

Ms Dharampal Satyapal Ltd And Anr vs Food Safety Officer on 13 December, 2022

Author: Swarana Kanta Sharma

Bench: Swarana Kanta Sharma

Neutral Citation Number 2022/DHC/005518

Neutral Citation Number 2022/DHC/005519

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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CRL.M.C. 5210/2022

D.S. CHEWING PRODUCT LLP & ORS. ...Petitioners

Through: Mr. Vivek Kohli, Sr. Advocate

with Mr. Sanjai Kumar

Pathak, Mr. Arvind Kumar

Tripathi and Ms. Shashi

Pathak, Advocates.

versus

FOOD SAFETY OFFICER

Through: Mr. Satish Kumar, A

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CRL.M.C. 5624/2022

M/S DHARAMPAL SATYAPAL LTD & ANR ...Petitioners

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CORAM:

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J.

Neutral Citation Number 2022/DHC/005518 Neutral Citation Number 2022/DHC/005519

1. The present petitions under Section 482 of the Code of Criminal Procedure, 1973, have been filed assailing the summoning order dated 03.02.2022 passed by learned Additional Chief Metropolitan Magistrate-01, Patiala House Courts, New Delhi (hereinafter as "Trial Court") in Complaint Case No.581/2022 filed under Sections 3/26/27/52/58/59 of Food Safety and Standard Act, 2006 (hereinafter as "FSSA, 2006") and the order dated 04.08.2022 passed in Crl. Revision No.155/2022 passed by learned Additional Sessions Judge- 04, Patiala House Courts, New Delhi (hereinafter as "Appellate Court") and for quashing of entire complaint proceeding.
2. The petitioner no. 1 in Crl.M.C.5210/2022 is the manufacturer of "Royal Zafrani Zarda", a flavoured chewing tobacco product and petitioner no. 2 to 4 are the designated partners of petitioner no.1. Whereas petitioner no. 1 in Crl.M.C.5624/2022 is the seller of "Royal Zafrani Zarda" and petitioner no. 2 is the nominee/operator of petitioner no. 1. Since both the petitions arise out of same set of facts and contentions and the issue before this Court in both the petitions is also common, the same are being decided through this common judgment.

FACTUAL MATRIX

3. The brief facts pertinent to adjudication of the present matter are as under:

3.1 The Food Safety Officer suspended herein had taken by purchasing, a sample of article "Royal Zafrani Zarda" for analysis under the provisions of The Food Safety and Standards Act, 2006, Neutral Citation Number 2022/DHC/005518 Neutral Citation Number 2022/DHC/005519 Rules and Regulations made thereunder, from one Food Business Operator Sh. Suraj Kumar Garg of M/s Shree Sai Enterprises on 04.02.2021. The sample was taken in presence of witness Sh. Suraj Bhan, Field Assistant. Notice in Form VA was prepared at the spot and copy thereof was given to Food Business Operator. Panchnama was also prepared at the spot and all the sample related documents prepared were read over and explained to Food Business Operator. 3.2 One part of the said sample of "Royal Zafrani Zarda"

bearing Sample number 849/1053/21/2021 and the Designated Officer Code Number 08/DO-24/16948 along with one copy of Form VI & another copy of Form VI in a separate sealed envelope having specimen seal impression was sent to the Food Analyst, Govt. of NCT of Delhi for analysis on 05.02.2021. The remaining two counterparts of the sample along with two copies of Form VI in a sealed packet as well as the fourth counterpart of the sample along with one Form VI in a separate sealed packet were deposited with the then Designated Officer, District South, on 05.02.2021. All copies of Form VI bears specimen seal impression of seal used for sealing sample, counterpart.

