

IN THE HIGH COURT OF JHARKHAND AT RANCHI

W.P. (C) No. 3346 of 2022

1. Dharampal Satyapal Limited, a company registered under the Companies Act, 1956, having registered office at 98, Okhla Industrial Estate, Phase-3, New Delhi-110020, P.O./P.S. Okhla, District-New Delhi through its Director Mr. Pawan Kumar Goyal, male, aged about 54 years, S/o. Late Shri Ram, R/o. I-1/33, Jai Mata Gali, Phase-1, Budh Vihar, Sultanpuri, C-Block, N.W. Delhi, P.O. Sultanpuri, P.S. Vijay Vihar, District New Delhi-110086.
2. Sri Pawan Kumar Goyal, male, aged about 54 years, Director, Dharampal Satyapal Limited, resident of I-1/33, Jai Mata Gali Phase-1, Budh Vihar, Sultanpur, C-Block, N.W. Delhi, P.O. Sultanpuri, P.S. Vijay Vihar, District New Delhi-110086.

... .. **Petitioners**

Versus

1. The Union of India through Secretary, Ministry of Health and Family Welfare, Government of India, Nirmal Bhawan, P.O. Nirmal Bhawan, P.S. Central Secretariat, District Central Delhi, New Delhi 110011.
2. The State of Jharkhand through the Chief Secretary, Government of Jharkhand, having its office at 1st Floor, Project Building, Dhurwa, P.O. and P.S. Dhurwa Town, District Ranchi, Jharkhand.
3. The Additional Chief Secretary cum State Food Safety Commissioner, Department of Health and Family Welfare, Government of Jharkhand, having its Registered Office at Nepal House, Doranda, P.O. & P.S. Doranda, Town and District Ranchi, Jharkhand.
4. The Director General of Police, Jharkhand Police Head Quarters, Dhurwa, P.O. and P.S. Dhurwa, District Ranchi 834004.

... .. **Respondents**

CORAM: SRI SANJAYA KUMAR MISHRA, C.J.
SRI ANANDA SEN, J.

For the Petitioners: Mr. Vivek Kholi, Sr. Advocate
Mr. Ajit Kumar, Sr. Advocate
M/s. Sanjai Pathak, Indrajit Sinha, Aashish
Kaushik, Anjali Sinha, Advocates
For the UOI: Mr. Anil Kumar, Addl. S.G.I.
Mr. Vikash Kumar, C.G.C.
For the State: Mr. Jai Prakash, A.A.G.-1A
Ms. Omiya Anusha, A.C. to A.A.G.-1A

Reserved on: 12.07.2023

Pronounced on: 28.08.2023

Per S. K. Mishra, C.J.

1) By filing this writ petition, the petitioners, being a private limited company registered under the provisions of the Companies Act, 1956 and another being its Director, have prayed to issue a declaration that Section 30(2)(a) of the Food Safety and Standards Act, 2006 (hereinafter referred to as 'the FSS Act' for brevity), is *ultra vires* of the said Act and suffers from vice of excessive delegation as it confers an independent source of legislation and power of policy decision upon the Commissioner of Food safety and empowers him to prohibit completely, without issuing any show-cause notice, the Trade and Commerce and other allied activities in the food products permanently which is contrary to the substantive provisions of the aforesaid Act.

The petitioners also seek a declaration that that the impugned provision, as mentioned above, is in the teeth of the constitutional prohibition as contained in Article 13(2) of the Constitution of India, 1950 and is also violative of constitutional guarantee regarding right of freedom of Trade and Commerce in the territory of India under Article 301, Part XIII of the Constitution of India, 1950.

The petitioners further pray a consequential declaration that the notification dated 03.06.2022 as unconstitutional, unenforceable and illegal and to issue a writ certiorari quashing the said notification being contrary to the law laid down by the Hon'ble Supreme Court in the case of **Godawat Pan Masala Products I.P. Ltd. and another vs. Union of India and others**, (2004) 7 SCC 68, and also being *ultra vires* of the FSS Act, for not issuing any show-cause notice to the parties effected, before taking a decision on such an issue. Other similar prayers have been made by the petitioners.

2) On 23.08.2006, the Food Safety and Standards Act, 2006 was enacted by the Parliament and it came into force on 1st August, 2011. The Ministry of Health and Family Welfare in exercise of powers conferred under Clause (e) of sub-section (2) of Section 92 read with Section 16 of the FSS Act, enacted the Food Safety and Standards (Food Products and Food Addictives) Regulations, 2011. On 15.08.2011 of the Jharkhand Food Safety and Standards Rules, 2000 came into force. On 05.09.2016, a notification amending Food Safety and Standards (Food Products and Food Addictives) Regulations, 2011, was issued. On 18.01.2017, Food Safety and Standards (Food Recall Procedure) Regulation, 2017 was enacted. In the meantime, the Goods and Services Tax (Compensation to States) Act, 2017, was enacted. On 08.05.2020, the State Government vide Notification No.16/Khadya (Vividh)-12-06/2017-84(16) imposed prohibition on manufacture, storage, distribution of sale of Rajnigandha Pan Masala along with 10 other brands of *Pan Masala* for one year. Vide Notification No.93(16) issued on 28.05.2021, the said prohibition was extended for one year on the said *Pan Masala* along with 10 other brands of *Pan Masala*. On 03.06.2022 again by virtue of impugned notification, the said prohibition on the aforesaid *Pan Masala* along with 10 other brands was extended for one year. Hence, this writ application was filed by the petitioners seeking the aforesaid reliefs.

