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W.A.No. 2093/18 and WP Nos.3076 & 3084 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 29.11.2022	Delivered on 20.01.2023
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THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

AND

THE HONOURABLE MR.JUSTICE K.KUMARESH BABU

Writ Appeal No.2093 of 2018
and CMP No.16394 of 2018
and WP Nos.3076 and 3084 of 2019
and WMP Nos.3351, 3353 & 3358 of 2019

WA No.2093 of 2018

The Designated Officer,
The Food Safety & Drugs Control Dept.
Office of the Food Safety & Standard Authority
38, II Floor, Collectorate Building
Villupuram District 605 602. .. Appellant/ Respondent

Vs.

Jayavilas Tobacco Traders LLP
Rep by its Partner, Mr.A.Prabakaran
Son of S.V.Arunachalam,
No.185, Bazaar Street,
Chinna Salem 606 201. .. Respondent/ Petitioner

Prayer: Writ Appeal filed under Clause 15 of Letters Patent, against the order passed by this Court dated 09.06.2017 passed in W.P.No.21 of 2017.



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W.A.No. 2093/18 and WP Nos.3076 & 3084 of 2019

For Appellant : Mr.R.Shanmugasundaram
Advocate General
Assisted by Mr.K.V.Sanjeev Kumar
Special Govt. Pleader

For Respondents : Mr. S.R.Rajagopal
Asst. by Mr.K.R.Laxman

WP Nos.3076 & 3084 of 2019

Manoj Kumar Srivatsava
Trading under the name & style of:
M/s.V.S.Products,
A Proprietorship concern,
Plot No.21-P, 2nd Phase,
Antharasanahalli Industrial Area,
Tumkur 572 106, Karnataka.

..Petitioner in both the petitions

Vs.

1 The Commissioner
Tamil Nadu Food and Safety and Drug
Administration Department,
No.359 Anna Salai, Chennai 600006.

2 The Designated Officer
2nd Floor, Old Collectorate Complex
Jayankonam Road, Ariyalur 621704.

3 The Food Safety Officer
Thirumanur Block,
Old Collectorate Complex,
Jayankondam Road, Ariyalur 621704

4 M.A.Asraf Ali .. Respondents in both the petitions



W.A.No. 2093/18 and WP Nos.3076 & 3084 of 2019

Prayer: Writ Petitions filed under Article 226 of the Constitution of India

WEB COPY seeking:

in WP 3076 of 2019: to issue a Writ of Certiorari Calling for the records pertaining to private Compliant preferred by the 3rd respondent in C.C.No.129 of 2018 on the file of the Judicial Magistrate No.II, Ariyalur, quash the same.

in WP 3084 of 2019: to issue a Writ of Certiorari Calling for the records pertaining to the Government Order vide Tamil Nadu Government Gazette, Extraordinary No.184 (No.1418/2013/S8/FSSA) dated 23.05.2018, quash the same.

For Petitioner : Mr.Satish Parasaran, Senior Counsel
(in WP No.3076/19) for Mr.G.Vivekanand,
Mr.Vaurni Mohan & Mr.T.S.Thevaraj

: Mr.Vivek Kohli, Senior Counsel
(in WP No.3084/19) for Mr.G.Vivekanand,
Mr.Vaurni Mohan &

Mr.T.S.Thevaraj

For Respondents : Mr.R.Shanmugasundaram
Advocate General
Assisted by Mr.K.V.Sanjeev Kumar
Special Govt. Pleader, for 1 to 3



COMMON JUDGMENT

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(Judgment of the Court was delivered by R.SUBRAMANIAN, J.)

The Writ Petitions, in which challenge is to the order of the Commissioner of Food Safety imposing a ban and sale of Gutka, Pan Masala, flavoured or scented food products or chewable food products by whatever name called containing Tobacco and/or Nicotine as ingredients invoking the power under Section 30 (2) (a) of The Food Safety and Standards Act, 2006, the Criminal Prosecution in CC No.129 of 2018 under Section 59(i), 58 and 63 of the said Act launched for violation of the ban have been tagged along with the Writ Appeal which challenges the judgment of the Writ Court made in WP No.21 of 2017 striking down the notices issued by the Authorised Officer under the Food Safety and Standards Act, seeking to prosecute the respondent in the Writ Appeal for sale of Tobacco products.

2. The respondent in the Writ Appeal challenged the notices issued by the Authorised Officer under the Food Safety and Standards Act, 2006 seeking to prosecute it for violation of the ban imposed by the Commissioner



for Food Safety by making available Tobacco products in the market. The Writ Court following the earlier pronouncements of this Court in Criminal OP (MD) No.5505 of 2015 and the judgment of the Hon'ble Supreme Court in *Godawat Pan Masala Products I.P. Ltd & Another v. Union of India & Others*, reported in *2004 (7) SCC 68*, concluded that the respondent cannot be prosecuted since Tobacco is covered under the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 (hereinafter referred to as the COTPA) . The State is on Appeal against the judgment of the Writ Court.

3. The Writ Petition No.3084 of 2019 has been filed by a Tobacco manufacturer challenging the notification issued by the Commissioner of Food Safety dated 23.05.2018 banning Manufacture, Storage, Transport, Distribution or sale of chewable food products, Gutka, Pan Masala, containing Tobacco and/or Nicotine as “**ingredients**” in the State of Tamil Nadu for a period of one year from 23.05.2018 invoking the power vested in him under Clause (a) of Sub Section 2 of Section 30 of the Food Safety and Standards Act, 2006 (hereinafter referred to as the FSS Act). The Writ



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Petition No.3076 of 2019 has also been filed by the petitioner in WP No.3084 of 2019 challenging the criminal proceedings initiated against it under Sections 59(i), 58 and 63 of the Food Safety and Standards Act, for the sale of banned Tobacco products.