3.3 A copy of the Food Analyst Report numbered FSS/157/2021, dated 19.02.2021, was also provided to the concerned parties. The petitioners, through their respective replies, had informed the Food Safety Officer that tobacco and tobacco items are not food and not governed by the provision of FSSA, 2006, and are rather covered under

the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Neutral Citation Number 2022/DHC/005518 Neutral Citation Number 2022/DHC/005519 Trade and Commerce, Production, Supply and Distribution) Act, 2003. Several judgments of different courts dealing with the present issue were also brought to the notice of the Food Safety Officer. A legal opinion was then obtained by the Food Safety Officer from his department, and after conclusion of the investigation, the entire case file including the statutory documents, Food Analyst's report, and the Food Safety Officer's report was sent by the Designated Officer to Commissioner (Food Safety), Department of Food Safety, Government of NCT of Delhi, who accorded consent under Section 42(4) of FSS Act, 2006 for the prosecution of accused on 28/01/2022.

4. The learned Trial Court vide order dated 03.02.2022 took cognizance of the offences mentioned in the complaint and summoned the accused persons. The relevant portion of the summoning order is as under:

"...Complaint perused.

On the basis of the complaint and other documents, prima facie, there is sufficient material to, proceed against the accused persons. Since, complainant is a public servant, his evidence U/s 200 Cr.P.C is dispensed with. Accordingly, cognizance of the offences as mentioned in the complaint is taken.

Issue summons to the accused persons through FSO through all modes for 02.05.2022..."

5. Against the aforesaid order, a revision petition Crl.Rev.No. 155/2022 was preferred by the petitioners herein in Neutral Citation Number 2022/DHC/005518 Neutral Citation Number 2022/DHC/005519 Crl.M.C.5624/2022, and the same was dismissed vide an order dated 04.08.2022 by the Appellate Court with the following observations:

"7. I have gone through the Form 5A filed alongwith the complaint before the Trial Court. The said Form 5A indicates that the labelling does not contain any description of the contents of the seized article. There is nothing to indicate that "Royal Zafrani Zarda" can be said to be a pure tobacco product to be able to come within the ages of the interim order passed by the Delhi High Court.

8. I have perused the description contained in Form 5A again and again. Nowhere are the contents/ ingredients of the packet described. I have next noticed the report of the Food Analyst which says that the product tested positive for silver leaf, saffron, aluminum leaf besides nicotine. At least, 1 of these articles, namely, Zafran, can be considered as a food article. The label as per Form 5A itself uses a word "Zafrani" and Zafran is a food article of substantial value used in cooking various dishes as well as for consumption as it is.

9. If the product was a purely tobacco product, the manufacture thereof was bound to disclose the same as tobacco product to be able to avail the benefit of the order which is now being relied upon. If the intention of the seller was to sell tobacco mixed with other food articles without even declaring that it was tobacco then it is matter of trial whether the product was being sold as food article or as a tobacco product. This court cannot conclude one way or the other at this stage, whether the same product was being sold as pure tobacco product or as a food article mixed with tobacco product and this contention finds support in the description of the product as contained in Form 5A filled by the Food Safety Officer, while seizing the product.

10. The reliance, at this stage, placed by the counsel for the revisionist on the physical appearance mentioned on the report of the food analyst would not come to the aid of the revisionist, inasmuch as, it is only providing the description Neutral Citation Number 2022/DHC/005518 Neutral Citation Number 2022/DHC/005519 physical appearance of the product as perceived by the food analyst but the expression "brown colour sample of tobacco"

cannot be read in isolation as the report further contains the words metal leaves and flavours peculiar to saffron.

11. I have also perused that this is not a case where the product has been seized as tobacco per say but as a product ready for consumption by human which contains, in addition to tobacco, other articles detrimental to the health. Even, the labelling by the accused in the present case does not indicate what are the ingredients of the product being sold.

12. If the flavoured chewing tobacco contains food ingredients like silver leaf, aluminum leaf and saffron alongwith tobacco can it be called a pure tobacco product? Prima facie, I do not think it is as easy a question.