3) At the outset, Mr. Jai Prakash, learned A.A.G.-1A, appearing for the State of Jharkhand, would submit that the writ application has become infructuous as the last date of the said notification has come to an end on 30th of June, 2023. However, we are of the opinion that the aforesaid notification did not only prohibit the sale of the aforesaid *Pan Masala* but it also by virtue of the provisions contained in the FSS Act made the storage, productions, sale, etc of the aforesaid *Pan Masala* a

criminal offence and, therefore, by virtue of the operation of the three identical notifications for three consecutive years, criminal liability as well as civil liability has already arisen which cannot be said to have become infructuous because of the afflux of time in completion of the outer limit of the notification. Hence, we took up the case on merits for adjudication.

4) The petitioners claim that the Commissioner of Food Safety has issued three consecutive prohibitory orders/notifications on 08.05.2020, 28.05.2021 and 03.06.2022 under Section 30(2)(a) of the FSS Act imposing prohibition of Rajnigandha Pan Masala and some other brands of *Pan Masala*. The duration for these prohibitions was for one year from the date of notifications. All these three prohibitory orders were passed on identical ground that Magnesium Carbonate was detected in some samples of Rajnigandha and other brands of *Pan Masala* analyzed in the State Food Testing Laboratory in 2019-20.

5) Being aggrieved by the three consecutive prohibitory orders and the coercive action taken by the police and Food Safety Department against the standardized food products, the petitioners approached this Court.

6) The petitioners claim that those prohibitory orders were illegal, arbitrary and *non est*, as the FSS Act does not treat Magnesium Carbonate as injurious to health. It is the positive case of the petitioners that Magnesium Carbonate is not *per se* injurious to health. It is a permitted additive in all the items of Food according to the Goods Manufacturing Practices (GMP). The USFDA recognizes that Magnesium Carbonate meets the specifications of foods chemicals Codex. It is used as an anti-caking and free flow agent; flour treating agent; a lubricant and release agent; a nutrient supplement; pH control agent; and a processing aid. Under the Food Safety and Standards

(Food Products and Food Additives) Regulations, 2011, a list of food additives with International Numbering System (INS) is given and Magnesium Carbonate is mentioned under Appendix B, after Table 7 at serial number 362 (list sorted by INS number) and 267 (list sorted alphabetically) as a recognized acidity regulator, anti-caking agent and colour retention agent.

There is no objective material on record to show that due to consumption of Rajnigandha Pan Masala, any “adverse public health situation” had arisen in Jharkhand or any area thereof. The term “public health” cannot be interpreted subjectively according to the personal whims of Food Commissioner of the State.

7) The FSS Act or the regulations framed thereunder do not forbid presence of Magnesium Carbonate in *Pan Masala*. Despite repeated questions by the Court, the learned Senior Counsel for the petitioners would argue in course of hearing of the case that the respondents could not point out any provision from the FSS Act which forbids presence of Magnesium Carbonate in *Pan Masala*. It is also submitted by the petitioners that Food Additives are defined under Section 3(k) and their uses are permitted according to Section 19 of the FSS Act. Food Safety and Standards (Food Products and Food Additives) Regulation, 2011 as amended from time to time contains relevant provisions which provide a different covenant and *Pan Masala* does not prohibit presence of Magnesium Carbonate. Regulation 3.1.1(1) under Chapter 3 deals with Food additives which says that the food additives listed herein are recognized as suitable for use in foods, safe and technologically justified. Regulation 3.1.1(2) provides for foods in which additives may be used. Regulation 3.1.1(3) provides for foods in which additives may not be used. Regulation 3.1.1(8) defines GMP. It is further submitted before us that the regulation contains GMP Table provisions for all food

categories which lays that the food additives as indicated herein may be used in all food categories except those categories listed in the Annex to GMP list under the conditions of GMP as outlined in 3.1(8). Magnesium Carbonate is specifically mentioned in the Table of food additives. Annex to GMP table specify food categories where GMP table shall not apply. *Pan Masala* is not mentioned thereunder. Additionally, learned Senior Counsel for the petitioners would submit that the statutory procedure for collection of samples and analysis thereof by accredited laboratories was not followed in 2019-20. Section 43 of the FSS Act prescribes accredited food laboratory for analysis of samples by the food analysts under the Act. Section 46(4) provides right of appeal against the report of Food Analyst. Section 47 prescribes procedure for sampling and analysis. The alleged analysis reports of Rajnigandha pertaining to the period 2019-20 were not placed on record by the respondents and the respondents failed to show compliance of Sections 43, 46 and 47 of the FSS Act. The State Food Laboratory was not accredited as per Section 43 during 2019-20. The learned Senior Counsel would further submit that if a statute provides for a thing to be done in a particular manner, it has to be done in that manner alone. The learned Senior Counsel would further submit that the respondents suppressed the analysis report of duly accredited National Food Laboratory, Kolkata (NFL) which reported that Magnesium Carbonate was found absent in Rajnigandha Pan Masala. Samples of Rajnigandha Pan Masala were sent on behalf of the respondent Nos.2 and 3 to NFL. The analysis reports of NFL dated 02.11.2021 and 13.05.2022 reported test for Magnesium Carbonate as negative, which are available at pages 21 & 22 of I.A. No.4235 of 2023. Despite these reports, the prohibition order was extended in 2021 and 2022. The learned Senior Counsel would further submit that the counter affidavit dated 08.09.2022