4. The case of the petitioner in the Writ Petitions is broadly one of competence on the part of the Commissioner of Food Safety to ban sale of Tobacco products within the State of Tamil Nadu. The contentions of the petitioner can be broadly classified into four aspects:

4.1. The first aspect based on the declaration of expediency made under Entry 52 of List I of Schedule VII of the Constitution of India and the enactment of the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 (COTPA);

4.2. The second aspect is the issue of repugnancy between the provisions of COTPA and FSS Act. This would also take in the theories of occupied field and express and implied repeal;



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4.3. The third aspect is, as to whether, the enactment of FSS Act, would impinge upon the enforceability of COTPA a prior enactment specifically dealing with Tobacco products. It is also an auxiliary contention that being a prior special law the COTPA would prevail over the FSS Act, which is a subsequent General Law.

4.4. Apart from the above, the petitioner would rely upon the provisions of FSS Act to contend that chewing Tobacco *per se* without any additives will not fall within the definition of Food under the FSS Act and as such the Commissioner of Food Safety will not have the power to ban its manufacture, sale etc. invoking the power invested in him/her under Section 30(2)(a) of the said Act. Relying upon the language of Clause (a) of Sub Section (2) of Section 30 of FSS Act, it is sought to be contended that the power to prohibit is an emergency power which could be invoked under some special situations and the same cannot be used to impose a permanent ban by issuing successive notifications year on year.

4.5. Drawing our attention to the Statement of objects and reasons,



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a reading of which shows that the purpose of the enactment was to lay down science based standards for articles of Food and to regulate their manufacture, storage, distribution, sale and import, it is sought to be contended that power to Regulate cannot lead to power to prohibit. It is also sought to be contended that Article 47 of the Constitution of India which provides for the State to make an endeavour to bring about prohibition of consumption, except for medicinal purposes, of intoxicating drinks and drugs which are injurious to health does not mention tobacco and therefore, the ban cannot be justified. We are also drawn to the Constituent Assembly Debates where the pros and cons of including Tobacco under Article 47 were debated upon and it was finally concluded that the Tobacco shall not be included in Article 47. The last but not the least is the issue of discrimination between smokeless and smoking Tobacco is also raised.

4.6. The challenge in WP No.21 of 2017 which is the subject matter of the Writ Appeal in WA No.2093 of 2018 was to a notice issued to the manufacturer of Tobacco for alleged violation of the prohibition imposed. The Writ Court allowed the Writ Petition relying upon the judgment in ***Godawat Pan Masala Products I.P. Ltd & Another v. Union of India &***



Others, wherein the Hon'ble Supreme Court held that the bar under Section 7(iv) of the Prevention of Food Adulteration Act, 1954, is not an independent source of power for the State Authority and the power to ban an article of food or an article used as an ingredient of food on the ground that it is injurious to health belongs appropriately to the Central Government to be exercised in accordance with the Rules made under Sub Section (1-A) (f) of Section 23 of the Prevention of Food Adulteration Act.

4.7. Reliance was also placed by the Writ Court on the judgment of this Court in *Manufacturer, M/s.Tejram Dharam Paul, Maurmandi, Bhatinda District, Punjab and another v. The Food Safety Inspector, Ambasamudram* in Criminal OP (MD) No.5505 of 2015 dated 27.04.2015, wherein again the contention that since Tobacco and the Tobacco products are covered under the COTPA, the provisions of the Food Safety and Standards Act, 2006, cannot be invoked.

5. The State/Appellant in Writ Appeal in WA No.2093 of 2018 and the respondent in the Writ Petitions would contend that the reliance placed upon the judgment in *Godawat Pan Masala Products I.P. Ltd & Another v.*



Union of India & Others, by the Writ Court in WP No.21 of 2017 may not

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be correct, in view of the fact that the law laid down in *Godawat Pan*

Masala Products I.P. Ltd & Another v. Union of India & Others, turned

on the provisions of the of the Prevention of Food Adulteration Act, which

has now been repealed and replaced by FSS Act, which contain altogether

different provisions. The Writ Court ought to have decided the Writ Petition

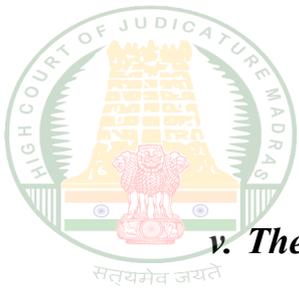
on the basis of the provisions of the present enactment, viz. The Food Safety

and Standards Act, 2006, instead of following the law laid down in

Godawat Pan Masala Products I.P. Ltd & Another v. Union of India &

Others.

5.1. It is also the contention of the State that the definition of food in the FSS Act, 2006 is much wider and will take within its sweep a large number of products which would not have been covered by the definition of Food in the prevention of Food Adulteration Act, 1954. Reliance is also placed on the language of Section 30(2)(a) which empowers the Commissioner of Food Safety, a State Level Officer to impose a ban in certain areas or throughout the State. Strong reliance is also placed by the State on the judgment of the Division Bench of this Court in *J.Anbazhagan*



v. The Union of India, made in WP No.19335 of 2017, wherein a Division

WEB COPY Bench of this Court had after analyzing the provisions of the Food Safety and Standards Act 2006, concluded that Tobacco would fall within the definition of Food as contained in Section 3(j) of the FSS Act, 2006.