15. I have noticed that the revisionist in the present case has relied upon the order of Sh. Anil Antil, Ld. ASJ-04, New Delhi District, Patiala House Courts, passed on 14.02.2020 to contend that the present case was squarely covered by the decision given by my Ld. Predecessor in another case. However, I may note that firstly, in Para 8 of the said order and judgment in CR No. 360/18, 362/18, 13/19, 361/18, 284/18 the Ld. Prosecutor had conceded to the legal proposition that Zarda being a Tobacco product, it could not be governed by FSS Act. The Prosecutor appearing before me is not willing to make any such concession. Further, I have noticed that the aspect whether the product being looked into was a pure tobacco product or having been mixed with other food articles and also the same containing other elements detrimental to health (i.e. other than tobacco and nicotine) and whether the same can be considered as a breach of FSS Act is a question of fact ***

20. In my view, the sanction has been granted by a public servant and there is a presumption that every exercise of power or performance of official duty by a public servant was done by following

proper procedure and the onus lies on Neutral Citation Number 2022/DHC/005518 Neutral Citation Number 2022/DHC/005519 the person alleging otherwise to prove the same. Even otherwise, the fact that the sanction was granted on a particular date can always be proved by seeking production of the file in which the sanction was being processed. When the file was put up before the sanctioning authority and when the same was received back would all be available in the said record. This issue is also, in my view, a question of fact and cannot be decided as a pure question of law.

21. Therefore, in these circumstances, the revision must fail and the summoning order cannot be treated as illegal at this stage. There is no way the Ld. MM could have concluded, based on the material before him, that he was dealing with a case of pure tobacco product or of a sanction given without application of mind..."

6. In the aforementioned circumstances, the petitioners, being aggrieved by the decision of Trial Court and Appellate Court, have challenged the legality and validity of the impugned orders dated 03.02.2022 and 04.08.2022.

SUBMISSIONS AT THE BAR

7. Learned Senior counsel for the petitioners states that the product "Royal Zafrani Zarda" is a tobacco product covered under the COTPA, 2003 and is not subject to the FSSA, 2006, and consequently, no authority under FSSA, 2006 is conferred with any powers to exercise jurisdiction over the product in question. It is stated that the initiation of proceeding against the tobacco products under the food safety law is contrary to the judgments of Hon'ble High Court in (i) Food Inspector v. Rupesh Jain and Ors. 2017 SCC Online Del 12391; (ii) Ram Babu Rastogi and Ors v. State 2011 SCC Online Del 5552, wherein it was declared that Regulations under the erstwhile Prevention of Food Neutral Citation Number 2022/DHC/005518 Neutral Citation Number 2022/DHC/005519 Adulteration Act (and the FSSA, 2006) have no bearing or relevance for tobacco products. It is contended on behalf of petitioners that the product "Royal Zafrani Zarda" is undisputedly "flavoured chewing tobacco" and has been known since decades, and the Food Analyst also recognized in his report the product as flavoured/scented tobacco. It is submitted that a huge pictorial warning, on both sides, covering 80% of the display and the relevant declaration, in compliance with the requirements spelt out under the COTPA, clearly state that the product is a Tobacco Product.

8. It is averred by learned senior counsel that the language of Regulation 2.3.4 of Food Safety and Standard (Prohibition & Restriction on Sale) Regulation, 2011 itself admits an apparent distinction between the "food products" on the one hand and tobacco and nicotine on the other. It is stated that the prosecution initiated on the basis of contravention of Regulation 2.3.4 is illegal and bad in law as the said regulation cannot be read to mean a prohibition against use of food additives in reparation of tobacco products because use of food additives per se in tobacco products for flavouring do not make the chewing tobacco unsafe for human consumption. None of the ingredients claimed to be found in the sample of product falls within the category of deleterious substances.