filed by the respondent Nos.2 and 3 also suppressed this material evidence. The learned Senior Counsel for the petitioners would further submit that the respondents cannot be permitted to depart from the reason mentioned in the impugned prohibition orders by supplying different material and improving upon the facts from other jurisdiction in the counter affidavit. It is submitted that prohibition against Rajnigandha Pan Masala was imposed only on the ground that Magnesium Carbonate was detected in some samples thereof in 2019-20 and presence of Magnesium Carbonate in *Pan Masala* contravenes the provisions of the FSS Regulations, 2011. Scientific research was also mentioned in the impugned prohibition orders although nothing was produced on record by the State. In the counter affidavit filed by the respondents, some unverified reports from other jurisdictions were relied upon to support the impugned notifications.

In this connection, the learned Senior Counsel has relied upon several judgments which shall be dealt with later on while we give opinion on the issues under litigation. The learned Senior Counsel would also submit that exercise of power under Section 30(2)(a) of the FSS Act lays down the powers and functions to be performed by the Commissioner of Food Safety, but it does not provide any guideline or procedure to exercise such function or powers by the administrative officer. It is, therefore, submitted that unless a reasonable procedure consistent with principles of natural justice or some other guiding principles for exercise of functions of prohibition is found within the scheme of the FSS Act, Section 30(2)(a) would become unconstitutional for conferring arbitrary and uncanalised power upon an administrative authority. Section 34 of the FSS Act provides for a procedure consistent with the principles of natural justice for exercise of function under Section 30(2)(a) of the FSS Act. Section 34 lays down the procedure of

satisfaction required to be arrived at by the designated officer before submitting a report to the Commissioner of Food Safety. If Section 30(2)(a) is interpreted as an independent power of prohibition without giving any opportunity of hearing to the affected party/parties, as submitted by the State, it is liable to be declared unconstitutional. Relying upon the reported case of **A.N. Parasuraman and Ors Vs. State of Tamil Nadu, (1989) 4 SCC 683**, the learned Senior Counsel appearing for the petitioners would submit that function under Section 30(2)(a) of the Act can be delegated to the junior officers under Section 30(3) of the Act. Thus, it implies that the function of under Section 30(2)(a) cannot be construed to be a power to announce a policy of prohibition. Ultimately, the learned Senior Counsel for the petitioners would submit that the issuance of notice prohibiting storage, sale, production, etc of the *Pan Masala* in question is a colourable exercise of function under Section 30(2)(a) of the Act by the respondents and, therefore, it is being a selective prohibition against a few brands of *Pan Masala* is on non-existent ground, creates a “policy arbitrage” in favour of the other brands. Therefore, the learned Senior Counsel prays for reliefs as mentioned above.

8) The respondents in this case took a plea that in the financial year 2019-20, owing to detection of Magnesium Carbonate in 11 brands of *Pan Masala*, pursuant to the collection, testing and analysis of 41 samples of *Pan Masala* from different districts of the State of Jharkhand, the manufacturing, storage, distribution or sale of the said 11 *Pan Masalas* has been prohibited in the public interest, vide, notifications of the years 2020, 2021 and 2022 as has been described in the preceding paragraphs. The respondents claim that Rajnigandha *Pan Masala* was found to contain Magnesium Carbonate on testing in Maharashtra in 2005 vide **Rajiv Kumar Gupta and others Versus State of**

Maharashtra, 2006 CriLJ 581. It was also found to contain nicotine on testing by CTRI Lab even more than pure tobacco products in **Ankur Gutkha Vs. Indian Asthma Care Society & Others, (2011 SCC OnLine SC 1612)**. The Government of Maharashtra between the years 2003 and 2011 collected 1173 samples of different brands of *Pan Masala* and on testing 1153 samples was found to contain Magnesium Carbonate including products manufactured by the petitioners. In this connection, Maharashtra Notification dated 18.07.2013 is relied upon. Rajnigandha Pan Masala was found to contain Magnesium Carbonate as carnosine colour on testing in Uttarakhand in the year 2017. Rajnigandha Pan Masala collected from different districts of Bihar were found to contain Magnesium Carbonate as an ingredient. It was also found to contain nicotine in National Tobacco Testing Laboratory (NITL), NOIDA (UP). The consistent presence of Magnesium Carbonate is in contravention of FSS Act and Regulation 2.11.5 of the Food Safety and Standards (Food Products and Food Additives) Regulations, 2011 and Regulation 2.3.4 of the Food Safety and Standards (Prohibition and Restrictions on Sales) Regulations, 2011. It is also stated that Magnesium Carbonate is not specified as an ingredient of *Pan Masala*. The Hon'ble Supreme Court in the case of **Central Areca-nut Marketing Corporation and others Versus Union of India and others** [T.C.C. No.01 of 2010, leading case in the batch of several petition including S.L.P. No.16308 of 2007] passed an order recording and directing that Secretaries, health Department of all the States and Union Territories for issuance of total compliance of the ban imposed on manufacturing and sale of Gutkha and *Pan Masala* with Tobacco and/or nicotine. Relying upon the observations made by the Hon'ble Supreme Court in

Centre for Public Interest Litigation Versus Union of India and others, (2013) 16 SCC 279, vide judgment dated 22.10.2013, the learned counsel for the respondents would further submit that any food article which is hazardous or injurious to public health is a potential danger to the fundamental right to life guaranteed under Article 21 of the Constitution of India. Mr. Anil Kumar, learned Addl. Solicitor General of India appearing for the respondent-Union of India, would submit that a paramount duty is cast on the States and its authorities to achieve an appropriate level of protection to human life and health which is a fundamental right guaranteed to the citizens under Article 21 read with Article 47 of the Constitution of India. Therefore, it is submitted that the writ application should be dismissed.

