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Neutral Citation Number: 2023:DHC:2375-DB

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Judgment reserved on: 13 February 2023**
Judgment pronounced on: 10 April 2023

\+ LPA 742/2022 & CAV 462/2022, CM APPL. 56085/2022, CM APPL. 56087/2022, CM APPL. 56088/2022

COMMISSIONER (FOOD SAFETY), GNCTD ..... Appellant

Through: Mr. Gautam Narayan, Additional Standing Counsel with Ms. Asmita Singh and Mr. Harshit Goel, Advocates for GNCTD.

versus

SUGANDHI SNUFF KING PVT. LTD. AND ORS.
..... Respondents

Through: Ms. C.S. Vaidyanathan, Dr. Abhishek Manu Singhvi and Mr. Vivek Kohli, Senior Advocates, with Mr. Nalin Tawar, Mr. Manoj Gupta, Mr. Sunil Tyagi, Ms. Prerna Kohli, Ms. Yeshi Rinchhen, Mr. Vishnu Anand, Mr. Akash Yadav, Mr. Harshit Mahalwal, Mr. Juvas Rawal, and Mr. Vinayak Goel, Advocates for Respondents No.1 & 2.
Mr. Pavan Narang, Mr. Himanshu Sethi, Ms. Aishwarya Chhabra & Mr. Shiven Khurana, Advocates for S.K. Tobacco & Gandhi

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Neutral Citation Number: 2023:DHC:2375-DB

Tobacco.
Mr. Bhagvan Swarup Shukla, CGSC with Mr. Sarvan Kumar, Advocate for UOI.

\+ LPA 748/2022 & CM APPL. 56613/2022, CM APPL. 56615/2022

UNION OF INDIA ..... Appellant

Through: Mr. Kirtiman Singh, CGSC with Ms. Manmeet Kaur, Mr. Waize Ali Noor, Ms. Vidhi Jain, Mr. Prateek Dhanda, Mr. Taha Yasin, Ms. Kunjala Bhardwaj, Mr. Madhav Bajaj, Mr. Yash Upadhyay, Ms. Shreya Mehra and Mr. Ranjit Singh, Advs. for UOI.

versus

SUGANDHI SNUFF KING PVT LTD & ORS. .... Respondents

Through: Ms. C.S. Vaidyanathan, Dr. Abhishek Manu Singhvi and Mr. Vivek Kohli, Senior Advocates, with Mr. Nalin Tawar, Mr. Manoj Gupta, Mr. Sunil Tyagi, Ms. Prerna Kohli, Mr. Sandeep Bhuraria, Ms. Yeshi Rinchhen, Mr. Vishnu Anand, Mr. Akash Yadav, Mr. Harshit Mahalwal, Mr. Juvas Rawal, Advocates for Respondents No.1 & 2.
Mr. Pavan Narang, Mr. Himanshu Sethi, Ms. Aishwarya Chhabra & Mr. Shiven Khurana, Advocates for

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S.K. Tobacco & Gandhi Tobacco.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE YASHWANT VARMA

J U D G M E N T

For ease of reference, refer the table as under:-

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A. ESSENTIAL FACTS

1. The **Ministry of Health and Family Welfare in the Union Government**[1] together with the **Government of National Capital Territory of Delhi**[2] have preferred the present appeals questioning the correctness of the judgment dated 27 September 2022 rendered by a learned Single Judge of the Court. The judgment came to be rendered on a batch of writ petitions which had assailed the validity of a Notification bearing No. F.1(3)DO- I/2012/10503-10521 dated 25 March 2015 passed by the Commissioner (Food Safety), GNCTD prohibiting the manufacture, storage, distribution or sale of tobacco, flavoured/scented, or mixed with any of the said additives and described as gutka, pan masala, flavoured/scented tobacco, *kharra* or otherwise called by any other name in its packaged or unpackaged form and sold either separately or as one composite product in the National Capital Territory.

2. Undisputedly, the aforesaid directive though originally prescribed to prevail for a period of one year from the date of publication of the said original notification had been extended from

[1] Union Government
[2] GNCTD

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time to time and supplemented by identical notifications issued over the years. Those notifications shall for the sake of brevity be hereinafter referred to as the **"Impugned Notifications"**. The original notification of 25 March 2015 read as under: -

"(TO BE PUBLISHED IN THE DELHI GAZETTE PART IV

EXTRAORDINARY)

Department of Food Safety
Government of NCT of Delhi
8th Floor, Mayur Bhawan
Connaught Place, New Delhi-110001
TeLNo,,23413488, e-mail ID: cfss.delhi@nic.in

No. F.1(3)/DO-I/2012/I0503-I0521 Dated: 25/3/15

NOTIFICATION

WHEREAS, Gutka, Pan Masala, Flavoured/Scented Tobacco, Kharra and similar products containing tobacco by whatsoever name called, cause damage to the health of consumer and their adverse impact could also lead to alterations of the genetic make-up of future generations;

WHEREAS, tobacco, whether flavoured, scented or mixed with other ingredients such as heavy metals, anti-caking agents (except to the extent specifically permitted as ingredients), silver leaf, binders, flavours, scents, fragrances, prohibited chemicals, or any one of these ingredients (the said ingredients are hereafter collectively or individually, as the context requires, referred to as "the said additives") are "food" under clause (j) of section 3 of the Food Safety and Standards Act, 2006;

WHEREAS, the Central Government has prohibited products containing tobacco and nicotine under regulation 2.3.4 of the Food Safety and Standards (Prohibition and Restrictions on Sales) Regulations, 2011 and anti-caking agents (beyond the extent permitted) under regulation 3.1.7 of The Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011;

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WHEREAS, the said food articles if consumed will endanger human health and well-being and whereas if consumption of these food articles is allowed without prohibition the well being of current and future generations will be compromised;

WHEREAS, under the law and in the interest of public health, Commissioner Food Safety is responsible for prohibiting in the interest of public health the manufacture, storage, distribution or sale of any article of food, and whereas the undersigned is duly authorized under section 30(2)(a) of the Food Safety and Standards Act, 2006, to make this order;

Therefore, in exercise of these powers conferred by clause (a) of sub-section (2) of section 30 of the Food Safety and Standards Act, 2006, the undersigned, Commissioner (Food Safety), National Capital Territory of Delhi, prohibit in the interest of public health for a period of one year from the date of publication of this Notification in the official gazette, in the National Capital Territory of Delhi the manufacture, storage, distribution, or sale of tobacco which is either flavoured, scented or mixed with any of the said additives, and whether going by the name or form of gutka, pan masala, flavoured/scented tobacco, kharra, or otherwise by whatsoever name called, whether packaged or unpackaged and/or sold as one product, or though packaged as separate products, sold or
distributed in such a manner so as to easily facilitate mixing by the consumer.

Sd/-

(K.K. JINDAL, IAS)
Commissioner (Food Safety)
Government of National Capital Territory of Delhi

No.F.1(3)/DO-I/2012/10503-10521 Dated:25/3/l5”

3. The writ petitioners had assailed the validity of the aforesaid notification on numerous grounds which have been duly noticed and considered by the learned Single Judge in the impugned judgment. The principal challenge, however, appears to have centered around the provisions of the **Cigarettes and Other Tobacco Products**

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(Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003[3] and which, according to the petitioners, conferred a right upon them to undertake the manufacture, production, sale and distribution of pan masala or any other chewing material having tobacco or gutka as one of its ingredients . The writ petitioners also appear to have contended that the **Food Safety and Standards Act, 2006**[4] was not liable to be considered as an enactment empowering the respondents to pass prohibitory orders impeding or impinging upon the rights conferred upon the petitioners by COTPA. The writ petitioners also questioned the validity of the prohibitory orders in light of the *'declaration of expediency'* as embodied in COTPA and the expression of public interest of the Union taking under its control the tobacco industry by virtue of Entry-52 falling in List-I of the Seventh Schedule of the Constitution.

4. For the purposes of appreciating the challenge which stood raised before the learned Single Judge, it would be apposite to reproduce the principal arguments and issues which stood framed in the batch of writ petitions. The learned Single Judge had, upon noticing the submissions addressed, identified the principal issues as the following: -

> "**First** one being the "*scope of the 'declaration of expediency' relating to the 'Food Industry' under Section 2 of the FSSA.* Another question for consideration before this Court is the *"trade*

[3] COTPA
[4] FSSA

and commerce in, manufacture of, supply and distribution of Tobacco covered under the term 'Food Industry'".

Second, *"Once COTPA occupies the entire domain- cradle to grave- for tobacco; can FSSA encroach upon an "Occupied Field"?*

Third, "*the enactment of FSSA (in 2006) does not in any manner impinge upon the enforceability of the COTPA (enacted in 2003) which continues to be applicable and in force. There is no "express" or "implied" repeal of the COTPA by the FSSA".*

Fourth, *"A prior 'special law' (COTPA) would prevail over a later 'general law' (FSSA)".*

Fifth, *""Food" as defined under the FSSA does not include tobacco within its ambit or scope."*

Sixth, *that "the scope, intent and purpose of the FSSA is to establish and regulate the standards for Food. The power to regulate the standards for Food. The power to regulate does not include in its ambit the power to prohibit. In any case, the power to prohibit does not vest in the Food Commissioner at all. The distribution of powers amongst the: (i) Union; (ii) State; and (iii) the Statutory authorities- Food Safety Authority and Food Commissioner; clearly indicates that the Food Commissioner cannot take the decision to prohibit and that too permanently".*

Seventh, *that "the assessment, analysis, management and communication of "Risk" under and in terms of FSSA and the mandatory procedure in terms of Section 18 has not been followed demonstrating that the same has not even been considered in the present case, let alone be followed".*

Eighth, *"Section 30(2)(a) confers a very temporary power to address urgent and emergency circumstances. It cannot be used to "ban" or "prohibit" a product or trade in a product. In any case, temporary power cannot be perpetuated by an unfounded and unscrupulous exercise year after year".*

Ninth, *"Article 47 does not deal with tobacco. In fact, tobacco was specifically left out of the purview of Article 47 after a debate in the Constituent Assembly".*

Tenth, *"Article 14- discrimination between Smokeless Tobacco and Smoking Tobacco".*"

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5. On due consideration of the aforenoted submissions, the learned Single Judge proceeded to record the following conclusions: -