5.2. Placing considerable reliance on the said judgment, the State would justify the ban imposed. The State would also contend that the provisions of COTPA which are meant to prohibit advertisement and to regulate trade and commerce, production supply and distribution of Cigarettes and other Tobacco products will not in any way impinge upon the powers of the Commissioner of Food Safety, conferred on him/her, under the provisions of FSS Act, 2006. It is also contended that both these enactments operate in different fields and even assuming that there is an overlapping the Courts must adopt an interpretation that would harmonise the provisions of the enactments than the one that would do violence to the provisions of the enactment. The statistics relating to the injuries caused by consumption of tobacco is also invoked by the State to justify the ban. The State would also point out that the ban is imposed based on the directions of the Hon'ble Supreme Court contained in its interim order in Transfer Civil Case No.1 of



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2010 dated 23.09.2016, wherein the Authorities have been directed to

comply with the mandate of law and file compliance affidavits.

6. We have heard Mr.R.Shunmugasundaram, learned Advocate General assisted by Mr.K.V.Sanjeev Kumar, learned Special Government Pleader appearing for the appellant in WA No.2093 of 2018 and for the respondents 1 to 3 in WP Nos.3076 & 3084 of 2019, Mr.Vivek Kohli, Senior Counsel assisted by Mr.G.Vivekanand, Mr.Varunimohan and Mr.T.S.Thevaraj, learned counsel appearing for the petitioner in WP No.3084 of 2019, Mr.Satish Parasaran, learned Senior Counsel Assisted by Mr.G.Vivekanand, Mr.Varunimohan and Mr.T.S.Thevaraj, learned counsel appearing for the petitioner in WP No.3076 of 2019 and Mr.S.R.Rajagopal, learned counsel assisted by Mr.K.R.Laxman, for the respondent in WA No.2093 of 2018.

7. From the pleadings and the submissions of the counsel on either side, the following core issues arise in these proceedings before us:

- (i) Whether the enactment of The Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade



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and Commerce, Production, Supply and Distribution) Act, 2003 (COTPA) by invoking the power under Article 52 of the Constitution of India would denude the Parliament to enact any other law relating to Cigarettes and Tobacco Products.

(ii) Whether there is any conflict between the COTPA and the Food Safety and Standards Act, 2006 in relation to Tobacco products.

(iii) Whether COTPA a special enactment would prevail over the Food Safety and Standards Act, 2006, a subsequent General Law.

(iv) Whether Tobacco or Tobacco products would fall within the definition of food under Section 3(j) of the Food Safety and Standards Act, 2006.

(v) Whether the provisions of Section 30(2)(a) of the Food Safety and Standards Act, 2006 confer the power on the Commissioner, Food Safety to impose a total ban on the sale of Tobacco and Tobacco products by issuing successive notifications year on year.

8. Issue No.1:

8.1. Both Mr.Vivek Kohli and Mr.Satish Parasaran, learned Senior



Counsel appearing for the writ petitioners would vehemently contend that COTPA being an enactment made invoking Entry 52 after having declared an expediency of public interest would exclusively deal with Tobacco and Tobacco products and any other law would be subject to the special enactment. Pointing out the fact that the trade and commerce within the State and production, supply and distribution of goods are covered by Entries 26 and 27 of List II of the Constitution of India and once the Parliament had chosen to enact invoking its power under Entry 52 after having declared an expediency of public interest State Legislatures are not competent and they have no role to play at all to enact Laws with respect to the said subject matters.

8.2. While Entries 26 and 27 of List II of Schedule VII of the Constitution of India deal with Trade and Commerce within the State and production and supply of distribution of goods within the State. Both these entries are made subject to Entry 33 of List III of the Constitution of India which reads as follows:

33. Trade and commerce in, and the production, supply and distribution of,-



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(a) the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest, and imported goods of the same kind as such products;

(b) foodstuffs, including edible oilseeds and oils;

(c) cattle fodder, including oilcakes and other concentrates;

(d) raw cotton, whether ginned or unginned, and cotton seed; and

(e) raw jute.

8.3. An attempt is made by the learned Senior Counsel appearing for the writ petitioners to convince us to conclude that once the Parliament chooses to enact a law invoking Entry 52 after declaring existence of an expediency of public interest all the activities relating to such industries, particularly the Tobacco Industry will have to be necessarily regulated under the said law, viz. COTPA and the other enactments either made by the Parliament or by the State Legislatures cannot either regulate or ban Tobacco



products. We are unable to accept the said submission of the learned Senior

WEB COUNSEL for more than one reason. No doubt Entry 52 enables the

Parliament to enact a Law in respect of Industries by declaring an expediency in Public interest. It is such declaration which enables the

Parliament to enact in respect of Industries which would otherwise be covered by either Entry 27 of List II or Entry 33 of List III of the Constitution of India.