9. Learned senior counsel has further referred to the recent decision of this Court dated 27.09.2022 in Sugandhi Snuff King Pvt. Ltd. & Anr. v. Commissioner (Food Safety) Government of NCT of Delhi, W.P. (C) No. 3362 of 2015 wherein various notifications issued by the Commissioner of Food Safety have been declared illegal, arbitrary and Neutral Citation Number 2022/DHC/005518 Neutral Citation Number 2022/DHC/005519 have been quashed, by observing that tobacco and tobacco products cannot be termed as "food" under the provisions of FSSA, 2006 and the same is governed under the provisions of COTPA, 2003.

10. It is also the case of petitioners that in the year 2018, a similar prosecution was launched by the respondent against the petitioners for the same product and summons were issued by the Trial Court, but the same were quashed by the court of then ASJ-04, Central District, Patiala House Court, New Delhi, in CR No. 360/2018, whereby it was observed as under:

"...9. In view thereof, considering the facts and circumstances of the case at hand, in light of the propositions of law enunciated by the above said authorities, in my considered opinion, the case of the revisionists is squarely covered by the authorities relied upon by the revisionists and shall not be governed by the provisions under the FSS Act, 2006 but regulated by the provisions of COPTA. The complainant has no power to initiate the proceedings against the revisionists under the said Act. Thus, the impugned summoning order dated 08.03.2018 passed by the learned ACMM is bad in law and cannot be sustained..."

11. It is further stated that the petitioners herein had also assailed the Notification dated 25.03.2015 issued by the Commissioner of Food Safety, Government of NCT of Delhi, which has now been quashed, through W.P.(C) No. 4477/2015 and vide order dated 06.05.2015, the respondent was ordered not to undertake any coercive steps against the petitioners.

12. As stated by learned senior counsel for petitioners, the learned Appellate Court had erred in not quashing the summoning order and the impugned order is based on conjectures and surmises as the learned Neutral Citation Number 2022/DHC/005518 Neutral Citation Number 2022/DHC/005519 Appellate Court had conveniently ignored the prominent and statutory warnings printed on each sample sachet of the product which is prescribed under COTPA, 2003 exclusively for tobacco products. It is further stated that learned Trial Court has issued the process mechanically, and the material and documents on record was not scrutinized and criminal law was set into motion on the mere asking of the Complainant, and that the impugned summoning order suffers from non-application of mind and deserves to be set-aside.

13. Controverting the aforesaid submissions, learned counsel for the respondent states that impugned orders suffer from no infirmity or illegality and the learned Appellate Court has already dealt with the contentions of the petitioners while dismissing their revision petition. It is stated that detailed observations were made by the Appellate Court with respect to the details mentioned in in Form VA and the case involves factual questions which have to be tested during the trial.

ANALYSIS AND FINDINGS

14. The core issue before this Court is as to whether the proceedings initiated against the petitioners, i.e. manufacturers and sellers of "Royal Zafrani Zarda" by the respondent i.e. Food Safety Officer, are de hors jurisdiction or not. To decide the same, it will be appropriate to consider the facts of the case in light of position of law.

15. In the present case, the petitioners have been broadly alleged to have violated the following provisions, rules and regulations:

i. Section 3(1)(zz)(i) of FSSA, 2006 Neutral Citation Number 2022/DHC/005518 Neutral Citation Number 2022/DHC/005519 ii. Regulation No. 2.3.4 of the Food Safety and Standard (Prohibition & Restriction on Sale) Regulation, 2011 iii. Regulation No. 2.2.1.7, 2.2.2.2, 2.2.2.4, 2.2.2.5(ii)(b) and 2.3.1.5 of the Food Safety & Standard (Packaging & Labeling) Regulation, 2011 iv. Prohibition order issued by Commissioner (Food & Safety), Govt. of NCT of Delhi vide notification No. F211(17)/DOFS/ HQ/2017/1293-1313 dated 15.07.2020

16. As per the case of petitioners, they are the manufacturers and sellers of an undisputed brand of "flavoured chewing tobacco", which is a tobacco product as defined and falling under the aegis of Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 (hereinafter as "COTPA, 2003").