> "**238.** Considering the submissions made and documents and judgments relied by the parties and in view of the detailed discussion and reasoning mentioned herein above, this Court is of the considered view that:
>
> (a) The impugned Notifications passed by the Commissioner of Food Safety in view of Regulation 2.3.4 in exercise of powers under Section 30(2)(a), is beyond the scope of powers conferred upon him by the FSSA.
>
> (b) The COTPA is a comprehensive legislation dealing with the sale and distribution of scheduled tobacco products and therefore, occupies the entire field relating to tobacco products. Therefore, the COTPA, being a special law, occupies the entire field for tobacco and tobacco products and would prevail over the FSSA which is a general law.
>
> (c) It has never been the intention of the Parliament to impose an absolute ban on manufacture, sale, distribution and storage of tobacco and/or tobacco products. However, the intention of the Parliament is to regulate the trade and commerce of tobacco and tobacco products in accordance with the COTPA, a Central Act which deals with tobacco industry.
>
> (d) The doctrine of implied repeal has no application to the present case as the FSSA and the COTPA occupy different fields i.e., the former applies to the "food industry" while the latter applies to the "tobacco industry". Therefore, the FSSA does not impliedly repeal the provisions of the COTPA.
>
> (e) Tobacco cannot be construed as "food" within the meaning of the provisions of FSSA.
>
> (f) Section 30(2)(a) of the FSSA has to be read in consonance with Section 18 of the FSSA. The power under Section 30(2)(a) is transitory in nature and the Commissioner of Food Safety can issue prohibition orders only in emergent circumstances after giving an opportunity of being heard to the concerned food operator(s). The impugned Notifications, however, have been issued by Respondent

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> No.1 year after year in a mechanical manner without following the general principles laid down under Section 18 and 30(2)(a) of the FSSA, which is a clear abuse of the powers conferred upon him under the FSSA.
>
> (g) The classification sought to be created between smokeless and smoking tobacco for justifying the issuance of the impugned Notifications is clearly violative of Article 14 of the Constitution."

6. The learned Single Judge has firstly proceeded to examine the scope of the FSSA. The Court ultimately came to conclude that while the FSSA may empower the food safety authorities to establish standards for quality of food, it would not include within its purview the power to prohibit the manufacture, sale, storage and distribution of tobacco and this more so when tobacco products are enlisted in the Schedule of products to be regulated by COTPA. Dealing with the aforesaid issue, the learned Single Judge has held as follows: -

> "**189.** The FSSA is an Act to consolidate all laws relating to "food" and to establish the FSSAI for laying down science-based standards for articles of food. As per the Preamble of the FSSA, the purpose of the FSSA is to provide safe, wholesome and unadulterated food to consumers. The Statement of Objects and Reasons of COTPA states that it is an Act for regulation of trade and commerce in, and production, supply and distribution of, cigarettes and "other tobacco products and for matters connected therewith".
>
> **190.** The power to establish standards of quality for goods under the FSSA would not include within its purview the power to "prohibit" the "manufacture, sale, storage and distribution" of any goods, moreover, when the goods sought to be prohibited pertain to the scheduled tobacco products under the COTPA.
>
> **191.** The Hon'ble Supreme Court in the case of ***Himat Lal K. Shah (supra)*** has explicitly held that the power to regulate does not normally include the power to prohibit. A power to regulate implies the continued existence of that which is to be regulated. In view of ratio laid down by ***Himat Lal (supra)*** and bare perusal of the entire scheme of the FSSA, it is apparent that power to frame

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> Regulations does not include the power to prohibit manufacture, distribution, storage and sale of a product."

7. Turning then to the provisions of Regulation 2.3.4 of the **Food Safety and Standards (Prohibition and Restrictions on Sales) Regulations, 2011**, the learned Single Judge observes that the intent of Regulation 2.3.4 is not to prohibit but to merely restrict the use of tobacco and nicotine as ingredients in food products. According to the learned Single Judge, Regulation 2.3.4 cannot be read as empowering the food safety authorities to regulate tobacco itself. The learned Judge accordingly proceeded to hold that the regulation of tobacco would be governed exclusively by the provisions of COTPA. This is evident from the following extract of the impugned judgment: -

> "**193.** On the bare perusal of Regulation 2.3.4, it is apparent that the intention is not to prohibit but restrict the use of tobacco or nicotine as ingredients in any food product. In the considered view of this Court, the language of Regulation 2.3.4 does not suggest regulating manufacture, distribution, storage or sale of tobacco or nicotine but amounts to regulating standards of food within the purview of the FSSA. Therefore, what has to be regulated under Regulation 2.3.4 is food without tobacco and not tobacco itself which is a scheduled item under the COTPA, which has to accordingly be regulated under the provisions of COTPA."

8. Proceeding further on the aforesaid subject, the learned Single Judge came to the following conclusion: -

> "**196.** In view of the aforementioned, the impugned Notifications passed by the Commissioner of Food Safety in view of Regulation 2.3.4 in exercise of powers under Section 30(2)(a), in so far as they prohibit the use of tobacco and nicotine with respect to scheduled tobacco products covered under the COTPA, are beyond the scope of powers conferred by the FSSA."

9. Turing then to the question of declaration of expediency and noticing that both COTPA as well as FSSA embodied the intent of the

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Union to take under its control the tobacco and food industries, the learned Single Judge held as follows: -

> "**197.** Section 2 of FSSA provides that it is expedient in public interest that the Union should take under its control the food industry, whereas Section 2 of COTPA provides that it is expedient in the public interest that the Union should take under its control the tobacco industry. On a comparative reading of the aforementioned provisions, it can be seen that the FSSA concerns "food industry" and the COTPA relates to the "tobacco industry". It is pertinent to note that in view of Entry 52 of List I, the Parliament has assumed to itself the legislative power to legislate upon tobacco and food industry. The declaration under Section 2 of FSSA purporting to take over the "food industry" cannot cover tobacco within its ambit as the same has already been covered under the "tobacco industry" with the enactment of the COTPA.
>
> **198.** The COTPA was enacted by the Parliament under Entry 52 of List I to Schedule VII of the Constitution and once the Parliament chooses to exercise its competence in terms of Entry 33 of List III, it may take over the entire gamut of activities. The power of State Legislatures to enact laws relating to 'Trade and Commerce within the State' and 'Production, supply and distribution of goods' under Entry 26 and Entry 27 of List II is subject to Entry 33 of List III, which enables the Parliament to legislate with respect to the aforesaid matters in relation to the tobacco industry amongst others. When the COTPA was enacted under Entry 52 of List I read with Entry 33 of List III, the Parliament took under its control the tobacco industry thereby denuding the States to legislate *qua* the scheduled tobacco products covered under COTPA. Therefore, once the Parliament has exercised power under Entry 52 of List I in order to take the entire tobacco industry under its control, the State Legislatures are not competent to enact laws on the said subject.
>
> **199.** The COTPA is a comprehensive, self-contained, seamless legislation dealing with the sale and distribution of scheduled tobacco products and therefore, occupies the entire field relating to tobacco products. FSSA, on the other hand, is a general legislation. Admittedly, the impugned Notifications have been issued by Respondent No.1 as an executive action under the garb of Regulation 2.3.4 in exercise of power conferred by Section 30(2)(a) of the FSSA. Therefore, the FSSA cannot override

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COTPA which is a Central Act enacted solely for the purposes of regulation of tobacco and its products.

200. The COTPA is a special enactment dealing with tobacco and exclusively and comprehensively deal with tobacco and tobacco products. As held in the case of ***Godawat Pan Masala*** *(supra),* COTPA is a special Act intended to deal with tobacco and tobacco products, while the PFA is a general enactment, therefore, the COTPA overrides the provisions of the PFA with regard to the power to prohibit the sale or manufacture of tobacco products which are listed in the Schedule of the COTPA. In ***Godawat Pan Masala*** *(supra),* the Hon'ble Supreme Court further held that COTPA is a special Act intended to deal with tobacco and tobacco products and hence it will override Section 7(iv) of the PFA. The relevant portion, *inter alia*, reads as follows:

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

202. Even the COTPA does not ban the sale and distribution of tobacco and tobacco products except for imposition of certain conditions and various checks and balances to regulate the advertisement and sale thereof. Furthermore, whether an article is to be prohibited as *res extra commercium* is a matter of legislative policy and must arise out of an Act of the Legislature and not merely by a Notification issued by an executive authority. Thus, the trade, sale and distribution of tobacco is permissible subject to certain restrictions imposed under the COTPA and the same has only been regulated and not prohibited.

205. Considering the aforesaid, it clearly emerges that the FSSA is an Act to consolidate the laws relating to food and for laying down science-based standards for articles of food and to regulate their manufacture, storage, distribution, sale and import to ensure

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> safe and wholesome food for human consumption and incidental matters. Whereas the COTPA is a comprehensive legislation which deals with advertisement, trade, sale and distribution of tobacco and tobacco products. The Union Government assumed control to legislate with regard to both the food industry and the tobacco industry, therefore, it is certain that at the time of enactment of the FSSA, the Legislature was not only aware and conscious of the existence of the COTPA, which was enacted in 2003 but made various rules under the COTPA and carried out multiple amendments in provisions and rules framed thereunder even after the enactment of the FSSA in 2006.
>
> **206.** Accordingly, it can be observed that the COTPA, being a 'special law', occupies the field for tobacco and tobacco products and would prevail over the FSSA which is a 'general law'."

10. Proceeding further, the learned Single Judge took up for consideration the question of whether FSSA could be said to have impliedly repealed COTPA. It ultimately came to conclude that, since both FSSA and COTPA occupy distinct fields, the former cannot be said to have impliedly repealed the provisions of COTPA.