8.4. True, the Parliament has enacted COTPA providing for prohibition of advertisement and regulation of Trade and Commerce, Production, Supply and Distribution of Cigarettes and other Tobacco products. Chewing Tobacco is included as a product in the Schedule to the said enactment. The object of the Act as found in the objects and reasons is to reduce exposure of people to tobacco smoke (passive smoking) and prevent the sale of tobacco products to minors and to protect them from becoming victims of misleading advertisements. As could be seen from the above, the object of the enactment of COTPA is to prohibit advertisement of tobacco and tobacco products and to reduce exposure of people to tobacco smoke and to prevent sale of tobacco products to minors. The Act, in our



considered opinion, does not deal with consumption of tobacco in any form

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by persons other than minors. By prohibiting smoking in public places the act intends to achieve its object of reducing exposure to tobacco smoke (passive smoke)

8.5. The answer to the question whether the State Legislature can legislate upon a particular Industry has to be essentially a firm no in view of the very Entries, viz. Entry 52 of List I, Entries 26 and 27 of List II and Entry 33 of List III. Entries 26 and 27 of List II which deal with Trade and Commerce within the State and production and supply and distribution of goods are made subject to provisions of Entry 33 and Entry 33 deals with Trade and Commerce and Production, Supply and Distribution of products of any Industry, the control of such Industry by the Union is declared by the Parliament by law to be expedient in the public interest and other goods that are enumerated therein. Therefore, once the Parliament enacts a law invoking Entry 52 after declaring expediency in public interest, the State Legislatures cannot legislate on the said Industry unless the procedure under Article 254 is followed. This by itself will not answer the issue that is raised in the Writ Petitions and the Writ Appeal.



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8.6. There are two enactments one is COTPA enacted in the year 2003 evidently under Entry 52 of List I of Schedule VII and the FSS Act enacted again by the Parliament under Entry 52 by declaring an expediency in public interest. Therefore, the Union had taken over the control of both the Tobacco Industry and the Food Industry by enacting these two Acts after having declared an expediency in Public interest. While the earlier enactment, viz. COTPA deals with Tobacco Industry, the subsequent enactment, viz. FSS Act deals with the Food Industry. There would arise an essential conflict between the provisions of these two enactments if one is to reach a conclusion that tobacco would be food within the meaning of Section 3(j) of the FSS Act. Such conflict, in our opinion, has to be resolved by attempting to harmonise the provisions of that two enactments. Both the enactments are made by the Parliament invoking Entry 52 and there is a chance of there being some overlapping in certain areas. That by itself cannot, in our opinion, denude the Parliament of the power to enact a Law controlling a different industry invoking Entry 52 of List I of Schedule VII of the Constitution of India.

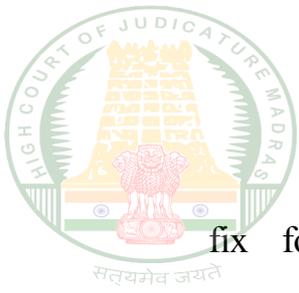


8.7. The submissions of the learned Senior Counsel appearing for

the petitioner in the Writ Petitions, to a great extent proceed on the power of the State Legislature to enact a Law on the same subject covered by the Law enacted by the Parliament under Entry 52. As we had already observed such power is not available to the State Legislatures, unless the procedure under Article 254 is followed. Therefore, the theory of occupied field would not apply, in the light of the above discussion, we answer the first issue to the effect that the Parliament is not denuded of the power to make a Law invoking Entry 52 in respect of a particular class of Industry after having made a Law invoking Entry 52 taking over a particular Industry merely because there is a chance of over lapping of the provisions of the two enactments.

9. Issue No.2:

9.1. The next question that would arise is the perceived conflict between the provisions of COTPA and FSS Act regarding Tobacco and Tobacco products. The FSS Act, as seen from its statement of objects and reasons is enacted to regulate Food Industry and to provide for systematic and scientific development of Food Processing Industry. It also attempts to



fix food standards and to regulate/monitor manufacturing, import, processing, distribution and sale of food. While the object of the COTPA is to ban advertisements, to regulate use of Tobacco products in public places and to ban sale of tobacco products to minors, the object of the FSS Act, is to regulate manufacture of food products and to ensure food safety and standards.

9.2. The objects of these two enactments are by and large different. Of course there is a possibility of over lapping, of the provisions of these two enactments particularly when it relates to chewing Tobacco, Gutka or Pan Masala, since those products could be brought within the meaning of the expanded definition of food under Section 3(j) of FSS Act. We are unable to see any conflict between the two enactments. If a Tobacco product answers the definition of food under the FSS Act, the manufacture or sale or distribution of it, could be regulated by the Commissioner of Food Safety under the powers invested in him under the regulations and the provisions contained in Section 30 (2) (a).

9.3. A contention is raised by the learned Senior Counsel



appearing for the petitioner in the Writ Petitions to the effect that there is a conflict between the provisions of the two enactments as the provisions of the two enactments stand and the objective sought to be achieved by the two enactments. We are unable to see any conflict between the two enactments except for a remote chance of there being overlapping in terms of implementation of the provisions of the enactments. This, as already stated, should be resolved by adopting the Principle of harmonious construction that attempt should be to reconcile the provisions of the enactments with a view to advance the objectives of the enactment.

9.4. A Division Bench of this Court in *Government of Tamil Nadu and others v. K.Sevanthinatha Pandarasannathi and Ors.*, reported in *Manu/TN/3949/2009*, had an occasion to consider the theory of incidental encroachment while dealing with amendment to the Tamil Nadu Hindu Religious and Charitable Endowments Act 1959, which sought to introduce a prohibition disqualifying a non-citizen from being a trustee of a Hindu Religious Institution within the State which was challenged on the ground that it amounted to transgression of rights of foreigners, which would be covered by Entry 17 of List I of the Schedule VII, which deals with



citizenship naturalization and aliens and therefore, the State Legislature was

incompetent to enact such law.