17. At the outset, a reference can be made to a decision of this Court in Food inspector v. Rupesh Jain 2017 SCC OnLine Del 12391 wherein under similar facts and circumstances, the Court had observed as under:

20. It is clear after going through the Schedule of the CPT Act that "Chewing Tobacco and "Pan Masala which has tobacco as one of its ingredients comes within the definition of "Tobacco Products as per Section 3(p) of the CPT Act.

None of the items including chewing tobacco mentioned in the Schedule could be included in the definition of "food under Section 2(v) (a) of the PFA, 1954 since none of these items could be said to be used as food for human consumption or ordinarily enter into or are used in the composition or preparation of human food. Further if the legislature intended to include Pan Masala having tobacco Neutral Citation Number 2022/DHC/005518 Neutral Citation Number 2022/DHC/005519 as one of its ingredients or Chewing Tobacco as a "food" item under Section 2(v) (a) of the PFA, 1954 then it would have been specifically mentioned in Appendix B which contains the standards of quality of all food items falling under the PFA, 1954. Therefore since "Chewing Tobacco and Pan Masala containing tobacco as one of its ingredients come within the ambit of the CPT Act, Rule 44J of the PFA, 1954 cannot be said to apply to these products.

21. The Hon'ble Supreme Court in Godawat Pan Masala Products I.P. Ltd. and Anr. vs. Union of India (2004) 7 SCC 68 while dealing with the issue whether the provisions of the CPT Act which is a special act will override the provisions of the PFA, 1954 held as under:

"6. The provisions of the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 are directly in conflict with the provisions of Section 7(iv) of the Prevention of Food Adulteration Act 1954. The former Act is a special Act intended to deal with tobacco and tobacco products particularly, while the latter enactment is a general enactment. Thus, the Act 34 of 2003 being a special Act and of later origin, overrides the provisions of Section 7(iv) of the Prevention of Food Adulteration Act, 1954 with regard to the power to prohibit the sale or manufacture of tobacco products which are listed in the Schedule to the Act 34 of 2003;"

(Emphasis supplied)

18. Earlier, in an another judgment titled Ram Babu Rastogi & Ors. v. State through Food Inspector 2011 SCC OnLine Del 5552, this Court had held on similar grounds as under:

"...6. A plain and simple reading of the aforesaid provisions would reveal that only those articles which are used as food or drink for human consumption and which ordinarily enter Neutral Citation Number 2022/DHC/005518 Neutral Citation Number 2022/DHC/005519 into or are used in the composition and preparation of human food including any flavouring material or condiments that may be used, are the items which are within the ambit of definition of "food" under this provision. As per the opinion of P.A., the sample article was "proprietary food" and within the ambit of Appendix B of the Rules. Appendix B provides for definition and standards of quality of the food articles which are within the ambit of the Rules and the Act. In this Appendix, "Pan Masala" finds mention at Item No. A.30 as a food generally taken as such or in conjunction with "Pan".

There is no mention of the "Flavoured Chewing Tobacco" in the Appendix B. With regard to the "Pan Masala", Mouth Freshener and "Supari", there are plethora of judgments which lay them as items which are within the meaning of "food" under Section 2(v) of the Act. The reference can be made to the decisions of Sri Krishan Gopal Sharma & Anr. Vs. Govt. of NCT of Delhi, 1996 (4) SCC 513 and Pyarali K.Tejani Vs. Mahadeo Ramchandra Dange & Others, 1974 SC 228.

7. The ingredients of Pan Masala as specified in Item A.30 consists of Betelnut, lime, coconut, catechu, saffron, cardamom, dry fruits etc. All these ingredients are used as food for human consumption in one form or the other. As against this, Section 3(p) of CPT Act defines the "tobacco products" as the products specified in the Schedule.