11. One of the principal issues which appears to have been urged for the consideration of the learned Single Judge was whether tobacco products could be termed as "food". Taking note of the divergent views which had been expressed by different High Courts on the said question, the learned Single Judge observed as under: -

> "**218.** In addition to the aforesaid, Regulation 2.3.4 prescribes that tobacco and nicotine shall not be used as ingredients in any food products. The said regulation has been framed under the FSSA, admittedly to regulate standards of food within the ambit of the FSSA and in the considered view of this Court, cannot be said to regulate standards and/or manufacture and sale of tobacco. In fact, the Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011, does not define tobacco, because no standards can be possibly laid down for tobacco, which further reinforces the fact that tobacco is not "food". If "tobacco" is

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> construed and interpreted as "food" within the meaning of FSSA, then intent/objective with which Regulation 2.3.4 is framed (i.e., to regulate standards of food under the FSSA) would be rendered redundant. Moreover, such an interpretation would be in complete contravention of the provisions of the FSSA, which is a comprehensive legislation dealing with the food industry.
>
> **219.** It is further worthwhile to note that Regulation 2.3.4 prohibits use of tobacco and nicotine as ingredients in food products thereby regulating the standards for "food" and not standards or trade in "tobacco". Hence, the said Regulation cannot be said to be in conflict with any of the provisions of the COTPA. The said Regulation merely lays down general principle for food safety and cannot in any manner be read to construe that "tobacco" is "food" within the meaning of the FSSA.
>
> **220.** After considering the arguments advanced and the judgments relied by the parties,"food" as defined in the FSSA does not include tobacco within its ambit or scope and therefore, tobacco cannot be termed as "food" within the meaning of the FSSA."

12. The learned Single Judge then took up for consideration the question of whether Section 30(2)(a) of the FSSA could be recognized as empowering the Commissioner (Food Safety) to pass a prohibitory order and which could be extended to operate beyond a period of one year. Proceeding to rule on the aforesaid issue, the learned Single Judge held as follows: -

> "**221.** 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.
>
> **222.** 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

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only in emergent circumstances in the interest of 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.

223. 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.

224. 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 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.

225. 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.

226. In this regard, it has been discussed in the case of **Omkar Agency** *(supra):*

> *"26. The question, now, is : whether before making an order under Section 30, the Commissioner is required to comply with the principles of natural justice?*

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27. In Olga Tellis v. Bombay Municipal Corporation, reported in (1985) 3 SCC 545, a Constitution Bench of Supreme Court had the occasion to deal with the provisions of Section 314 of the Bombay Municipal Corporation Act, 1888. It was held by the 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 further 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 Supreme Court 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 the 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.

28. The relevant observations, appearing in Olga Tellis (supra), are being reproduced herein as follows;

> *para 44"... (the said section) 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*

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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."

para 45…"It must further be presumed that, while vesting in the Commissioner 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 ('Hear the other side') could be presumed to have been intended. Section 314 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 the 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."

29. Relying on the aforesaid observations made in the case of Olga Tellis (supra),the Supreme Court, in the case of C.B. Gautam v. Union of India, reported in (1993) 1SCC 78, has held that it must, however, be borne in mind that courts have generally read into the provisions of the relevant sections a requirement of giving a reasonable opportunity of being heard before an order is made, which would have adverse civil consequences for the parties affected. This would be particularly so in a case, where the validity of the section would be open to a serious challenge for want of such an opportunity.

30. In the case of Godawat Pan Masala v. Union of India, reported in (2004) 7 SCC 68, the Supreme Court repelled the contention put forward by the State of Maharashtra that the impugned notifications being a legislative act, there was no

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question of complying with the principles of natural justice. The Supreme Court, in Godawat Pan Masala (supra), held that if such arguments were to be accepted, then, every executive act could masquerade as a legislative act and escape the procedural mechanism of fair play and natural justice. In this regard, reliance was placed on the case of State of T.N. v. K. Sabanayagam, (1998) 1 SCC 318, wherein it has been observed that even when exercising a legislative function, the delegate may, in a given, case be required to consider the viewpoint, which may be likely to be affected by the exercise of power.

31. As pointed out, in K. Sabanayagam (supra), a conditional legislation can be broadly classified into three categories:

a. when the legislature has completed its task of enacting a statute, the entire superstructure of the legislation is ready but its future applicability to a given area is left to the subjective satisfaction of the delegate.

b. where the delegate has to decide whether and under what circumstances a legislation, which has already come into force, is to be partially withdrawn from operation in a given area or in given cases so as not to be applicable to a given class of persons who are otherwise admittedly governed by the Act; and

c. where the exercise of conditional legislation would depend upon satisfaction of the delegate on objective facts placed by one class of persons seeking benefit of such an exercise with a view to deprive the rival class of persons, who, otherwise, might have already got statutory benefits under the Act and who are likely to lose the existing benefit, because of exercise of such a power by the delegate.

32. The Supreme Court emphasised, in K. Sabanayagam (supra), that in the third type of cases, the satisfaction of the delegate must necessarily be based on objective considerations and, irrespective of the fact as to whether the exercise of such power involves a judicial or quasi-judicial function, it has to be nonetheless treated a function, which requires objective consideration of relevant factual data pressed into service by one side, which could be rebutted by the other side, who would be adversely affected if such exercise of power is undertaken by the delegate.

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> *33. In view of the above reasoning, the following facts emerge with respect to the issuance of prohibition orders under Section 30(a) of the Food Act:—*
>
> *a. Before passing of the order, there must be emergent circumstances based on objective materials that 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, be prohibited;*
>
> *b. The tenure of the prohibitory order has to be temporay in nature and must not exceed 1 (one) year in its entirety; now, any extension of the prohibitory order would amount to virtually and effectively making a legislation by executive fiat;*
>
> *c. The principle of audi alteram partem applies in exercise of powers under Section 30(a) and the aggrieved persons should be heard before continuing with theprohibition order; and*
>
> *d. Since the prohibition is with reference to a food business operator, the prohibition must indicate the name of food business operator and also the brand name, if any, under which the food business is carried out."*
>
> **227.** Section 30(2)(a) clearly stipulates that the maximum period for which such prohibitory order may be passed is not more than one (1) year. However, it has been noted that the impugned Notifications under challenge in the present case have been issued year after year in a mechanical manner without following the general principles laid down under Section 18 and 30(2)(a) of the FSSA, which is a clear abuse of the powers conferred upon the Commissioner of Food Safety under the FSSA. This clearly amounts to be an act which only the Legislature is entitled to exercise and no such power has been vested in the Commissioner of Food Safety in terms of the provisions of the FSSA. Thus, it is clear that Respondent No.1 has clearly exceeded its power and authority in issuance of the impugned Notifications in contravention of the powers conferred upon him under the FSSA."

13. The writ petitioners further appear to have assailed the 2015 notification on the ground that it had resorted to an irrational and arbitrary discrimination between smoking and smokeless tobacco.

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The writ petitioners had essentially asserted that bearing in mind the deleterious effect of both those categories of tobacco products on public health, there existed no justification for a prohibition having been imposed in respect of smokeless tobacco alone. The aforesaid submission found favour with the learned Single Judge who ultimately came to record as under: -

> "**228.** It has been argued on behalf of the Petitioners that the Respondents are purporting to ban an artificially created sub-category of tobacco, namely, 'smokeless tobacco' which includes chewing tobacco, pan masala, gutka, etc.and other scheduled tobacco products listed under the COTPA. However, there appears to be no rational nexus to the object sought to be achieved by the impugned Notifications prohibiting manufacture, storage, sale and distribution of smokeless tobacco products. Admittedly, the object sought to be achieved by the said prohibitory order(s) in the nature of the impugned Notifications, is "public health". However, there is no justification whatsoever for making such a differentiation in smokeless and smoking tobacco, which may be different in their forms but are no different in terms of their impact on public health. It is worthwhile to note that the COTPA, which is the Central Act governing the tobacco industry, does not make any such distinction between smokeless and smoking tobacco under its Schedule.
>
> **229.** In the light of the aforesaid observations, it is apparent that the said classification/distinction between smokeless and smoking tobacco has no connection with the object sought to be achieved by the impugned Notifications. In fact, the said discrimination which is being promoted by the impugned Notifications encourages smoking tobacco over smokeless tobacco, thereby being not only clearly discriminatory but in violation of Article 14 of the Constitution.
>
> **230.** Further, the impugned Notifications have purportedly being issued in the garb of Regulation 2.3.4 which bars the usage of tobacco and nicotine in any food article. However, admittedly, tobacco and nicotine are not only found in smokeless tobacco but also in smoking tobacco, which has conveniently been excluded from the rigours of the impugned Notifications. Therefore, there is no justification for the classification between smokeless and smoking tobacco sought to be created by the impugned

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> Notifications issued by the Respondents. Moreover, the prohibition imposed by virtue of the impugned Notifications by discriminating between smokeless and smoking tobacco does not fall under reasonable restrictions on exercise of fundamental rights under Article 19(6) of the Constitution.
>
> **231.** It has further been argued on behalf of the Petitioners that the burden of proof rests upon the Respondents to justify that the creation of an artificial sub-classification within tobacco products, i.e., smokeless and smoking tobacco, bears a clear or reasonable nexus to the object sought to be achieved by the impugned Notifications i.e., public interest. However, considering the arguments and submissions advanced by the Respondents, this Court is of the view that the said burden has not been sufficiently discharged by the Respondents, which makes the said classifications/ distinctions falling short of passing the test of Article 14 of the Constitution. Consequently, there is no nexus with the object sought to be achieved by the impugned Notifications, so as to justify a valid classification under Article 14 of the Constitution.
>
> **232.** In view of the detailed arguments advanced on behalf of the parties and for the explanation and the reasons as discussed herein above, this Court is of the considered view that the classification sought to be created between smokeless and smoking tobacco is clearly violative of Article 14 of the Constitution."

14. The appellants appear to have founded the impugned notification and the imperatives for issuance of the prohibitory orders in light of the various orders passed by the Supreme Court in **Ankur Gutka v Indian Asthma Care Society & Ors**[5] **and Central Arecanut & Cocoa Marketing and Processing Co-operative Ltd**. It was their submission that the impugned notification came to be promulgated in order to give effect to the directives issued by the Supreme Court in the aforenoted matters and which had led to various States in the country prohibiting the distribution and sale of gutka and

[5] SLP No. 16308 of 2007

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pan masala with tobacco and/or nicotine. While dealing with this aspect, the learned Single Judge has held as follows: -

> "**234.** It is to be noted that it has been submitted before the Hon'ble Supreme Court in the matter of Ankur Gutka (supra) and Central Arecanut (supra) that notwithstanding the complete ban imposed on Gutka and Pan Masala with tobacco and/or nicotine in such States, the manufacturers have devised a subterfuge for selling Gutka and Pan Masala in separate pouches and the ban is being flouted in this manner. In view of the interim directions issued by the Hon'ble Supreme Court, it is clear that compliance of the ban imposed on manufacturing and sale of Gutka and Pan Masala with tobacco and/or nicotine has to be ensured. Even though the main matter(s) is pending adjudication, the aforesaid direction passed by the Hon'ble Supreme Court is in line with Regulation 2.3.4 as it directs "for compliance of the ban imposed on manufacturing and sale of Gutkha and Pan Masala with tobacco and/or nicotine". The essence of Regulation 2.3.4 is to prohibit use of tobacco and nicotine as ingredients in any food products and not prohibit the manufacture and sale of tobacco and/or nicotine per se. In view thereof, the present case is distinguishable as it relates to chewing tobacco in itself and not with Gutka and Pan Masala with tobacco and/or nicotine."