9.5. While considering the said contention, the Division Bench after referring to the judgment of the Hon'ble Supreme Court in *Karnataka State Electricity Board vs. Indian Aluminium Company*, reported in *AIR 1976 SCC 103*, held that if the legislation incidentally trenches upon and might come to fall under another list, the Act as a whole would be valid notwithstanding such incidental trenching. Therefore, even assuming there is a possibility of a conflict of the provisions of two Parliamentary enactments, it shall be the endeavor of the Court to reconcile the provisions of both the enactments with reference to the objects such legislations seek to achieve and the Court should not take shelter under the theory of conflict to invalidate a legislation or an action taken under a power vested by a legislation. We are therefore convinced that there is in fact no conflict between the two legislations as they deal with two different aspects and if it all there is an overlapping, the same can be cured by invoking the principle of purposive interpretation.

**10. Issue No.3:**

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10.1. The next contention on behalf of the petitioner in the Writ Petitions is that the COTPA being a special enactment would prevail and FSS Act, though a later enactment being a General Law will not result in implied repeal of the special enactment. Invoking the maxim *Generalia specialibus non derogant*, it is sought to be contended that the provisions of FSS Act will not have the effect of repealing or overriding the provisions of COTPA. Reliance is placed upon the judgment of the Hon'ble Supreme Court in *R.S.Raghunath v. State of Karnataka and another*, reported in *(1992) 1 SCC 335*, wherein the Hon'ble Supreme Court had held that one cannot infer suppression of a prior special law by a subsequent general law and the overlapping if any has to be by excluding the applicability of the general law to the extent the field is occupied by the special enactment. While doing so, the Hon'ble Supreme Court observed as follows:

“28. In the case of Maharaja Pratap Singh Bahadur v. Man Mohan Dev. AIR 1966 SC 1931, the Supreme Court approved the following quotation from Maxwell on Interpretation of Statutes:

"A general later law does not abrogate an earlier



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special one by mere implication. Generalia specialibus non derogant, or, in other words, 'where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so.' In such cases it is presumed to have only general cases in view, and not particular cases which have been already otherwise provided for by the special Act"

10.2. In view of the above declared position of law, we have to necessarily find out the areas where there is a likelihood of conflict and restrict the operation of FSS Act, to areas which are not covered by the COTPA. As we had already pointed out from the objectives of both the enactments, it cannot be said that there is a real conflict between the two enactments. While the previous enactment, viz. the COTPA seeks to



regulate manufacturers sale and distribution of tobacco products, the later enactment, viz. the Food Safety and Standards Act, 2006 deals with providing certain standards for food items and to regulate the food industry in order to ensure availability of safe and wholesome food for the people. The other object that is sought to be achieved by the FSS Act is to provide for systematic and scientific development of food processing industry.

10.3. We are therefore of the considered opinion that both the enactments can co-exist and the conflict if any can be resolved by restricting the operation of the Food Safety and Standards Act, to the areas which are covered by the COTPA.

11. Issue No.4:

11.1. This takes us to the primary contention of the learned Senior Counsel for the petitioners on the definition of 'Food' under Food Safety and Standards Act, 2006. Section 3(j) of the said Act defines 'Food' as follows:

3(j) "Food" means any substance, whether processed, partially processed or unprocessed, which is intended for human consumption and includes primary food to the extent defined in clause (zk), genetically



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modified or engineered food or food containing such ingredients, infant food, packaged drinking water, alcoholic drink, chewing gum, and any substance, including water used into the food during its manufacture, preparation or treatment but does not include any animal feed, live animals unless they are prepared or processed for placing on the market for human consumption, plants, prior to harvesting, drugs and medicinal products, cosmetics, narcotic or psychotropic substances:

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

Clauses **zk** of Section 3 of the said Act which would be relevant reads as follows:

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

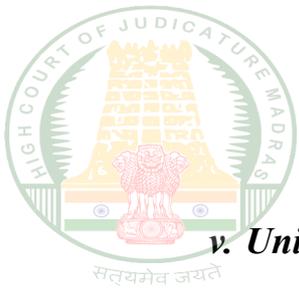


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11.2. While the learned Senior Counsel for the petitioner would contend that tobacco particularly chewing tobacco without any additives cannot be treated as food as defined under Section 3(j) of FSS Act, by relying upon the judgment of the Hon'ble Supreme Court in *Godawat Pan Masala Products I.P. Ltd & Another v. Union of India & Others*, and the judgment of the Delhi High Court in *Sugandhi Snuff King Pvt. Ltd. and Another v. Commissioner (Food Safety) Government of Delhi*, reported in *2022 SCC online Del 3149*, and various other decisions of other High Courts. It is sought to be contended that tobacco particularly chewing tobacco without any additive will not be covered by the definition of food under Section 3(j) of FSS Act.

11.3. Contending contra the learned Advocate General would rely upon the judgment of the Division Bench of this Court in *J.Anbazhagan v. The Union of India*, to contend that tobacco is Food within the meaning of Section 3(j) of FSS Act.