9) On the basis of the pleadings raised as enumerated above, the following are the mixed questions of law and facts in this case:-

- (i) Whether the Commissioner of Food Safety in exercise of powers under Section 30(2)(a) of the Food Safety and Standards Act, 2006 can take a decision which is contrary to the specific provision of the Parent Act and Regulations made thereunder?
- (ii) Whether an order under Section 30(2)(a) of section 34 of the FSS Act should precede by notice to show cause contemplating such an action?
- (iii) Whether the action of completion prohibition on manufacture, sale, transport, distribution of any brand for an indefinite period is contemplated under any of the provisions of the FSS Act, 2006?

- (iv) Whether the permission under the relevant Regulation with regard to Magnesium Carbonate to be used as food additive leads to a natural corollary that the same is not injurious to health?
- (v) Whether the Commissioner, Food Safety can base any prohibitory order for indefinite period on account of an *ex parte* collection of samples and food collected in the years 2019 and 2020?
- (vi) Whether the issuance of prohibitory orders on year to year basis for the third time in succession by the Commissioner of Food Safety amounts to a fraud upon the Statute and amounts to colourable exercise of powers?

10) At the very outset, we note here that petitioner No.1 in this case is a Company and, therefore, the provisions of Section 179 of the Companies Act, 2013 corresponding to Section 213 of the Companies Act, 1956 should be complied with. This is to say that before filing a writ application, a resolution of the Board is necessary. But the Orissa High Court in **M/s. Jindal Steel & Power Limited & another Vs. State of Orissa and others** (Writ Petition No.6068 of 2009, dated 02.11.2020), authored by one of us, namely, S.K. Mishra, J., has held that it is a curable defect. In this case, while the matter was taken up in the first instance, this issue should have been noted by the Court, but, instead, this Court directed for filing of counter affidavit and, thereafter, pleadings have been exchanged. Supplementary pleading has also been given. So, at this stage, dismissing the writ application only for non-compliance of the curable will defeat the interest of justice. Hence, we are not inclined to hold that the writ application as laid is not proper.

11) Dealing with the questions framed by us at paragraph 10, we propose to take up question Nos. (i), (ii) and (iii).

At the outset, the learned Senior Counsel for the petitioners would submit that the absolute power, as propounded by the learned Senior Counsel for the respondents, on the Commissioner of Food is excessive delegation of power and, therefore, unconstitutional, has to be considered on its own merits.

In course of hearing, Mr. Anil Kumar, the learned Additional Solicitor General of India appearing for the Union of India, has, however, defending the provisions of the FSS Act, especially Section 30(2)(a) thereof, would submit that the Act itself contains safeguards for the use of the powers.

12) For the convenience of understanding the various provisions in the light of the argument advanced, this Court takes note of the preamble of the Act which provides that the FSS Act is being enacted to consolidate the laws relating to food and to establish the Food Safety and Standards Authority of India for laying down science based standards for articles of food and to regulate their manufacture, storage, distribution, sale and import, to ensure availability of safe and wholesome food for human consumption and for matters connected therewith or incidental thereto.

13) Clause 5 of the Statement of Object and Reasons provides that the Bill incorporates the salient features of the Prevention of Food Adulteration Act, 1954 (37 of 1954) and is based on international legislations, instrumentalities and Codex Alimentaries Commission (which related to Food Safety norms). In a nutshell, it is further provided that the Bill takes care of international practices and envisages an overreaching policy framework and provision of a single window to guide and regulate persons engaged in manufacture, marketing, processing, handling, transportation, import and sale of food. The main features of the Bill are, (a) movement from multi-level and multi-

department control to integrated line-up; (b) Integrated response to strategic issues like Novel/genetically modified foods, international trade; (c) licensing for manufacture of food products which is presently granted by the Central Agency under the various Acts and Orders, would de-centralize to the Commissioner of Food Safety and its Officers; (d) single reference point for all matters relating to food safety and standards, regulations and enforcement; (e) seek from the near regulatory regime to self compliance to food safety management system; (f) responsibility on food business operators to ensure that food processed, manufactured, imported or distributed in compliance with the domestic food laws; and (g) provision for graded penalties depending on the gravity of the offence and accordingly civil penalties for minor offences and punishment for serious violations.

14) Chapter VII of the FSS Act provides for enforcement of the Act, which is relevant for the purpose of this particular litigation.