15. The writ petitions ultimately came to be allowed with the impugned notifications being quashed and the learned Single Judge coming to conclude that the Commissioner (Food Safety) had not only exceeded the power and the authority conferred upon him under the FSSA but also in contravention thereof. Before proceeding to notice the submissions, which were addressed on these appeals, the Court deems it apposite to notice the relevant statutory provisions as it is in the backdrop of those provisions that the challenge would ultimately have to be evaluated.

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B. THE REGULATORY REGIME

16. COTPA came to be promulgated by Parliament in 2003. The Preamble of COPTA reads as follows: -

> "An Act to prohibit the advertisement of, and to provide for the regulation of trade and commerce in, and production, supply and distribution of, cigarettes and other tobacco products and for matters connected therewith or incidental thereto.
>
> WHEREAS, the Resolution passed by the 39th World Health Assembly (WHO), in its Fourteenth Plenary meeting held on the 15th May, 1986 urged the member States of WHO which have not yet done so to implement the measures to ensure that effective protection is provided to non-smokers from involuntary exposure to tobacco smoke and to protect children and young people from being addicted to the use of tobacco;
>
> AND WHEREAS, the 43rd World Health Assembly in its Fourteenth Plenary meeting held on the 17th May, 1990, reiterated the concerns expressed in the Resolution passed in the 39th World Health Assembly and urged Member States to consider in their tobacco control strategies plans for legislation and other effective measures for protecting their citizens with special attention to risk groups such as pregnant women and children from involuntary exposure to tobacco smoke, discourage the use of tobacco and impose progressive restrictions and take concerted action to eventually eliminate all direct and indirect advertising, promotion and sponsorship concerning tobacco;
>
> AND WHEREAS, it is considered expedient to enact a comprehensive law on tobacco in the public interest and to protect the public health;
>
> AND WHEREAS, it is expedient to prohibit the consumption of cigarettes and other tobacco products which are injurious to health with a view to achieving improvement of public health in general as enjoined by article 47 of the Constitution;
>
> AND WHEREAS, it is expedient to prohibit the advertisement of, and to provide for regulation of trade and commerce, production, supply and distribution of, cigarettes and other tobacco products and for matters connected therewith or incidental thereto:……."

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17. Section 2 embodies the expression of intent of the Union Government referable to Entry-52 falling in List-I of the Seventh Schedule. That provision reads as under: -

> "**2. Declaration as to expediency of control by the Union**–It is hereby declared that it is expedient in the public interest that the Union should take under its control the tobacco industry"

18. Sections 4 and 5 of COTPA carry the prohibitions placed by the Legislature in respect of smoking in public places and advertisement of cigarettes and other tobacco products. Those provisions are set out hereinbelow: -

> "**4. Prohibition of smoking in a public place–**No person shall smoke in any public place:
>
> Provided that in a hotel having thirty rooms or a restaurant having seating capacity of thirty persons or more and in the airports, a separate provision for smoking area or space may be made."
>
> **5. Prohibition of advertisement of cigarettes and other tobacco products.–***(1)* No person engaged in, or purported to be engaged in the production, supply or distribution of cigarettes or any other tobacco products shall advertise and no person having control over a medium shall cause to be advertised cigarettes or any other tobacco products through that medium and no person shall take part in any advertisement which directly or indirectly suggests or promotes the use or consumption of cigarettes or any other tobacco products.
>
> *(2)* No person, for any direct or indirect pecuniary benefit, shall–
>
> *(a)* display, cause to display, or permit or authorise to display any advertisement of cigarettes or any other tobacco product; or
>
> *(b)* sell or cause to sell, or permit or authorise to sell a film or video tape containing advertisement of cigarettes or any other tobacco product; or
>
> *(c)* distribute, cause to distribute, or permit or authorise to distribute to the public any leaflet, hand-bill or document which is

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or which contains an advertisement of cigarettes or any other tobacco product; or

(d) erect, exhibit, fix or retain upon or over any land, building, wall, hoarding, frame, post or structure or upon or in any vehicle or shall display in any manner whatsoever in any place any advertisement of cigarettes or any other tobacco product:

Provided that this sub-section shall not apply in relation to–

(a) an advertisement of cigarettes or any other tobacco product in or on a package containing cigarettes or any other tobacco product;

(b) advertisement of cigarettes or any other tobacco product which is displayed at the entrance or inside a warehouse or a shop where cigarettes and any other tobacco products are offered for distribution or sale.

(3) No person, shall, under a contract or otherwise promote or agree to promote the use or consumption of–

(a) cigarettes or any other tobacco product; or

(b) any trade mark or brand name of cigarettes or any other tobacco product in exchange for a sponsorship, gift, prize or scholarship given or agreed to be given by another person."

19. Sections 6 and 7 of COTPA embody the prohibition with respect to sale of cigarettes to person below 18 years of age and the restrictions statutorily imposed on production, supply and distribution of cigarettes and other tobacco products and those being subject to the pictorial warnings which must be carried compulsorily. Those two provisions read as follows: -

"**6. Prohibition on sale of cigarette or other tobacco products to a person below the age of eighteen years and in particular area.**–No person shall sell, offer for sale, or permit sale of, cigarette or any other tobacco product–

(a) to any person who is under eighteen years of age, and

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(b) in an area within a radius of one hundred yards of any educational institution.

7. Restrictions on trade and commerce in, and production, supply and distribution of cigarettes and other tobacco products.–*(1)* No person shall, directly or indirectly, produce, supply or distribute 6 cigarettes or any other tobacco products unless every package of cigarettes or any other tobacco products produced, supplied or distributed by him bears thereon, or on its label [such specified warning including a pictorial warning as may be prescribed.]

(2) No person shall carry on trade or commerce in cigarettes or any other tobacco products unless every package of cigarettes or any other tobacco products sold, supplied or distributed by him bears thereon, or on its label, the specified warning.

(3) No person shall import cigarettes or any other tobacco products for distribution or supply for a valuable consideration or for sale in India unless every package of cigarettes or any other tobacco products so imported by him bears thereon, or on its label, the specified warning.

(4) The specified warning shall appear on not less than one of the largest panels of the package in which cigarettes or any other tobacco products have been packed for distribution, sale or supply for a valuable consideration.

(5) No person shall, directly or indirectly, produce, supply or distribute cigarettes or any other tobacco products unless every package of cigarettes or any other tobacco products produced, supplied or distributed by him indicates thereon, or on its label, the nicotine and tar contents on each cigarette or as the case may be on other tobacco products along with the maximum permissible limits thereof:

Provided that the nicotine and tar contents shall not exceed the maximum permissible quantity thereof as may be prescribed by rules made under this Act."

20. Sections 8 and 9 then set forth the statutory requirement of printing specific warnings on packages containing tobacco products, along with the language in which such warnings are to be expressed.

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Section 10 prescribes the size of letters and the figures in which the specified warnings are to be displayed on the packaging. COTPA also envisages the establishment of a testing laboratory which may be granted recognition by the Union and charged with the task of testing the nicotine and tar contents in cigarettes and other tobacco products. Sections 13 and 14 of COTPA embody the coercive measures which the competent authorities under the enactment are entitled to adopt in case of a violation of its provisions. Sections 20, 21, 22 of COTPA provide for various punishments for violation of the provisions of the said Act.

21. Tobacco products are those which are specified in the Schedule in terms of Section 3*(p)*. The said Schedule reads as under: -

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

22. Turning then to the FSSA, the Court firstly deems it apposite to refer to its Statement of Objects and Reasons which reads thus: -

> **"STATEMENT OF OBJECTS AND REASONS**
>
> 1. Multiplicity of food laws, standard setting and enforcement agencies pervades different sectors of food, which creates confusion in the minds of consumers, traders, manufacturers and investors. Detailed provisions under various

laws regarding admissibility and levels of food additives, contaminants, food colours, preservatives, etc., and other related requirements have varied standards under these laws. The standards are often rigid and non-responsive to scientific advancements and modernisation. In view of multiplicity of laws, their enforcement and standard setting as well as various implementing agencies are detrimental to the growth of the nascent food processing industry and is not conducive to effective fixation of food standards and their enforcement.

2. In as early as in the year 1998, the Prime Minister's Council on Trade and Industry appointed a Subject Group on Food and Agro Industries, which had recommended for one comprehensive legislation on Food with a Food Regulatory Authority concerning both domestic and export markets. Joint Parliamentary Committee on Pesticide Residues in its report in 2004 emphasized the need to converge all present food laws and to have a single regulatory body. The Committee expressed its concern on public health and food safety in India. The Standing Committee of Parliament on Agriculture in its 12th Report submitted in April, 2005 desired that the much needed legislation on Integrated Food Law should be expedited.

3. As an on going process, the then Member-Secretary, Law Commission of India, was asked to make a comprehensive review of Food Laws of various developing and developed countries and other relevant international agreements and instruments on the subject. After making an indepth survey of the International scenario, the then Member-Secretary recommended that the new Food Law be seen in the overall prospective of promoting nascent food processing industry given its income, employment and export potential. It has been suggested that all acts and orders relating to food be subsumed within the proposed Integrated Food Law as the international trend is towards modernisation and convergence of regulations of Food Standards with the elimination of multi-level and multi-departmental control. Presently, the emphasis is on (a) responsibility with manufacturers, (b) recall, (c) Genetically Modified and Functional Foods, (d) emergency control, (e) risk analysis and communication and (f) Food Safety and Good Manufacturing Practices and Process Control *viz*., Hazard Analysis and Critical Control Point.