"Flavoured Chewing Tobacco" finds its place along with other items like Cigarettes, Cigars, Cheroots, Beedis, Hukkah tobacco, snuff, gutka etc. In Entry 8 of the Schedule to the Act "pan masala or any chewing material having tobacco as one of its ingredients (by whatever name called)"

also finds mention therein. To clarify that, it is not the pan masala which has been discussed above as food items with the aforementioned ingredients, but the pan masala having tobacco as one of its ingredients by whatever name it may be called that is within the definition of "tobacco products" of Section 3(p) of the Act. None of the items mentioned in Section 3(p) including the chewing tobacco could be said to be falling within the meaning of "food" under Section 2(v) of Neutral Citation Number 2022/DHC/005518 Neutral Citation Number 2022/DHC/005519 the PFA Act, since none of these items could be said to be used as food for human consumption, or ordinarily entering into or used in the composition or preparation of human food. In the case of Godawat Pan Masala Products I.P.Ltd. and Another Vs. Union of India and Others, 2004(2) FAC 33, the Supreme Court held that the CPT Act, 2003 is a special Act to deal with tobacco and tobacco products particularly, while the PFA Act, 1954 is a general enactment. The former being a Special Act, and of later origin, overrides the provisions of Section 7(iv) of the PFA Act, 1954 with regard to the powers to prohibit the sale or manufacture of tobacco products which are listed in the Schedule to the former Act..."

19. It can however be noted that Regulation No. 2.3.4 of Food Safety and Standard (Prohibition & Restriction on Sale) Regulation, 2011 is *pari materia* with the erstwhile Rule 44J of Prevention of Food Adulteration Rules, 1955 which was under consideration by this Court in Food Inspector v. Rupesh Jain (*supra*) and Ram Babu Rastogi v. State (*supra*). For reference, these rules are reproduced as under:

"44J. Product not to contain any substances which may be injurious to health --
Tobacco and nicotine shall not be used as ingredients in any food products."

"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."

20. On the basis of Regulation 2.3.4, the Commissioner of Food Safety, Government of NCT of Delhi had issued Notification No. F211(17)/DOFS/HQ/2017/1293-1313 dated 15.07.2020, which is as under:

"...WHEREAS, Gutka, Pan Masala, Flavoured / Scented Tobacco, Kharra and similar products containing tobacco by Neutral Citation Number 2022/DHC/005518 Neutral Citation Number 2022/DHC/005519 whatsoever name called, cause damage to the health of consumers and their adverse impact could also lead to alterations of the genetic make-up of future generations; WHEREAS, tobacco, whether flavoured, scented or mixed with other ingredients such as heavy metals, anticaking agents (except to the extent specifically permitted as ingredients), silver leaf, binders, flavours, scents, fragrances, prohibited chemicals, or any one of these ingredients (the said ingredients are hereafter collectively or individually, as the context requires, referred to as "the said additives") are "food" under clause (j) of section 3 of the Food Safety and Standards Act, 2006;

WHEREAS, the Central Government has prohibited products containing tobacco and nicotine under regulation 2.3.4 of the Food Safety and Standards (Prohibition and

Restrictions on Sales) Regulations, 2011 and anticaking agents (beyond the extent permitted) under regulation 3.1.7 of The Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011;

WHEREAS, the said food articles if consumed 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 generations will be compromised;

WHEREAS, under the law and in the interest of public health, Commissioner Food Safety is responsible for prohibiting in the interest of public health the manufacture, storage, distribution or sale of any article of food, and whereas the undersigned is duly authorized under section 30(2)(a) of the Food Safety and Standards Act, 2006, to make this order; Therefore, in exercise of these powers conferred by clause (a) of sub section (2) of section 30 of the Food Safety and Standards Act, 2006, the undersigned, Commissioner (Food Safety), National Capital Territory of Delhi, prohibit in the interest of public health for a period of one year from the date of publication of this Notification in Neutral Citation Number 2022/DHC/005518 Neutral Citation Number 2022/DHC/005519 the official gazette, in the National Capital Territory of Delhi the manufacture, storage, distribution, or sale of tobacco which is either flavoured, scented or mixed with any of the said additives, and whether going by the 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 the consumer..."