11.4. Even in *Godawat Pan Masala Products I.P. Ltd & Another*



v. Union of India & Others, the Hon'ble Supreme Court has considered the

question as to whether Tobacco or Gutka or Pan Masala is food, the said

question is answered in paragraphs 66 to 68 of the said judgment as follows:

“66. The learned counsel relied on a judgment of a division bench of this Court in C.A. No. 12746-12747 of 1996 (decided on 6.11.2003). In our view, this judgment is of no aid to us. In the first place, this judgment arises under the provisions of the Essential Commodities Act, 1955, read with the Tamil Nadu Scheduled Articles (Prescription of Standards) Order, 1977 and the notification dated 9.6.1978 issued by the Central Government which laid down certain specifications "in relation to foodstuffs". The question that arose before the Court was whether tea is 'foodstuff' within the meaning of the said legislation. The Division Bench of this Court came to the conclusion that 'tea' is not food as it is not understood as 'food' or 'foodstuff' either in common parlance or by the opinion of lexicographers. We are unable to derive much help from this judgment for the reason that we are not concerned with tea. It is not possible to extrapolate the reasoning of this judgment pertaining to tea into the realm of pan masala and gutka. In any event, the judgment in Tejani (supra) was a judgment of the Constitutional Bench



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which does not seem to have been noticed.

67. We are, therefore, unable to agree with the contention that pan masala or gutka does not amount to "food" within the meaning of definition in Section 2(v) of the Act. However, we do not rest our decision solely on this issue.

Paradoxical consequence:

68. There is yet another reason why we are inclined to take the view that Section 7(iv) deals with a situation of emergency with respect to the local area. A decision for banning an article of food or an article containing any ingredient of food injurious to health can only arise as a result of broadly considered policy. If such a power be conceded in favour of a local authority like the Food (Health) Authority, paradoxical results would arise. The same article could be considered injurious to public health in one local area, but not so in another. In our view, the construction of the provision of the statute must not be such as to result in such absurd or paradoxical consequences. Hence, for this reason also, we are of the view that the power of the State (Health) Authority is a limited power to be exercised locally for temporary duration.

Therefore it is futile on the part of the petitioners to contend that tobacco is



not food within the definition of Section 3(j) of FSS Act. In fact a Division

WEB COPY Bench of this Court in ***J.Anbazhagan v. The Union of India***, had considered the definition occurring in Section 3(j) of FSS Act.

11.5. After referring to the judgment of the Writ Court in WP No.21 of 2017 which is under Appeal before us the Division Bench in ***J.Anbazhagan v. The Union of India***, had pointed out that the definition of food under the FSS Act is more wider and can take within its sweep many products which may not fall within the definition of food under Section 2(5) of the prevention of Food Adulteration Act, 1954. While doing so, the Division Bench has observed as follows:

71. "Food" is defined in Section 3(j) of the Food Safety Act to mean any substance, whether processed, partially processed or unprocessed, which is intended for human consumption and includes genetically modified or engineered food, but does not include animal feed, live animals, unless they are prepared or processed for placing in the market for human consumption, plants prior to harvesting, drugs and medicinal products, cosmetics, narcotic or psychotropic



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substances.

72. The definition of “food” which includes any substance whether processed, partially processed or unprocessed, which is intended for human consumption, and even includes chewing gum, is clearly wide enough to include gutkha and other forms of chewable tobacco intended for human consumption.

73. The Food Safety Act is a statute enacted after COTA. The definition of “Food” in Section 3(j) of the Food Safety Act is different from the definition of food in the Prevention of Food Adulteration Act, 1954, which was as follows:

“Section 2. Definitions: - In this Act unless the context otherwise requires,-

....

(v) “Food” means any article used as food or drink for human consumption other than drugs and water and includes,

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

(b) Any flavouring matter or condiments, and

(c) Any other article which the Central Government



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may, having regard to its use, nature, substance or quality declare, by notification in the official Gazette, as food for the purposes of this Act.”

74. Under the Food Safety Act, food means any substance, whether processed, partially processed or unprocessed, which is intended for human consumption. It includes primary food to the extent defined in clause (zk), that is an article of food being a produce of agriculture or horticulture or animal husbandry and dairying or aquaculture in its natural form resulting from the growing, raising, cultivation, picking, harvesting, collection or catching in the hands of a person other than a farmer or fisherman. It also includes genetically modified or engineered food or food containing such ingredients, infant food, packaged drinking water, alcoholic drink, chewing gum, and any substance, including water, used into the food during its manufacture, preparation or treatment. What is excluded is animal feed, live animals unless they are prepared or processed for placing on the market for human consumption, plants prior to harvesting, drugs and medicinal products, cosmetics, narcotic or psychotropic substances.



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75. *Significantly, in Godawat Pan Masala Products I.P. Ltd. and another v. Union of India and others, reported in (2004) 7 SCC 68, the Supreme Court observed:*

“6. 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.”

76. The Prevention of Food Adulteration Act, 1954 has been repealed and replaced by the Food Safety Act. The definition of “food” in Section 3(j) of the Food Safety Act is different from and far more expansive than the definition of “food” in Section 2(v) of the Prevention of Food Adulteration Act. Further, the Food Safety Act has been enacted after the COTA.

77. The judgment of the Supreme Court in Godawat Pan Masala Products I.P. Ltd., supra, rendered in the context of the Prevention of Food Adulteration Act, 1954 will not have application in the facts and



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circumstances of the instant case.