4. In this background, the Group of Ministers constituted by the Government of India, held extensive deliberations and approved the proposed Integrated Food Law with certain

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modifications. The Integrated Food Law has been named as The Food Safety and Standards Bill, 2005. The main objective of the Bill is to bring out a single statute relating to food and to provide for a systematic and scientific development of Food Processing Industries. It is proposed to establish the Food Safety and Standards Authority of India, which will fix food standards and regulate/monitor the manufacturing, import, processing, distribution and sale of food, so as to ensure safe and wholesome food for the people. The Food Authority will be assisted by Committees and Panels in fixing standards and by a Central Advisory Committee in prioritization of the work. The enforcement of the legislation will be through the State Commissioner for Food Safety, his officers and Panchayati Raj/Municipal bodies.

5. The Bill, *Inter alia*, incorporates the salient provisions 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, the Bill takes care of international practices and envisages on overarching policy framework and provision of 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-departmental control to integrated line of command;

(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 Agencies under various Acts and Orders would stand decentralized to the Commissioner of Food Safety and his officer;

(d) single reference point for all matters relating to Food Safety and Standards, regulations and enforcement;

(e) shift from mere regulatory regime to self-compliance through Food Safety Management Systems;

(f) responsibility on food business operators to ensure that food processed, manufactured, imported or distributed is in compliance with the domestic food laws; and

(g) provision for graded penalties depending on the gravity of offence and accordingly, civil penalities for minor offences and punishment for serious violations.

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> 6. The abovesaid Bill is contemporary, comprehensive and intends to ensure better consumer safety through Food Safety Management Systems and setting standards based on science and transparency as also to meet the dynamic requirements of Indian Food Trade and Industry and International trade.
>
> The Bill seeks to achieve the aforesaid objectives."

23. As would be evident from the Preamble of the FSSA, it is an Act essentially aimed at consolidating laws relating to food and to establish the **Food Safety and Standards Authority of India**[6] for laying down science-based standards for articles of food and to regulate their manufacture, storage, distribution, sale and import. The principal objective of the Act is to facilitate food safety and to ensure availability of safe and wholesome food for human consumption and for matters connected therewith. The FSSA also carries a declaration referable to Entry 52 falling in List I of the Seventh Schedule and the said declaration stands embodied in Section 2 thereof. The Act came to be promulgated on 23 August 2006. However, its various provisions were enforced from different dates. For the purposes of evaluating the challenge which stands raised in the present appeals, it would be appropriate to refer to the following definitions as set out in Section 3 of the FSSA: -

> **"3**. **Definitions**. – (1) In this Act, unless the context otherwise requires,–
>
> (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

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> 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;
>
> (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 "contaminants" or substances added to food for maintaining or improving nutritional qualities;
>
> (y) "ingredient" means any substance, including a food additive used in the manufacture or preparation of food and present in the final product, possibly in a modified form;
>
> (zw) "substance" includes any natural or artificial substance or other matter, whether it is in a solid state or in liquid form or in the form of gas or vapour;"

24. Section 18 of the Act sets out the general principles to be borne in mind by appropriate governments as well as the FSSAI while implementing the provisions of the Act. The said provision reads as under: -

> **"18. General principles to be followed in administration of Act**.–The Central Government, the State Governments, the Food Authority and other agencies, as the case may be, while implementing the provisions of this Act shall be guided by the following principles namely:–

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(1) (a) endeavour to achieve an appropriate level of protection of human life and health and the protection of consumer's interests, including fair practices in all kinds of food trade with reference to food safety standards and practices;
(b) carry out risk management which shall include taking into account the results of risk assessment and other factors which in the opinion of the Food Authority are relevant to the matter under consideration and where the conditions are relevant, in order to achieve the general objectives of regulations;
(c) where in any specific circumstances, on the basis of assessment of available information, the possibility of harmful effects on health is identified but scientific uncertainty persists, provisional risk management measures necessary to ensure appropriate level of health protection may be adopted, pending further scientific information for a more comprehensive risk assessment;
(d) the measures adopted on the basis of clause (c) shall be proportionate and no more restrictive of trade than is required to achieve appropriate level of health protection, regard being had to technical and economic feasibility and other factors regarded as reasonable and proper in the matter under consideration;
(e) the measures adopted shall be reviewed within a reasonable period of time, depending on the nature of the risk to life or health being identified and the type of scientific information needed to clarify the scientific uncertainty and to conduct a more comprehensive risk assessment;
(f) in cases where there are reasonable grounds to suspect that a food may present a risk for human health, then, depending on the nature, seriousness and extent of that risk, the Food Authority and the Commissioner of Food Safety shall take appropriate steps to inform the general public of the nature of the risk to health, identifying to the fullest extent possible the food or type of food, the risk that it may present, and the measures which are taken or about to be taken to prevent, reduce or eliminate that risk; and
(g) where any food which fails to comply with food safety requirements is part of a batch, lot or consignment of food of the same class or description, it shall be presumed until

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the contrary is proved, that all of the food in that batch, lot or consignment fails to comply with those requirements.

(2) The Food Authority shall, while framing regulations or specifying standards under this Act– *(a)* take into account–

(i) prevalent practices and conditions in the country including agricultural practices and handling, storage and transport conditions; and

(ii) international standards and practices, where international standards or practices exist or are in the process of being formulated,

unless it is of opinion that taking into account of such prevalent practices and conditions or international standards or practices or any particular part thereof would not be an effective or appropriate means for securing the objectives of such regulations or where there is a scientific justification or where they would result in a different level of protection from the one determined as appropriate in the country;

(b) determine food standards on the basis of risk analysis except where it is of opinion that such analysis is not appropriate to the circumstances or the nature of the case;

(c) undertake risk assessment based on the available scientific evidence and in an independent, objective and transparent manner;

(d) ensure that there is open and transparent public consultation, directly or through representative bodies including all levels of panchayats, during the preparation, evaluation and revision of regulations, except where it is of opinion that there is an urgency concerning food safety or public health to make or amend the regulations in which case such consultation may be dispensed with:

Provided that such regulations shall be in force for not more than six months;

(e) ensure protection of the interests of consumers and shall provide a basis for consumers to make informed choices in relation to the foods they consume;

(f) ensure prevention of–

(i) fraudulent, deceptive or unfair trade practices which may mislead or harm the consumer; and

(ii) unsafe or contaminated or sub-standard food.

(3) The provisions of this Act shall not apply to any farmer or fisherman or farming operations or crops or

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> livestock or aquaculture, and supplies used or produced in farming or products of crops produced by a farmer at farm level or a fisherman in his operations."

25. The Impugned Notifications which had been assailed before the learned Judge were asserted to have been promulgated by virtue of the powers conferred upon the Commissioner of Food Safety of respective State Governments. Those powers, as spelt out in Section 30, would be evident from the following extract of that provision: -

> **"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;

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> *(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."

26. Section 89 confers an overriding effect on the provisions of the FSSA over all other food related laws. That section reads thus: -

> **"89. Overriding effect of this Act over all other food related laws**. –The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."

27. Since the principal controversy which stands raised centers upon Regulation 2.3.4 of the **Food Safety and Standards (Prohibition and Restrictions on Sales) Regulations, 2011**[7], the same is extracted hereinbelow: -

> **"2.3.4**: Product not to contain any substance which may be injurious to health: Tobacco and nicotine shall not be used as ingredients in any food products."

28. Pan masala as a food article is regulated by virtue of the provisions contained in Regulation 2.11 titled 'Other Food Products and Ingredients' and forming part of the **Food Safety and Standards**

[7] Prohibition Regulations 2011

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(Food Products Standards and Food Additives) Regulations 2011[8]. Regulation 2.11.5 which specifically deals with the aforesaid food article reads as follows: -

> "2.11.5 Pan Masala means the food generally taken as such or in conjunction with Pan, it may contain;—
>
> Betelnut, lime, coconut, catechu, saffron, cardamom, dry fruits, mulethi, sabnermusa, other aromatic herbs and spices, sugar, glycerine, glucose, permitted natural colours, menthol and non prohibited flavours.
>
> It shall be free from added coaltar colouring matter and any other ingredient injurious to health.
>
> It shall also conform to the following standards namely:—
>
> | | |
> |---|---|
> | Total ash | Not more than 8.0 per cent by weight (on dry basis) |
> | Ash insoluble in dilute HCl acid | Not more than 0.5 per cent by weight (on dry basis)" |

29. It would also be pertinent to notice some of the salient provisions of the **Prevention of Food and Adulteration Act 1954** [9] as its stood before it came to be repealed by FSSA. The word 'food' was defined under the aforesaid enactment in Section 2(v) as follows:-

> **"Section -2(v)**
>
> (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

[8] Food Products Regulations 2011
[9] PFA

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(c) any other article which the Central Government 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;"

30. It would be pertinent to recall that in **Godawat Pan Masala Products I.P. Ltd. & Anr. v. Union of India & Ors.**[10]**,** the Supreme Court had been called upon to consider the jurisdiction of the Food Health Authority to prohibit sale of food articles. The aforesaid action of the Food Health Authority and the powers exercised were examined in the backdrop of Section 7 of the said Act. That provision as carried in the repealed enactment read as follows: -

"Section-7. Prohibition of manufacture, sale, etc. of certain articles of food :-

No person shall himself or by any person on his behalf, manufacture for sale or store, sell or distribute-

(i) any adulterated food,

(ii) any misbranded food,

(iii) any article of food for the sale of which a licence is prescribed, except in accordance with the conditions of the licence;

(iv) any article of food the sale of which is for the time being prohibited by the Food (Health) Authority [in the interest of public health;]

(v) any article of food in contravention of any other provision of this Act or of any rule made thereunder, [or]

(vi) any adulterant.

Explanation.- - For the purpose of this section, a person shall be deemed to store any adulterated food or misbranded food or any article of food referred to in clause (iii) or clause (iv) or clause (v) if he stores such food for the manufacture therefrom of any article of food for sale."

[10] (2004) 7 SCC 68

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31. While the Court would be dealing with the decision in *Godawat* in greater detail in the latter parts of this decision, it may, at this stage, only be noted that one of the questions which stood formulated was whether pan masala could be construed as "food". That question was unequivocally answered in the affirmative with the Court rejecting the contention that pan masala could not be said to fall within the ambit of Section 2(v) of the PFA. The orders issued by the Food Health Authority however came to be set aside with the Supreme Court noting that the notifications issued were ultra vires the Act, unconstitutional and void. The Supreme Court while arriving at that conclusion had held that Section 7(iv) of the PFA was not an independent source of power which could be availed of or invoked by the State authorities. It found that the power of the State Food Health Authority could have been exercised only under the relevant Rules which stood framed. It is also pertinently observed that the powers so conferred on the Food Health Authority was transitory in nature and that the power to prohibit or ban an article of food was one which stood vested exclusively in the Union Government in light of the provisions contained in Section 23(1-A)(f) of the PFA.