Section 29 provides for the authorities responsible for the enforcement of the Act. Section 30 provides for appointment of the Commissioner of Food Safety of the State. Section 31 provides for licensing and registration of food business. Section 32 provides for improvement notices. Section 33 provides for prohibition mainly on conviction of a food business operator on orders passed by the Courts. Section 34 provides for emergency prohibition notices and orders. Section 35 provides notification for food poisoning. Section 36 provides that the Commissioner of Food Safety shall, by order, appoint the Designated Officer, who shall not be below the rank of a Sub-Divisional Officer, to be in-charge of food safety administration in such area a may be specified and duties and functions have been laid down. Food Safety and powers of Food Safety Officer have been provided in Sections 37 and 38 of the Act respectively. Liability of Food Safety Officer in certain

cases has also been provided in Section 39. Section 40 provides that the purchaser may have the food analysed and the procedures thereof and Section 41 provides for the power of search, seizure, investigation, prosecution and procedure thereof. Section 42 provides for launching of prosecution.

15) Three words/expressions appear in different Sections are – “food”, “food business” and “Designated Officer”, for which we have to refer to Section 2 for the definition thereof.

16) “Food” has been defined under Section 3(1)(j) of the Act which reads as follows:-

“(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 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.

17) “Food addictive” has also been defined under Section 3(1)(k) of the Act which reads as follows:-

(k) “food additive” means any substance not normally consumed as a food by itself or used as a typical ingredient of the food, whether or not it has nutritive value, the intentional addition of which to food for a technological (including organoleptic) purpose in the manufacture, processing, preparation, treatment, packing, packaging, transport or holding of such food results, or may be reasonably expected to result (directly or indirectly), in it or its by-products becoming a component of or otherwise affecting the characteristics of such food but does not include —contaminants¹¹ or substances added to food for maintaining or improving nutritional qualities;

18) Section 3(1)(n) of the Act defines “food business” to be any undertaking, whether for profit or not and whether public or private, carrying out any activities related to any stage of manufacture, processing, packaging, storage, transportation, distribution of food, import and includes food services, catering services, sale of food or food ingredients.

19) Section 30 provides for appointment of Commissioner of Food Safety and the duties to be performed by him. It reads as follows:-

“30. Commissioner of Food Safety of the State.—(1) The State Government shall appoint the Commissioner of Food Safety for the State for efficient implementation of food safety and standards and other requirements laid down under this Act and the rules and regulations made thereunder.

(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;

(b) carry out survey of the industrial units engaged in the manufacture or processing of food in the State to find out compliance by such units of the standards notified by the Food Authority for various articles of food;

(c) conduct or organise training programmes for the personnel of the office of the Commissioner of Food Safety and, on a wider scale, for different segments of food chain for generating awareness on food safety;

(d) ensure an efficient and uniform implementation of the standards and other requirements as specified and also ensure a high standard of objectivity, accountability, practicability, transparency and credibility;

(e) sanction prosecution for offences punishable with imprisonment under this Act;

(f) such other functions as the State Government may, in consultation with the Food Authority, prescribe.

(3) The Commissioner of Food Safety may, by Order, delegate, subject to such conditions and restrictions as may be specified in the Order, such of his powers and functions under this Act (except the power to appoint Designated Officer, Food Safety Officer and Food Analyst) as he may deem necessary or expedient to any officer subordinate to him.”

20) We take note of the fact that Section 30(2)(a) of the FSS Act provides that the Commissioner of Food Safety shall perform all or any of the functions, namely, prohibit in the interest of public health, the manufacture, storage, distribution or sale of an 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.

21) The “Designated Officer” as appointed by the Commissioner of Food Safety has power to make a report to the Commissioner.

22) Section 34(1) of the FSS Act provides that if the Designated Officer is satisfied that the health risk condition exists with respect to any food business, he may, after a notice served on the food business operator (in this Act referred to as an “emergency prohibition notice”), apply to the Commissioner of Food Safety for imposing the prohibition. Sub-section (2) provides that if the Commissioner of Food Safety is satisfied, on the application of such an officer, that the health risk condition exists with respect to any food business, he shall, by an order, impose the prohibition. Sub-section (3) further provides that the Designated Officer shall not apply for an emergency prohibition order unless, at least one day before the date of application, he has served notice on the food business operator of the business of his intention to apply for the order. Sub-section (4) provides that as soon as practicable after the making of an emergency prohibition order, the Designated Officer shall require the Food Safety Officer to – (a) serve a copy of the order on the food business operator of the business; or (b) affix a copy of the order at a conspicuous place on such premises used for the purposes of that business; any person who knowingly contravenes such an order shall be guilty of an offence and shall be punishable with imprisonment for a term which may extend to two years and with fine which may extend to two lakh rupees. Sub-section (5) provides that an emergency prohibition order shall cease to have effect on the issue by the Designated Officer of a certificate to the effect that he is satisfied that the food business operator has taken sufficient measures for

justifying the lifting of such order. Sub-section (6) provides that the Designated Officer shall issue a certificate under sub-section (5) within seven days of an application by the food business operator for such a certificate and on his being not satisfied, the said officer shall give notice to the food business operator within a period of ten days indicating the reasons for such decision. This clause empowers the Commissioner of the Food Safety to serve emergency prohibition notices and orders to the food business operator if the Designated Officer is satisfied that the health risk condition with respect to any food business and on an application made by him to the Commissioner of the Food Safety for imposing the appropriate prohibition. The Designated Officer shall not apply for an emergency prohibition order unless at least one day before the date of application, he has served notice on the food business operator of the business of his intention to apply for the order. Any person who knowingly contravenes such an order shall be guilty of an offence and shall be punishable with imprisonment as described above and emergency prohibition order shall cease to have effect on the issue by the Designated Officer of a certificate to the effect that he is satisfied that the food business operator has taken sufficient measures justifying lifting of such order (reference has been made to the notes and clauses appearing in the Act itself).