21. The first such notification was issued in the year 2015, i.e. Notification bearing No. F.1(3)DOI/2012/ 10503-10521 dated 25.03.2015 by the Commissioner of Food Safety, Government of NCT of Delhi in purported exercise of power under Section 30(2)(a) of FSSA, 2006. Similar notifications were issued every year till 2021, including the one dated 15.07.2020, as reproduced above. Legality of these notifications were challenged by way of several petitions filed before this Court, which were clubbed and heard together, and vide judgment dated 27.09.2022 in Sugandhi Snuff King Pvt. Ltd. & Anr. v. Commissioner (Food Safety) Government of NCT of Delhi 2022 SCC OnLine Del 3149 a Coordinate bench of this Court, while dealing with all the aspect and legal provisions in the batch of petitions, has settled the controversy wherein it has been held that tobacco cannot be construed as "food" under FSSA, 2006 and COTPA, 2003 occupies the entire field for tobacco and tobacco products. The relevant portion is as under:

"...202. The COTPA is a comprehensive, self-contained, seamless legislation dealing with the sale and distribution of scheduled tobacco products and therefore, occupies the entire field relating to tobacco products. FSSA, on the other Neutral Citation Number 2022/DHC/005518 Neutral Citation Number 2022/DHC/005519 hand, is a general legislation. Admittedly, the impugned Notifications have been issued by Respondent No. 1 as an executive action under the garb of Regulation 2.3.4 in exercise of power conferred by Section 30(2)(a) of the FSSA. Therefore, the FSSA

cannot override COTPA which is a Central Act enacted solely for the purposes of regulation of tobacco and its products.

241. Considering the submissions made and documents and judgments relied by the parties and in view of the detailed discussion and reasoning mentioned herein above, this Court is of the considered view that:

(a) The impugned Notifications passed by the Commissioner of Food Safety in view of Regulation 2.3.4 in exercise of powers under Section 30(2)(a), is beyond the scope of powers conferred upon him by the FSSA.

(b) The COTPA is a comprehensive legislation dealing with the sale and distribution of scheduled tobacco products and therefore, occupies the entire field relating to tobacco products. Therefore, the COTPA, being a special law, occupies the entire field for tobacco and tobacco products and would prevail over the FSSA which is a general law.

(c) It has never been the intention of the Parliament to impose an absolute ban on manufacture, sale, distribution and storage of tobacco and/or tobacco products. However, the intention of the Parliament is to regulate the trade and commerce of tobacco and tobacco products in accordance with the COTPA, a Central Act which deals with tobacco industry.

(d) The doctrine of implied repeal has no application to the present case as the FSSA and the COTPA occupy different fields i.e., the former applies to the "food industry" while the latter applies to the "tobacco industry". Therefore, the FSSA does not impliedly repeal the provisions of the COTPA.

(e) Tobacco cannot be construed as "food" within the meaning of the provisions of FSSA.

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(f) Section 30(2)(a) of the FSSA has to be read in consonance with Section 18 of the FSSA. The power under Section 30(2)(a) is transitory in nature and the Commissioner of Food Safety can issue prohibition orders only in emergent circumstances after giving an opportunity of being heard to the concerned food operator(s). The impugned Notifications, however, have been issued by Respondent No. 1 year after year in a mechanical manner without following the general principles laid down under Section 18 and 30(2)(a) of the FSSA, which is a clear abuse of the powers conferred upon him under the FSSA.

(g) The classification sought to be created between smokeless and smoking tobacco for justifying the issuance of the impugned Notifications is clearly violative of Article 14 of the Constitution...."