32. Post the decision which came to be rendered in *Godawat*, Rule 44J came to be inserted in the **Prevention of Food Adulteration Rules 1955**[11]. That provision read as under: -

[11] 1955 Rules

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

33. Pan Masala as an article of food was regulated in accordance with the Clause A.30 falling in Appendix B of the 1955 Rules. The said clause is extracted hereinbelow: -.

> **"A.30**-PAN MASALA means the food generally taken as such or in conjunction with Pan, it may contain -
>
> Betelnut, lime, coconut, catechu, saffron, cardamom, dry fruits, mulathi, sabermusa, other aromatic herbs and spices, sugar, glycerine, glucose, permitted natural colours, menthol and non-prohibited flavours.
>
> It shall be free from added coal tar colouring matter, and any other ingredient injurious to health.
>
> It shall also conform to the following standards, namely:-
>
> Total ash.-Not more than 8.0 per cent by weight (on dry basis).
>
> Ash insoluble in dilute hydrochloric acid. - Not more than 0.5 per cent by weight (on dry basis)."

C. CONTENTIONS OF GNCTD

34. Leading the challenge in the present appeals, Mr. Gautam Narayan, learned ASC appearing for the GNCTD, addressed the following submissions. Mr. Narayan, at the outset, submitted that the writ petitioners as well as the learned Single Judge clearly erred in construing the Impugned Notifications as being directed towards the manufacture, storage and sale of tobacco. Learned counsel submitted that the Impugned Notifications were never intended to either regulate or prohibit either pure tobacco or raw tobacco. Learned counsel laid

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emphasis on the fact that the notifications sought to prohibit the sale of tobacco which is flavoured, scented or mixed with other ingredients. It was his submissions that tobacco when mixed with flavoring or scenting agents or other ingredients clearly falls within the definition of food as contemplated under the FSSA. Learned counsel submitted that the primary objective of the Impugned Notifications was to enforce and implement the prohibition on sale of flavoured or scented tobacco and to address the modus adopted by the writ petitioners and other similar manufacturers of making available for sale chewing tobacco in a pouch separated from pan masala and to thereby defeat the ban on gutka. This ban, according to Mr. Narayan, was sought to be circumvented by selling the aforenoted two products in separate sachets/packets and sometimes as a composite combination.

35. Mr. Narayan submitted that the moment tobacco is mixed with pan masala, it would clearly fall foul of Regulation 2.3.4. It was contended that it was the aforesaid fact which weighed upon the appellants to issue the Impugned Notifications. Mr. Narayan further submitted that the Impugned Notifications themselves came to be promulgated in order to effect compliance with the orders passed by the Supreme Court in *Ankur Gutka* and *Central Arecanut***.** Learned counsel drew the attention of the Court to the order dated 07 December 2010 passed in *Ankur Gutka* where amongst various other directions, the Supreme Court called upon the Solicitor General to require the National Institute of Public Health to undertake a

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comprehensive analysis and study with respect to the contents of gutka, tobacco, pan masala and similar articles being manufactured in the country and the harmful effects of consumption thereof.

36. The relevant extracts from the order of 07 December 2010 are reproduced hereinbelow: -

> "Heard learned counsel for the parties and perused the record including the affidavit of Dr. Manoranjan Hota, Director, Ministry of Environments and Forests, Government of India and documents annexed with it.
>
> Interim order dated 7.9.2007 and other similar orders passed by this Court are vacated and the following directions are given:
>
> 1) The learned Solicitor General should instruct the concerned Ministries to approach National Institute of Public Health to undertake a comprehensive analysis and study of the contents of gutkha, tobacco, pan masala and similar articles manufactured in the country and harmful effects of consumption of such articles. The learned Solicitor General says that a report based on such study will be made available within eight weeks.
> 2) The Plastics (Manufacture, Usage and Waste Management) Rules, 2009 be finalised, notified and enforced within a period of eight weeks from today.
> 3) The direction contained in the impugned order of the High Court for imposition of fine shall remain stayed.
> 4) Respondent Nos.3 to 15 and other manufacturers of gutkha, tobacco, pan masala are restrained from using plastic material in the sachets of gutkha, tobacco and pan masala. This direction shall come into force with effect from 1st March, 2011."

37. It was then submitted that it was in light of the aforesaid direction that the **National Institute of Health and Family Welfare**[12], New Delhi submitted a report. Drawing the attention of the Court to the relevant parts of that report, Mr. Narayan submitted

[12] NIHFW

that NIHFW enumerated and chronicled the numerous health concerns which arose from the consumption of gutka and chewing tobacco. Mr. Narayan laid emphasis on the following extracts from that report:-

> **"Harmful Effects**
>
> CANCERS
>
> *Oral pre-malignant lesions/conditions*
>
> Several studies, majority of them from India, have reported a strong association between smokeless tobacco use and oral premalignant/precancerous lesions like leukoplakia, erythroplakia, submucous fibrosis or lichen planus (either alone or in combination) *(Annexure 1(d), 39 – 45).* The risk of these lesions has been found to increase with the duration and frequency of smokeless tobacco use *(Annexure 1 (d), 39, 42).*
>
> *Oral cancer*
>
> A large number of studies from India provide consistent results of an increased risk of oral cancer with the use of different forms of smokeless tobacco used in the country (Gutkha, mishri, gudaku, khaini, etc) *(Annexure 46 – 55).* Similar results are seen in International studies and reviews including the IARC monograph *(Annexure 1 (d), 56, 57).* There is also good evidence to suggest that the risk of developing oral cancer is directly associated with the duration and frequency of tobacco usage (Annexure 1 (d), 46 – 48, 52, 53).
>
> *Oesophageal cancer*
>
> Smokeless tobacco use or tobacco chewing has been reported as an important risk factor for the cancer of the oesophagus by multiple studies from India and abroad *(Annexure 1 (d), 54, 58 – 62).* Moreover study results suggest an increased risk of oesophageal cancer with increase in the duration and frequency of smokeless tobacco usage *(Annexure 60 – 62).*
>
> *Stomach cancer*
>
> Few Indian and International studies were identified which have reported an increased risk of stomach cancer with the usage of smokeless tobacco *(Annexure 1 (d), 59, 63).*

Pancreatic cancer

All the relevant studies identified for this topic have been conducted outside India and their results indicate a strong association between smokeless tobacco and pancreatic cancer *(Annexure 1 (d), 58, 64 – 66).* The association was significant even after adjustment for other variables.

Throat (pharynx and larynx) cancer

Results from different studies suggest an increased risk of pharyngeal cancer and/or laryngeal cancer with the use of different forms of smokeless tobacco *(Annexure 47, 53, 54, 67 – 69).* Two studies also observed a strong dose-response relationship between chewable tobacco and risk of pharyngeal cancer *(Annexure 54, 68).*

Renal cancer

Most of the studies included in the IARC monograph have reported an increased risk of renal cell cancer by 3-4 times with the use of smokeless tobacco *(Annexure 1 (d))*

MORTALITY

Results from some studies indicate an increased risk of all-cause mortality or all-cancer mortality in smokeless tobacco users compared to non-users *(Annexure 70 – 73),* and the increased risk was seen predominantly in female users. In addition, one Swedish study has reported an increased risk of dying from cardiovascular disease among the users *(Annexure 74).*

NON-CANCEROUS DISEASES/CONDITIONS

Oro-dental health

All the Indian studies identified under this section have shown a close association between smokeless tobacco usage and different types of periodontal diseases (inflammation, gingival recession and bleeding, staining, tooth loss) and/or caries (Annexure 75 – 80). A review of oral mucosal disorders associated with gutkha usage also found an increased risk of peri-odontal inflammation *(Annexure 43).*

Hypertension & Cardiovascular diseases

Results from several studies indicate that regular use of smokeless tobacco increases the risk of hypertension *(Annexure*

81 – 86) and that of cardiovascular disease *(Annexure 82, 84, 86, 87).* A systematic review of observational studies from Sweden and USA has also shown an increased risk of fatal myocardial infarction *(Annexure 88).*

Nervous system diseases

Two large studies have found a significant association between the use of smokeless tobacco and the risk of fatal cerebrovascular stroke (or stroke) *(Annexure 89, 90).*

Metabolic abnormalities

A study from Sweden reported significant association between high-dose consumption of snus/snuff and metabolic syndrome which is defined as 3 or more abnormalities of abdominal obesity, high cholesterol level, high triglycerides level, hypertension, and diabetes or hyperglycemia *(Annexure 91).* Another study has found increased triglyceride and cholesterol levels among smokeless tobacco user *(Annexure 86).*

Reproductive health

Multiple studies have reported adverse effects of smokeless tobacco on the reproductive health of men and women and during pregnancy. A study of Indian men attending an infertility clinic reported a strong association with decrease in sperm quality and sperm count *(Annexure 92),* while another study found an increased risk of cervical lesions in women *(Annexure 93).* Its use during pregnancy is reported to be associated with increased incidence of birth complications and anemia *(Annexure 94, 95),* increased risk of fetal loss *(Annexure 96, 97),* and a higher incidence of preterm babies and low-birth weight babies *(Annexure 98 – 100).*

Other diseases (Gastro-intestinal and Respiratory)

Results from few studies have found increased prevalence of benign gastrointestinal diseases (oesophagitis, sub-mucous fibrosis) in smokeless tobacco users *(Annexure 101, 102).* Moreover it has been associated with chronic bronchitis and impaired lung function with chronic use *(Annexure 103, 104).”*

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38. It becomes pertinent to note that NIHFW had taken note of the **Global Adult Tobacco Survey India**[13] and which had reported that more than 35% of adults in India use tobacco in some form or the other. That report had further recorded that out of the aforesaid percentage, 21% adults consumed smokeless tobacco, 9% were smokers and 5% were those who used to indulge in smoking as well as in consumption of smokeless tobacco. The number of tobacco users in India were estimated to stand at 274.9 million of which 163.7 million were estimated to be users of only smokeless tobacco, 68.9 million were smokers and 42.3 million users were those who indulged in the consumption of both. GATS India had further found that the Quit Ratio for the users of smokeless tobacco was around 5%. Proceeding further to account for the harmful effects associated with the use of tobacco, NIHFW found that the consumption of smokeless tobacco was not only the leading cause of various categories of cancers, it had a direct impact on mortality and was also the root cause of various non-cancerous diseases including hypertension, cardiovascular diseases, nervous system diseases, metabolic abnormalities and poor reproductive health. NIHFW also estimated the economic costs of treating smokeless tobacco as standing at a staggering USD 285 million. It was further observed that the total economic cost of tobacco use was reportedly USD 1.7 million.