78. *It appears that in Jayavilas Tobacco Traders LLP v. The Designated Officer, The Food Safety and Drugs Control Department, (W.P.No.21 of 2017, dated 9.6.2017), Duraiswamy,J. referred to and followed the judgment of the Supreme Court in Godawat Pan Masala Products I.P. Ltd., supra. It is on that ground that the notifications impugned were held to be void.*

79. *With the greatest of respect, we are unable to agree with the Single Bench decision of Duraiswamy,J. in Jayavilas Tobacco Traders LLP, supra, and and the decision of the Madurai Bench in Crl.O.P.(MD) No.5505 of 2015 [Manufacturer, M/s.Tejram Dharam Paul, Maurmandi, Bhatinda District, Punjab and another v. The Food Safety Inspector, Ambasamudram] dated 27.04.2015.*

80. *In Dhariwal Industries Limited and another v. State of Maharashtra and others, reported in (2013) 1 Mah LJ 461, a Single Bench of the Bombay High Court held:*

"19. While the definition in the 1954 Act excluded



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drugs and water, the definition in the Food Safety Act, 2006 excludes animal feed, live animals, plants prior to harvesting, drugs and medicinal products, cosmetic, narcotic and psychotropic substance. Obviously, gutka and pan masala do not fall in any of these excluded categories. The expression "any substance which is intended for human consumption" in FSS Act, 2006 is also wider than the expression "any article used as food or drink for human consumption" in PFA Act, 1954. It is also pertinent to note that the definition of food in the Act of 2006 specifically includes "chewing-gum" and any substance used into the food during its manufacture, preparation or treatment. Hence, even if gutka or pan masala were not to be ingested inside the digestive system, any substance which goes into the mouth for human consumption is sufficient to be covered by definition of food just as chewing-gum may be kept in the mouth for some time and thereafter thrown out. Similarly gutka containing tobacco may be chewed for some time and then thrown out. Even if it does not enter into the digestive system, it would be covered by the definition of "food" which is in the widest possible terms. The definition of "food" under section 2(v) of the PFA Act was narrower than the



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definition of food under Food Safety Act, still the Supreme Court in Ghodawat case held that pan masala and gutka were "food" within the meaning of PFA Act. The very fact that the petitioners themselves had obtained licences under the PFA Act and have also obtained licences under the Food Safety Act, 2006 is sufficient to estop them from raising the contention that gutka and pan masala do not fall within the definition of "food" under the Food Safety Act, 2006."

81. We agree with the view of the learned Single Bench of the Bombay High Court that gutkha and pan masala are food within the meaning of the Food Safety Act. Gutkha also being a tobacco product might be governed by the provisions of the COTA. COTA deals with regulation of cigarettes or other tobacco products. The Food Safety Act is not in conflict with the provisions of COTA in any manner. COTA does not deal with adulteration, though it may remotely touch upon misbranding.

11.6. In fact the Division Bench had gone on to conclude that the endeavor of the Court should be to harmonise two Acts seemingly in conflict. The Division Bench has also pointed out that there does not appear to be any



conflict between COTPA and FSS Act. The absence of non- obstante clause in COTPA was also considered by the Division Bench in paragraph 82 of the said judgment and it had observed as follows:

“82. It is well settled that the endeavour of the Court should be to harmonize two Acts seemingly in conflict. Of course, in this case there does not appear to be any conflict between COTA and the Food Safety Act. COTA is in addition to and not in derogation of other laws relating to food products. There is no non obstante clause in COTA which excludes the operation of other Acts.”

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.

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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.

12. Issue No.5:

12.1. This leads us to the last but not the least question as to the scope of the power of the Commissioner of Food Safety to impose a ban on sale of tobacco and tobacco products. Considerable reliance is placed by the learned Senior Counsel for the petitioner in the Writ Petitions and the respondent in the Writ Appeal on the judgment of the Delhi High Court in



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Safety) Government of Delhi, wherein the scope of the provisions of Section 30(2)(a) read with the provisions of Section 2.3.4 of the Regulations was considered.

12.2. The learned Single Judge of the Delhi High Court has considered the effect of the provisions of Section 30(2)(a) and Regulation 2.3.4, the provisions of Section 18 of FSS Act have also been noticed by the Court. No doubt, the Delhi High Court has held that the provisions of COTPA would prevail over the provisions of FSS Act, and the learned Single Judge has also concluded that Tobacco is not a food product within the meaning of Section 3(j) of FSS Act. We have given our conclusions on the above questions and therefore, we express our inability to agree with the conclusion of the Delhi High Court to the effect that Tobacco cannot be construed as Food within the meaning of the provisions of FSS Act.

12.3. However, on the question as to whether the impugned notifications passed under Section 30 (2) (a) of FSS Act read with Regulation 2.3.4 are beyond the powers of the Commissioner of Food Safety,



we are inclined to agree with the conclusions of the Delhi High Court.

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Regulation 2.3.4 provides for Tobacco and Nicotine shall not be used as ingredients in any food product. Section 30(2)(a) of the FSS Act, which empowers the Commissioner of Food Safety to impose a ban reads as follows:

"30. Commissioner of Food Safety of the State.—

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

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

12.4. A reading of the provision shows that a power is vested in the Commissioner of Food Safety to prohibit in the interest of public health, the manufacture, storage, distribution or sale of any food article, for the whole State or any Part thereof for such period, not exceeding one year. This



power, in our considered opinion, as observed by the Delhi High Court, is a

power to impose a ban for a temporary period considering public health.

This is akin to imposing a ban on poultry products when there is outbreak of bird flu and situations of like nature. This provision, in our opinion, cannot be used for imposing a permanent ban that too by issuing successive notifications year on year. While dealing with the said question, the Delhi High Court has observed as follows:

224. In terms of Section 30(2)(a) of the FSSA, the power to prohibit conferred upon the Commissioner of Food Safety was limited and subjected to the product sought to be prohibited, being an article of food in the whole of the state or any area or part thereof upto a maximum period of one year. Thus, the power to prohibit so conferred was temporary in nature.