23) It is apparent that if Section 30(2)(a) of the FSS Act is taken in isolation with the other provisions of the Act, then the Commissioner of Food Safety has been delegated absolute power to ban any article of the food for such a period not exceeding one year. However, a purposive interpretation of the definition of “food”, “business of food”, “designated officer”, etc reveals that the Act has certain built-in safeguards for imposition of a prohibitory order.

24) Thus, it is clear that the Commissioner of Food Safety, Section 30(3) of the FSS Act may, by order, delegate, subject to such conditions and restrictions as may be specified in the Order, such of his powers and functions under the Act (except the power to appoint Designated Officer) as he may deem necessary or expedient to any officer subordinate to him. Thus, it is clear that the Commissioner of Food Safety cannot act without a specific request made on this behalf by the Designated Officer. The Designated Officer cannot recommend or make an application to the Commissioner of Food Safety without issuing a notice to the concerned food business operator. Though, “food business” has been defined separately, we are of the considered opinion that these two definitions are complimentary to each other rather than being contrary to each other. Once an article is considered to be included in the definition of food, then, any transaction therein being manufacture, sale, storage, transportation, processing, etc shall be meant to be food business and a food business operator in relation to food business means a person by whom the business is carried on or owned and is responsible for ensuring the compliance of this Act, rules and regulations made thereunder. Thus, it is clear that the power conferred upon the Commissioner of Food Safety is not excessive delegation if not unbridled. In other words, we may add that the powers conferred on the Commissioner of Food Safety have certain built-in safeguards in it, so that an order is not passed in a whimsical manner. In this connection, we take into consideration the judgment passed by the High Court of Patna in the case of **Omkar Agency v. The Food Safety and Standards Authority of India**, being the lead case, reported in *2016 SCC Online Pat 9231*. Dealing with the similar questions, the Patna High Court has held that necessarily when the Preamble of the Act states that science based standardization would be

adopted in laying down standards of food, the Commissioner, while exercising powers under Section 30, must be in possession of objective materials that the food, sought to be prohibited, does not conform to the standards as prescribed by the Regulations. It is necessary, therefore, to analyze the various provisions of the Food Act to ascertain the standardization process. Section 3(zl) of the Act defines “prohibition order” to mean an order issued under Section 33 of the Food Act. Section 33 reveals that prohibition orders can be passed by the Courts, when a food business operator is convicted. It lays down the general rule regarding prohibition. The High Court of Patna in paragraph 19 of the aforesaid judgment further observes that an exception to Section 34 of the Food Act, which provides for emergency prohibition order, has been incorporated. It provides that if the Designated Officer is satisfied that health risk exists with respect to any food business, he may, after a notice served on the food business operator (referred to in the Food Act as an “emergency prohibition notice”), apply to the Commissioner of Food Safety for imposing the prohibition. Section 34(2) further provides that if the Commissioner of Food Safety is satisfied, on the application of such an officer, that the health risk condition exists with respect to any food business, he shall, by an order, impose the prohibition. In paragraph 20 of the judgment, the Patna High Court has held that Section 30(2)(a) has to be understood in the light of Section 34. As a result, a prohibition order can be issued by the Commissioner of Food Safety only when a report is laid down by the Designated Officer that the health risk condition exists with respect to any food business. With respect to any food product, since there may be numerous brands, it is equally necessary of the Designated Officer and also the Commissioner of Food Safety to specify, which particular brand is to be prohibited. While dealing with the question whether before making an order under

Section 30, the Commissioner is required to comply with the principles of natural justice, the Patna High Court has referred to the reported case of **Olga Tellis v. Bombay Municipal Corporation**, (1985) 3 SCC 545, wherein the Constitution Bench of Hon'ble Supreme had the occasion to deal with the provisions of Section 314 of the Bombay Municipal Corporation Act, 1888. It was held by the Hon'ble Supreme Court that Section 314 confers on the Commissioner the discretion to cause an encroachment to be removed with or without notice. That discretion has to be exercised in a reasonable manner so as to comply with the constitutional mandate that the procedure, accompanying the performance of a public act, must be fair and reasonable. The Court must lean in favour of this interpretation, because it helps sustain the validity of the law. It was further held, in **Olga Tellis** (supra), that it must be presumed that, while vesting the Commissioner with the power to act without notice, the Legislature intended that the power should be exercised sparingly and, in cases of urgency, which brook no delay. In all other cases, no departure from the *audi alteram partem* rule could be presumed to have been intended. On the provisions of Section 314, the Hon'ble Supreme Court further held in **Olga Tellis** (supra) that it is so designed as to exclude the principles of natural justice by way of exception and not as a general rule. There are situations, which demand exclusion of the rules of natural justice by reason of diverse factors like time, place, the apprehended danger and so on. The ordinary rule, which regulates all procedure, is that persons, who are likely to be affected by the proposed action, must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively depending upon the facts of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the

Legislature only in circumstances, which warrant it. Such circumstances must be shown to exist, when so required, the burden being upon those, who affirm their existence.