39. The Summary of Evidence as forming part of that report is reproduced hereunder: -

[13] GATS India

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> "**Evidence summary**
>
> Most of the relevant studies identified are from India, Sweden and USA with studies from India making the biggest contribution. There is strong and consistent evidence from a number of studies to indicate significant risk of oral cancer and pharyngeal cancer, oesophageal cancer, and pancreatic cancer with smokeless tobacco use. The risk of these cancers is found to increase with increasing dosage and frequency of smokeless tobacco use.
>
> Results from several studies suggest presence of strong and consistent evidence that smokeless tobacco is significantly associated with poor oro-dental health, risk of hypertension and cardiovascular diseases, and adverse effects on reproductive health (especially during pregnancy with birth complications, fetal loss, low birth weight, prematurity). The evidence available for other diseases/conditions is limited but consistent in reporting increased risk of all-cause mortality and all-cause cancer mortality in female users, and increased risk of cerebrovascular stroke, metabolic abnormalities, oesophageal dieases, and respiratory diseases among all users.
>
> There is also some evidence to suggest that the total healthcare economic cost of tobacco use in India is many times more than the annual government expenditure on tobacco control and about 16% more than the total tax revenue generated from tobacco."

40. The aforesaid report came to be duly placed before the Supreme Court in the proceedings aforenoted. It would be pertinent to note that by this time, FSSA had already come into force. According to the Appellants, the Prohibition Regulations 2011 were enforced with effect from 05 August 2011 and saw the enforcement of Regulation 2.3.4. According to Mr. Narayan, the said Regulation was directly correlated to the various findings which had come to be recorded by NIHFW and was clearly aimed at fighting the aforesaid scourge. Mr. Narayan further drew the attention of the Court to a communication of 21 November 2012, issued by the Special Secretary in the Ministry of Health of the Union Government which had advised States to consider

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the passing of necessary orders at the State level to ban the manufacture and sale of gutka, pan masala and other chewable products having tobacco and nicotine. The aforesaid advisory sought to draw sustenance from Regulation 2.3.4 as well as the decision taken by the Government of Mizoram which had proceeded to ban the aforesaid articles.

41. *Ankur Gutka* thereafter came to be called on 03 April 2013 before the Supreme Court. In the aforesaid proceedings, the Supreme Court recorded the statement made on behalf of the Union that Governments of 23 States and Administrators of 5 Union Territories had proceeded to issue notifications imposing a complete ban on gutka and pan masala with tobacco. The Additional Solicitor General had also referred to a subterfuge adopted by manufacturers of the aforesaid articles who were stated to be attempting to overcome the ban by selling gutka and pan masala in a convenient twin packet packaged to facilitate mixing of tobacco with spice mixtures by consumers. Taking note of the aforesaid, the Supreme Court proceeded to pass the following directions: -

> "Ms.Indira Jaisingh, learned Additional Solicitor General invited the Court's attention to notifications issued by the Government of 23 States and the Administrators of 5 Union Territories for imposing complete ban on Gutkha and Pan Masala with tobacco and/or nicotine and then stated that notwithstanding the ban, the manufactures have devised a subterfuge for selling Gutkha and Pan Masala in separate pouches and in this manner the ban is being flouted.
>
> Ms.Indira Jaisingh also placed before the Court xerox copy of D.O.No.P.16012/12/11-Part I dated 27.08.2012 sent by the Special Secretary, Ministry of Health and Family Welfare,

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> Government of India to the Chief Secretaries of all the States except the States of Madhya Pradesh, Kerala, Bihar, Rajasthan, Maharashtra, Haryana, Chhatisgarh and Jharkhand and submitted that the Court may call upon the remaining States and Union Territories to issue necessary notifications.
>
> In view of the statement made by the learned Additional Solicitor General, we order issue of notice to the Chief Secretaries of the States and the Administrators of the Union Territories which have so far not issued notification in terms of 2006 Act to apprise this Court with the reasons as to why they have not taken action pursuant to letter dated 27.08.2012.
>
> We also direct the Secretaries, Health Department of all the 23 States and 5 Union Territories to file their affidavits within four weeks on the issue of total compliance of the ban imposed on manufacturing and sale of Gutkha and Pan Masala with tobacco and/or nicotine."

42. According to Mr. Narayan, it was in light of the aforesaid directions issued by the Supreme Court that GNCTD proceeded to issue the Impugned Notifications. Mr. Narayan also referred to the order dated 23 September 2016 passed by the Supreme Court in *Central Arecanut* and which had reiterated the directions issued in A*nkur Gutka*. The Court deems it apposite to extract the following relevant passages from that order: -

> "At this stage, learned Amicus Curiae has invited the attention of the Court to the Order dated 3.4.2013 passed by this Court. The relevant part of the said order reads as follows:
>
> > "Ms. Indira Jaising, learned Additional Solicitor General invited the Court's attention to notifications issued by the Government of 23 States and the Administrators of 5 Union Territories for imposing complete ban on Gutkha and Pan Masala with tobacco and/or nicotine and then stated that notwithstanding the ban, the manufacturers have devised a subterfuge for selling Gutkha and Pan Masala in separate pouches and in this manner the ban is being flouted.

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> Ms. Indira Jaising also placed before the Court xerox copy of D.O.No.P.16012/12/11-Part I dated 27.08.2012 sent by the Special Secretary, Ministry of Health and Family Welfare, Government of India to the Chief Secretaries of all the States except the States of Madhya Pradesh, Kerala, Bihar Rajasthan, Maharashtra, Haryana, Chhatisgarh and Jharkhand and submitted that the Court may call upon the remaining States and Union Territories to issue necessary notifications.
>
> In view of the statement made by the learned Additional Solicitor General, we order issue of notice to the Chief Secretaries of the States and the Administrators of the Union Territories which have so far not issued notification in terms of 2006 Act to apprise this court with the reasons as to why they have not taken action pursuant to letter dated 27.08.2012.
>
> We also direct the Secretaries, Health Department of all the 23 States and 5 Union Territories to file their affidavits within four weeks on the issue of total compliance of the ban imposed on manufacturing and sale of Gutkha and Pan Masala with tobacco and/or nicotine."

Learned Amicus Curiae has also invited our attention to paragraph 21 of the Written Submissions on behalf of the Ministry of Health and Family Welfare, Government of India, in S.L.P. (C) No. 16308 of 2007, which reads as follows:

> "21. It is most respectfully submitted that to circumvent the ban on the sale of gutkha, the manufacturers are selling pan masala (without tobacco) with flavoured chewing tobacco in separate sachets but often conjoint and sold together by the same vendors from the same premises, so that consumers can buy the pan masala and flavoured chewing tobacco and mix them both and consume the same. Hence, instead of the earlier "ready to consume mixes", chewing tobacco companies are selling gutkha in twin packs to be mixed as one"

Learned Amicus Curiae has also pointed out that this Court has not granted any stay of Regulation 2.3.4 of the Food Safety and Standards (Prohibition & Restrictions on Sales) Regulations, 2011 and the concerned authorities are duty bound to enforce the said

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> regulation framed under Section 92 read with Section 26 of the Food Safety & Standards Act, 2006.
>
> In view of the above, the concerned statutory authorities are directed to comply with the above mandate of law. We also direct the Secretaries, Health Department of all the States and Union Territories to file their affidavits before the next date of hearing on the issue of total compliance of the ban imposed on manufacturing and sale of Gutkha and Pan Masala with tobacco and/or nicotine."

43. As would be evident and manifest from a reading of the aforesaid extracts, the Supreme Court appears to have called upon all concerned statutory authorities to act in furtherance of the directions issued in *Ankur Gutka* and to comply with the mandatory provisions of Regulations 2.3.4.

44. Close on the heels of the passing of the aforesaid direction, the Ministry of Health and Family Welfare in the Union Government is stated to have reiterated its request to the respective States and Union Territories to ensure compliance with the aforesaid directions issued by the Supreme Court and to prohibit any counterproductive activities being undertaken by manufacturers so as to circumvent the ban and overcome the prohibition comprised in Regulation 2.3.4. An identical request is also stated to have been addressed by FSSAI to all States and Union Territories in terms of its letter of 09 October 2017. It was the submission of Mr. Narayan that since the impugned Notifications had been issued principally to give effect to the binding directives of the Supreme Court, there existed no justification for the learned Single Judge to have quashed the same.

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45. Proceeding further with the challenge to the impugned judgment, it was the submission of Mr. Narayan that chewing tobacco is clearly an article which is intended for human consumption and therefore constitutes "food" as defined in Section 3(1)(j) of the FSSA. According to learned counsel, the principal intent of Regulation 2.3.4 is to ensure that tobacco and nicotine are not used as ingredients in any food product. Learned counsel laid emphasis upon the fact that pan masala, undisputedly, would constitute food and would fall within the ambit of Section 3(1)(j). Mr. Narayan laid emphasis on the subtle and yet significant distinction between the definition of food as contained in the Act in contrast to how the said expression was defined under PFA. Mr. Narayan submitted that PFA had defined food to mean *'any article used as food or drink for human consumption including any article which ordinarily enters into or is used in the composition or preparation of human food'*. According to Mr. Narayan, the FSSA defines food in a more expansive manner by defining it to mean *'any substance which is intended for human consumption'*. Emphasis was laid on Section 3(1)(j) employing the expressions "*means*", "*includes*" as well as "*but does not include*". Mr. Narayan submitted that Section 3(1)(j) thus not only explicitly defines and describes food as envisioned under the Act, it also and simultaneously includes various articles which would fall within its ambit. It was also stressed that only certain articles such as animal feed, live animals, plants prior to harvesting, drugs and medicinal products, cosmetics, narcotic or psychotropic substances are

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specifically excluded. Learned counsel sought to highlight the fact that pan masala or gutka have not been placed in the list of excluded items and thus reinforcing their submission that they would fall within the ambit of food as defined.