22. Admittedly, as per the Food Analyst Report, the product "Royal Zafrani Zarda" is a flavoured/scented tobacco. The physical description of the product has been described as "Brown color sample of tobacco containing Metal leaves and flavours peculiar to saffron. The sample is flavoured chewing tobacco as it contains food ingredients like silver leaves flavours and saffron alongwith tobacco." As observed above, the issue in question is no more res intergra. Regulation 2.3.4 of Food Safety and Standard (Prohibition & Restriction on Sale) Regulation, 2011 is not applicable in the present case. Notification No. F211(17)/DOFS/ HQ/2017/1293-1313 dated 15.07.2020, allegedly violated by the petitioners, has also been quashed by this Court in Sugandhi Snuff King Pvt. Ltd. (supra).

23. When the product has itself been categorized as chewing tobacco by the Department of Food Safety, Government of NCT of Delhi, the Neutral Citation Number 2022/DHC/005518 Neutral Citation Number 2022/DHC/005519 same would immediately fall under the purview of COTPA, 2003, relevant provisions of which have been mentioned hereinunder:

Section 3(p) of COTPA, 2003 is as under:

"tobacco products" means the products specified in the Schedule.

The Schedule to COTPA, 2003 is as under:

1. Cigarettes
2. Cigars
3. Cheroots
4. Beedis
5. Cigarette tobacco, pipe tobacco and hookah tobacco
6. Chewing tobacco
7. Snuff
8. Pan masala or any chewing material having tobacco as one of its ingredients (by whatever name called).
9. Gutka
10. Tooth powder containing tobacco.

(Emphasis supplied)

24. Consequently, the provision regarding "unsafe food" under Section 3(1)(zz)(i) of FSSA, 2006 is also not applicable to the present case, since the product in question herein cannot be termed as "food" under FSSA, 2006. For the same reason, Regulation No 2.2.1.7, 2.2.2.2, 2.2.2.4, 2.2.2.5 (ii) (b) & 2.3.1.5 of the Food Safety & Standard (Packaging & Labeling) Regulation 2011 also have no applicability in the present case. Even otherwise, in the case of petitioners that there was no mis-branding on their product and proper labeling was done as per Cigarettes and other Tobacco Products (Packaging and Labeling) Rules, 2008 wherein it has been prescribed to add bold and conspicuous textual health warning and ghastly images in the form of "pictorial health warning" on the packaging of all tobacco products, Neutral Citation Number 2022/DHC/005518 Neutral Citation Number 2022/DHC/005519 smoking or smokeless etc. During the course of arguments, a sample of the product "Royal Zafrani Zarda" was also shown to the Court and the said sample had pictorial health warnings covering a large area of the packaging. Be that as it may, even if there was any lack on part of the petitioners/manufacturers in labeling the product as per law, the same will have to be dealt as per the provisions of Cigarettes and other Tobacco Products (Packaging and Labeling) Rules, 2008 and Section 20 of COTPA, 2003 or any other law applicable therein, and prosecution cannot be initiated under FSSA, 2006 for such violation, if any.

25. When the impugned order dated 04.08.2022 passed by the Appellate Court is analysed in light of above legal position, it emerges that the Court had placed heavy reliance on the ingredients of the product mentioned in Form VA and had ignored the portion of the Report of the Food Analyst wherein it was specifically mentioned that the product was a flavoured chewing tobacco. Secondly, the Appellate Court had also observed that labeling was different among two different samples which were before it, wherein one of it appeared to be case of mis-branding. As held above, if any such violation of laws with respect to labeling exists, the same can be dealt within the rules and regulations framed under COTPA, 2003.

26. Therefore, considering the facts and circumstances of the case and the settled position of law, when the product in question is admittedly chewing tobacco, application of FSSA, 2006 is ruled out. In view thereof, the impugned orders dated 03.02.2022 and 04.08.2022 Neutral Citation Number 2022/DHC/005518 Neutral Citation Number 2022/DHC/005519 alongwith Complaint Case No. 581/2022 and all proceedings therefrom are quashed.

27. Accordingly, the present petition is allowed.

SWARANA KANTA SHARMA, J DECEMBER 13, 2022/kss