25) Thus, it is clear that the argument advanced by the learned Senior Counsel appearing for the petitioners that a delegation of unbridled power on the Commissioner of Food Safety is erroneous on the face of it and on that count itself, the Court cannot come to the conclusion that it is *ultra vires* of the Constitution of being excessive delegation.

26) We are, on the other hand, of the opinion that the powers conferred under Section 30(2)(a) of the FSS Act has to be read in conformity with other provisions of the Act, especially, Chapter VII. Special reference to the procedures laid down under Section 34 of the said Act. "Emergency prohibition notices and orders" has to be understood in the light of the expression appearing as "xxx xxx for such period, not exceeding one year, as may be specified xxx xxx" in Section 30(2)(a) of the FSS Act. Thus, we are of the further opinion that not only there are safeguards in the Act itself for exercise of powers conferred upon the Commissioner of Food Safety, but also this power should be exercised after following the principle of *audi alteram partem* or the principles of natural justice. Before passing any order, an application filed by the Designated Officer, the Food Commissioner should also consider the case of the party affected and should take into consideration the case put forth by them.

27) In the present litigation, it is not the case of the respondents that the Designated Officer made an application to the Food Commissioner and on the basis of the same, the Food Commissioner has passed the order. On the other hand, it is apparent that certain reports were placed before the Food Commissioner and on the basis of the reports that there was presence of Magnesium Carbonate in the *Pan Masala* in

question, the Commissioner has come to the conclusion that it is injurious to health of its consumption and that emergency prohibition order was passed under Section 30(2)(a) of the FSS Act. It may be noted that there is no finding on the part of the Commissioner of Food Safety that an emergent situation appears and it leaves no time for following the principles of natural justice, especially when such an order has been passed on three different occasions for three consecutive years. In the meantime, the petitioners could have been asked to show cause or put forth his case regarding presence of Magnesium Carbonate and permitted additive as an anti-caking agent in the food safety regulations, etc. Thus, this Court is of the opinion that there has been a colourable exercise of powers by the respondents, especially respondent No.1 and, in exercise of such powers, an erroneous order, which is not sustainable under law, has been passed.

28) Coming to the question of presence of Magnesium Carbonate in the *Pan Masala*, it is not disputed that it is a duly recognized and permitted food additive worldwide and also the regime of FSS Act. The Regulation 3.1 of the Food Safety and Standards (Food Products and Food Addictives) Regulations, 2011, provides that food additives listed therein are recognized as suitable for use in food and are safe. Regulation 3.1.1(2) mentions the food additives may be used. Regulation 3.1.1(3) mentions the food in which additives may not be used. Annexure 1 to Appendix A of the Regulations contains GMP Table Provisions for all food categories. Therefore, Magnesium Carbonate is permitted in all items according to Good Manufacturing Practices (GMP) unless other expressly prohibited or prescribed. The respondents have not pointed out any provision from the Act or Regulations which prohibits presence of Magnesium Carbonate in *Pan Masala*.

29) “*Pan Masala*” is defined under Regulation 2.11.5 of the Food Safety and Standards (Food Products and Food Additives) Regulations, 2011 that It may contain *inter alia* Betelnut, lime, catechu, cardamom, etc. and sugar, glucose, etc.

30) Appendix A provides for GMP Table Provisions for all food categories. It provides that the additives mentioned in the Table from Serial No.260 in which Acetic acid has been mentioned as indicated may be used in all food categories except those categories listed in Annexure to GMP Table List under the conditions of Good Manufacturing Practice. Serial No.504(ii) lists Magnesium hydroxide carbonate. The same Appendix A provides and Annex to GMP Table and categorizes for individual food items where GMP Table does not apply. It lists from Serial No.1 i.e. Category No.1.1.1 to Serial No.86 Category No.14.2.3.3. A very careful examination of the said Annex of inapplicability of the GMP, we find that it does not contain a mention of *Pan Masala*. Mainly it contains food items like milk, fish, eggs, fruits, vegetables, fruit juices, vegetable juices, etc and repeated examination of the said Annex to the GMP Table reveals that *Pan Masala* as a category of food is not included in the said list. Thus, the decision of the respondents holding that this presence of Magnesium Carbonate in certain samples of *Pan Masala* will not make itself prohibited under the regime of the new FSS Act which is improved and more comprehensive legislation than the Prevention of Food Adulteration Act, 1954.

31) Learned Senior Counsel for the petitioners would also lay emphasis on the ground of prohibition and termed it contrary to the materials on record. The petitioner No.1 received RTI reply dated 26.10.2022 from the office of Designated Officer, Sadar, Ranchi. Two analysis reports on the said *Pan Masala* were annexed to the reply. The analysis reports supplied under the Right to Information Act, 2005

reveals that at the instance of the State of Jharkhand, analysis of the Rajnigandha Pan Masala has been done twice in the National Food Regulatory, Kolkata and reports dated 02.11.2021 and 13.05.2022 were received by respondent Nos.2 and 3. Presence of Magnesium Carbonate was reported as “Nil” in both the samples of Rajnigandha Pan Masala.

32) It is pertinent to mention that these two test reports were available with the respondents before issuing the 3rd prohibition order dated 03.06.2022, but they did not act upon the same and even they did not reveal about the same in their counter affidavit. It is, therefore, clear that continuation of the 2nd notification dated 28.05.2021 and the impugned 3rd notification dated 03.06.2022 are absolutely without any basis after the aforementioned analysis reports and, hence, unfounded and baseless. The respondents despite being in possession of the said test reports from a duly recognized/accredited referral food laboratory as per Section 3(p), deliberately and actively suppressed the same and did not bring the same on record.

