of Section 91(1) of the Act.

7. In the instant case, it is not the case of the respondents that the petitioner was not available. It is not their case that the procedure set out in Section 38(1)(c) of the Act could not be fulfilled. Therefore, the sealing of the petitioners' premises appears to be unwarranted.

8. The issue can be approached from yet another angle. The Hon'ble Supreme Court of India in the decision reported in (2022) 3 SCC 694 (Akshay N Patel v. RBI) reiterated the proportionality standard in determining violations of fundamental rights. The four-pronged approach laid down in Aadhar case was approvingly cited. The test is as follows :

<https://www.mhc.tn.gov.in/judis> “319. ... This discussion brings out that following four subcomponents of proportionality need to be satisfied:

319.1. A measure restricting a right must have a legitimate goal (legitimate goal stage).

319.2. It must be a suitable means of furthering this goal (suitability or rational connection stage).

319.3. There must not be any less restrictive but equally effective alternative (necessity stage).

319.4. The measure must not have a disproportionate impact on the right holder (balancing stage).” The doctrine of proportionality can be invoked to test the validity of an executive action. In this case, the seized articles could have been left in the safe custody of the petitioners. This is contemplated by the Act itself. Instead, the second respondent resorted to sealing the premises itself. The act of the second respondent fails the test laid down in the third prong. The sealing was done on 16.12.2023. More than two weeks have passed. The petitioners are small time shop keepers. Right to carry on business is guaranteed under Article 19(1)(g) of the Constitution of India. Of course, there is no right to trade in banned items. But the petitioners can sell other products in their shops. By sealing the shop, the petitioners' right to livelihood is affected. This will have a disproportionate impact on the petitioners' rights. In any event, by keeping the shops closed, the investigation in this case is not going to be <https://www.mhc.tn.gov.in/judis> advanced. If the shops are ordered to be opened, the investigation will not suffer. It is not necessary that the premises should continue to remain closed as that may not serve any purpose. Even if there is justification in initially sealing the premises, at some point of time or the other, they have to be de sealed. Merely for the reason that banned tobacco products were kept for sale, a shop cannot be closed forever. That is why, the Rules provide for sealing the premises only for one reason ie., inability to adhere to the procedure contemplated in Section 38(1)(c) of the Act or the proviso thereto.

9.Considering the impact on the petitioners' livelihood, the respondents are directed to de seal the petition-mentioned premises forthwith. The petitioners are directed to file affidavits before this Court undertaking not to trade in any banned items including tobacco products. If the undertaking is breached, consequences will follow. The writ petitions are allowed on these terms. No costs. Connected miscellaneous petitions are closed.

02.01.2024 Index : Yes / No Internet : Yes / No Skm Issue order copy on 02.01.2024 <https://www.mhc.tn.gov.in/judis> To

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2.The Designated Officer, Tamil Nadu Food Safety and Drug Administration Department, Food Safety Wing, Trichy District.

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