225. Perusal of Section 30(2)(a) of the FSSA exhibits various principles with regard to issuance of prohibition order by the Commissioner of Food Safety under the said provision, which are as follows: (a) the manufacture, sale, distribution and storage of a food article may be prohibited in the whole or a part of the State only in emergent circumstances in the interest of



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public; (b) the tenure of such a prohibitory order is temporary in nature and cannot exceed one (1) year in its entirety; (c) the issuance of order be passed/continued only after compliance of the principles of natural justice; and (d) the prohibition must indicate the name and brand name of the food business operator.

226. It is further a settled position of law that there is a requirement of giving a reasonable opportunity of being heard, in compliance of the principles of natural justice, before making an order, which would have adverse civil consequences for the parties affected.

227. Section 18 of the FSSA lays down the general principles that have to be mandatorily followed in administration of the Act. In order for a prohibition to be exercised, alternative policies are to be evaluated; interested parties are to be consulted and risk analysis, risk assessment and risk management has to be ascertained; interested parties are consulted qua factors relevant for protection of health; and appropriate prevention/control options are selected, besides compliance of other principles as laid down under Section 18 of the FSSA. Moreover, the use



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of the word "shall" in Section 18 of the FSSA clearly demonstrates its mandatory nature of the procedure to be followed. Accordingly, the powers conferred upon the Commissioner of Food Safety have to be exercised subject to compliance of mandatory principles as prescribed under Section 18 of the FSSA.

228. However, it is pertinent to mention that in the present case, no compliance under Section 30(2)(a) read with Section 18 of the FSSA has been undertaken before issuance of the impugned Notifications by Respondent No.1. At the outset, no risk analysis, risk assessment or risk management has been made in the present case. Further, there has been no reference to emergent circumstances which led to issuance/passing of the impugned Notifications. In fact, no opportunity of being heard has been provided to the stakeholders who would be adversely affected by such prohibitory order i.e., issuance of the impugned Notifications.

12.5. The need for hearing the persons who would be aggrieved by such ban was also emphasized by the Court. We are in entire agreement with the observations of the Delhi High Court extracted above with reference



to the power of the Commissioner of Food Safety, to issue notification under

Section 30(2)(a) banning sale or manufacture of tobacco and allied products.

As we have held that the notifications can be only temporary measures and allowing the Commissioner, Food Safety to impose a permanent ban by issuing successive notifications would amount to conferring a power that is not contemplated by the statute.

12.6. Yet another contention of the learned Advocate General that remains to be answered is the claim that the ban is sought to be imposed pursuant to the interim order of the Hon'ble Supreme Court dated 23.09.2016 made in Transfer Civil Case No.1 of 2010. We have perused the said order which is sought to be relied upon by the learned Advocate General. We are unable to agree with his contention that there is a positive direction to ban sale of Tobacco products. All that the Hon'ble Supreme Court has observed is that Clause 2.3.4 of the Regulations has not been stayed and the same will have to be complied with. We had already adverted to the Regulations as well as the Provisions of Section 30(2)(a) which have been invoked to justify the ban. Any total ban will have to be backed by a Statutory Power which is conspicuously absent in both the enactments under



consideration. Hence we reject the said contention of the learned Advocate

General.

12.7. The Parliament was alive, when it enacted FSS Act, to the perils caused by consumption of Tobacco. We must also assume that the Parliament was alive to the perils caused by consumption of tobacco even when it enacted COTPA. Either of the enactments, unfortunately, do not provide for a complete ban on Tobacco products. While the provisions of COTPA seek to ban advertisements and regulate usage the provisions of FSS Act do not contain any power to impose a permanent ban on Tobacco products. What is sought to be achieved by the Food Safety and Standards Act, 2006 is, as observed earlier, a scientific method of processing of food and providing for food safety and standards, if read in the light of the object of the enactment, the provisions of Section 30(2)(a) has to be limited to the power to impose a temporary ban in certain emergency situations. If we are to up hold the power of the Commissioner, Food Safety, to issue successive notifications under Section 30(2)(a) thereby imposing an almost permanent ban on a food product, we will be permitting something which was not contemplated bylaw and that will amount to doing violence to the provisions



of the enactment.

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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.

14. In fine WP No.3084 of 2019 will stand allowed the impugned notification will stand set aside, WP No.3076 of 2019 will stand allowed, the criminal proceeding launched on the basis of the ban imposed by the notification will stand quashed. The Writ Appeal will stand dismissed not on the premise indicated by the Writ Court, but on the ground that the notification issued banning sale of tobacco and tobacco products is beyond the scope of the powers of the Commissioner of Food Safety under Section 30(2)(a) of the FSS Act. We leave the parties to bear their own costs.



W.A.No. 2093/18 and WP Nos.3076 & 3084 of 2019

(R.SUBRAMANIAN, J.) (K.KUMARESH BABU, J.)

20.01.2023

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To

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W.A.No. 2093/18 and WP Nos.3076 & 3084 of 2019

R.SUBRAMANIAN, J.

and

K.KUMARESH BABU, J.

(jv)

Writ Appeal No.2093 of 2018
and CMP No.16394 of 2018
and WP Nos.3076 and 3084 of 2019
and WMP Nos.3351, 3353 & 3358 of 2019

20.01.2023