33) In course of hearing, learned Senior Counsel appearing for the State would submit that 11 brands of *Pan Masala* have been prohibited in the interest of public health by three consecutive notifications for three years. It is also submitted that the matter is *res integra* before the Hon'ble Supreme Court in **Central Areca-nut Marketing Corporation and others vs. Union of India and others [Transfer Case (C) No. 1 of 2010]** and, hence, this petition is not maintainable. However, we are of the opinion that since no order of stay has been issued prohibiting this Court from entertaining writ application by the Hon'ble Supreme Court, there is no justification in not deciding the case and keep it pending for an unspecified period of time. It is further submitted that Rajnigandha Pan Masala was found to contain

Magnesium Carbonate on testing in Maharashtra in 2005 vide **Rajiv Kumar Gupta and others Versus State of Maharashtra, 2006 CriLJ 581**, it was also found to contain nicotine testing by CTRI Lab, even more than pure tobacco products in **Ankul Gutkha Vs. Indian Asthma Care Society and others** (S.L.P. No.16308/2007). The State of Maharashtra has collected different samples of different brands of Pan Masala and the samples were containing Magnesium Carbonate, including products manufactured by the petitioners. It is further stated that it is containing nicotine and that it is false to mention in its advertisement that no nicotine is contained in the product.

34) Learned Senior Counsel for the State would further submit that the Hon'ble Supreme Court in the case of **Central Areca-nut Marketing Corporation (supra)** has passed an order recording and directing to Secretaries, Health Department of all the States and the Union Territories to file affidavits on the issue of total compliance of ban imposed on manufacturing and sale of *Gutkha* and *Pan Masala* with tobacco and/or nicotine.

35) This has to be understood carefully. The Hon'ble Supreme Court has directed banning on manufacturing and selling of "Gutkha and Pan Masala" with "tobacco and/or nicotine". The Hon'ble Supreme Court did not pass any order on complete ban of *Pan Masala* when it is manufactured or stored, transported or consumed or sold for consumption, but does not contain any tobacco or nicotine. The learned Senior Counsel for the State would also submit that the *Pan Masala* containing Magnesium Carbonate leads to acute hyper magnesemia, cardiac arrests and other related diseases and, therefore, Bombay High Court in **Sanket Food Products Private Limited Vs. Union of India and**

others, decided in the year 2011, held that Magnesium Carbonate is injurious to health. However, as we have seen from the Good Manufacturing Practices as Appendix A to Regulations of 2011, Magnesium Carbonate is considered to be a permissible additive product as anti-caking agent.

36) Moreover, it is seen that the respondents have taken a decision to ban certain Pan Masalas as on three consecutive years by three consecutive notifications to that effect on the ground that it contained Magnesium Carbonate. From the aforesaid analysis, we are of the opinion that presence of Magnesium Carbonate itself does not make a food article prohibited. An attempt has been made by the learned Senior Counsel appearing for the State-respondents that nicotine was found in certain laboratory analysis. However, it is not the case of the respondents that the Pan Masala in question does have any nicotine or tobacco in it. In fact, it is the consistent case of the petitioners that the said Pan Masala does not have any tobacco or nicotine in it. A report to that effect is also annexed in the supplementary affidavit whereby the State Government was in know of the fact that the Central Food Laboratory, Kolkata has come to the conclusion it does not contain nicotine, but they did choose not to act upon it and passed orders in clear ignorance of scientific proven facts. Further, the order of prohibition under challenge, was passed not because of presence of any nicotine. So the State Government cannot supplement a fresh ground by filing counter affidavit, which was not the basis of the impugned prohibition notification.

37) Thus, on the aforesaid analysis of the entire facts, we are of the opinion that the orders passed by Commissioner of Food Safety, State of Jharkhand is not only illegal, but also based on insufficient and inappropriate data and require to be quashed.

38) Mr. Jai Prakash, learned A.A.G.-1A appearing of the State, would submit that since the period has already lapsed, there is no need to quash the notifications. However, we are of the firm opinion that if due to issuance of the notification, criminal investigation and prosecution has been launched against certain persons, it cannot be said that after lapse of the period of notification, the same cannot be quashed. The adverse consequence of the notification remains. Such consequence can only be undone by quashing the notifications which are illegal. In fact, a Public Interest Litigation is pending before us in which a petitioner has sought for a direction from this Court to enforce the three notifications and register F.I.R., conduct effective investigation, expedite the trial, etc, and therefore, allowing all the three notifications to stand, would not attract civil consequences but also perpetuate criminal cases against persons who cannot be held guilty for violation of an order which is clearly illegal and unsustainable.

39) In the result, this writ petition is allowed. The notifications dated 08.05.2020, 28.05.2021 and 03.06.2022, *qua* the brand of the petitioner, are hereby quashed with retrospective effect from the dates of their issue.

40) However, there shall be no orders as costs.

41) Pending Interlocutory Applications, if any, stand disposed of.

42) Urgent Certified copies as per rules.

(Sanjaya Kumar Mishra, C.J.)

Ananda Sen, J. I agree.

(Ananda Sen, J.)

A.F.R.

Manoj/-