46. It was submitted that pan masala in any case was a food product which was specifically dealt with both under the PFA as well as the Regulations framed under the Act. This, according to learned counsel, would clearly be evident from a reading of Rule 44J of the 1955 Rules and Clause 2.11.5 of the Food Products Regulations 2011. Mr. Narayan then submitted that even prior to the promulgation of the FSSA, the word 'food' had consistently been conferred an expansive meaning. Reliance in this regard was placed on the following pertinent observations as appearing in the decision of the Supreme Court in **State of Bombay v. Virkumar Gulabchand Shah**[14] which had held turmeric to be food stuff. This is evident from the following passages of this decision:-

> "**18.** The English decision about tea just cited is to be contrasted with another decision, also about tea, given a few months later in the same year: *Sainsbury* v. *Saunders* [*Sainsbury* v. *Saunders*, 88 LJ KB 441] . Two of the Judges, Darling and Avory, JJ. were parties to the earlier decision; Salter, J. was not. He held that though tea had been held in the earlier case not to be a "food" for the purpose of the Food Hoarding Order of 1917, it was a "food" within the meaning of the expressions used in certain Defence of the Realm Regulations read with the New Ministries and Secretaries Act of 1916 which empowered the Food Controller to regulate "the food supply of the country" and the "supply and consumption and production of food". Avory, J. also considered that tea was an article of food for the purposes

[14] (1952) 2 SCC 41

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of these laws though Darling, J. preferred to adhere to his earlier view. All three Judges also held that the provisions were wide enough to enable the Food Controller to hit at articles which were not food at all, such as sacks and tin containers (Darling, J.) so long as he was able by these means even indirectly to regulate the supply of "food", but that portion of the decision does not concern us here because the laws they were interpreting were more widely phrased.

19. Now the comparison of one Act with another is dangerous, especially when the Act used for comparison is an English Act and a wartime measure, and I have no intention of falling into that error. I am concerned here with the Act before me and must interpret its provisions uninfluenced by expressions, however similar, used in other Acts. I have referred to the cases discussed above, not for purposes of comparison but to show that the terms "food" and "foodstuffs" can be used in both a wide and a narrow sense and that the circumstances and background can alone determine which is proper in any given case.

20. Turning to the Act with which we are concerned, it will be necessary again to advert to its history. Rule 81(2) was wide and all-embracing and the Order of 1944 clearly fell within its ambit. It is also relevant to note that one of the purposes of the Order, as disclosed in its Preamble, was to "maintain supplies *essential* to the life of the community". As turmeric was specifically included with certain other spices, it is clear that turmeric was then considered to be a commodity essential to the life of the community, that is to say, it was considered an essential commodity and not merely a luxury which at a time of austerity could be dispensed with.

21. Then, when we turn to the Ordinance and the Act of 1946, we find from the Preamble that the legislature considered that it was still necessary—

> "… to provide for the *continuance* … of powers to control the production, supply and distribution of, and trade and commerce in, *foodstuffs*.…"
>
> (emphasis supplied)

Section 3(1) of the Act continues this theme:

> "**3. *Powers to control production, supply, distribution, etc., of essential commodities***.—(1) The Central Government, so far as it appears to it to be necessary or expedient for maintaining or increasing supplies of

> any *essential commodity*, or for securing their equitable distribution and availability at fair prices, may by notified order provide for regulating or prohibiting the production, supply and distribution thereof, and trade and commerce therein."
>
> (emphasis supplied)

The Ordinance is in the same terms.

22. Now I have no doubt that had the Central Government re-promulgated the Order of 1944 in 1946 after the passing of either the Ordinance or the Act of 1946, the Order would have been good. As we have seen, turmeric falls within the wider definition of "food" and "foodstuffs" given in a dictionary of international standing as well as in several English decisions. It is, I think, as much a "foodstuff", in its wider meaning, as sausage, skins and baking powder and tea. In the face of all that I would find it difficult to hold that an article like turmeric cannot fall within the wider meaning of the term "foodstuffs". Had the Order of 1944 not specified turmeric and had it merely prohibited forward contracts in "foodstuffs" I would have held, in line with the earlier tea case, that that is not a proper way of penalising a man for trading in an article which would not ordinarily be considered as a foodstuff. But in the face of the Order of 1944, which specifically includes turmeric, no one can complain that his attention was not drawn to the prohibition of trading in this particular commodity and if, in spite of that, he chooses to disregard the Order and test its validity in a court of law, he can hardly complain that he was trapped or taken unawares; whatever he may have thought he was at any rate placed on his guard. As I see it, the test here is whether the Order of 1944 would have been a good order had it been re-promulgated after the Ordinance of 1946. In my opinion, it would, and from that it follows that it is saved by the saving clauses of the Ordinance and the Act.

23. I have already set out Section 5 of the Ordinance. In my opinion, the Order of 1944 falls within its purview, and if it is saved by that, it is equally saved by Section 17(2) of the Act. The section is in these terms:

> "**17. (2)** Any order … deemed to be made under the said Ordinance and in force immediately before the commencement of this Act shall continue in force and be deemed to be an order made under this Act.…"

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> **24.** In my opinion, the conviction was good and the High Court was wrong in setting it aside, but though the matter has no relevance here because of the undertaking given by the learned Solicitor General not to proceed against the respondent any further in this matter, I think it right to observe that the attitude of the learned English Judges in the first tea case would not be without relevance on the question of sentence in many cases of this kind. There can, I think, be no doubt that businessmen who are not lawyers might well be misled into thinking that the Ordinance and the Act did not intend to keep the Order of 1944 alive because the Order related to certain specified spices while the Ordinance and the Act changed the nomenclature and limited themselves to "foodstuffs", a term which, on a narrow view, would not include condiments and spices. However, these observations are not relevant here because we are not asked to restore either the conviction or the sentence. In view of that, there will be no further order and the acquittal will be left as it stands."

47. Mr. Narayan then referred to the decision of the Supreme Court in **Pyarli K. Tejani v. Mahadeo Ramchandra Dange**[15] which had found *supari* to be "food" under PFA. Learned counsel submitted that the Constitution Bench in *Pyarli K. Tejani* had squarely rejected the contention that the word 'food' under the PFA was liable to be understood as being confined to articles which were consumed for nourishment and taste. The relevant extracts from the said decision are extracted hereinbelow: -

> **"14.** We now proceed to consider the bold bid made by the appellant to convince the Court that supari is not an article of food and, as such, the admixture of any sweetener cannot attract the penal provisions at all. He who runs and reads the definition in Section 2(*v*) of the Act will answer back that supari is food. The lexicographic learning, pharmacopic erudition, the ancient medical literature and extracts of encyclopaedias pressed before us with great industry are worthy of a more substantial submission. Indeed, learned Counsel treated us to an extensive

[15] (1974) 1 SCC 167

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> study to make out that supari was not a food but a drug. He explained the botany of betal nut, drew our attention to Dr Nandkarni's Indian Materia Medica, invited us to great Susruta's reference to this aromatic stimulant, in a valiant endeavour to persuade us to hold that supari was more medicinal than edible. We are here concerned with a law regulating adulteration of food which affects the common people in their millions and their health. We are dealing with a commodity which is consumed by the ordinary man in houses, hotels, marriage parties and even routinely. In the field of legal interpretation, dictionary scholarship and precedent-based connotations cannot become a universal guide or semantic tyrant, oblivious of the social context subject of legislation and object of the law. The meaning of common words relating to common articles consumed by the common people, available commonly and contained in a statute intended to protect the community generally, must be gathered from the common sense understanding of the word. The Act defines "food" very widely as covering any article used as food and every component which enters into it, and even flavouring matter and condiments. It is commonplace knowledge that the word "food" is a very general term and applies to all that is eaten by men for nourishment and takes in subsidiaries. Is supari eaten with relish by men for taste and nourishment? It is. And so it is food. Without tarrying further on this unusual argument we hold that supari is food within the meaning of Section 2(*v*) of the Act."

48. Mr. Narayan proceeded further to contend that the nourishment argument was in any case rendered a death knell by the Supreme Court in **State of Tamil Nadu vs. Krishnamurthy**[16] which had enunciated the test to be whether the article in question is generally or commonly used for human consumption. The relevant extracts from the decision of *State of Tamil Nadu* are set out hereunder: -

> **"7.** According to the definition of "food" which we have extracted above, for the purposes of the Act, any article used as

[16] (1980) 1 SCC 167

food or drink for human consumption and any article which ordinarily enters into or is used in the composition or preparation of human food is "food". It is not necessary that it is intended for human consumption or for preparation of human food. It is also irrelevant that it is described or exhibited as intended for some other use. It is enough if the article is generally or commonly used for human consumption or in the preparation of human food. It is notorious that there are, unfortunately, in our vast country, large segments of population, who, living as they do, far beneath ordinary subsistence level, are ready to consume that which may otherwise be thought as not fit for human consumption. In order to keep body and soul together, they are often tempted to buy and use as food, articles which are adulterated and even unfit for human consumption but which are sold at inviting prices, under the pretence or without pretence that they are intended to be used for purposes other than human consumption. It is to prevent the exploitation and self-destruction of these poor, ignorant and illiterate persons that the definition of "food" is couched in such terms as not to take into account whether an article is intended for human consumption or not. In order to be "food" for the purposes of the Act, an article need not be "fit" for human consumption; it need not be described or exhibited as intended for human consumption; it may even be otherwise described or exhibited; it need not even be necessarily intended for human consumption; it is enough if it is generally or commonly used for human consumption or in the preparation of human food. Where an article is generally or commonly not used for human consumption or in the preparation of human food but for some other purpose, notwithstanding that it may be capable of being used, on rare occasions, for human consumption or in the preparation of human food, it may be said, depending on the facts and circumstances of the case, that it is not "food". In such a case the question whether it is intended for human consumption or in the preparation of human food may become material. But where the article is one which is generally or commonly used for human consumption or in the preparation of human food, there can be no question but that the article is "food". Gingelly oil, mixed or not with groundnut oil or some other oil, whether described or exhibited as an article of food for human consumption or as an article for external use only is "food" within the meaning of the definition contained in Section 2(*v*) of the Act."

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49. It was submitted that the tests propounded in *Pyarli K. Tejani* were then reiterated by the Supreme Court in **Krishna Gopal Sharma & Anr. v. Govt. of NCT of Delhi**[17] where the Supreme Court held that both pan masala as well as mouth freshener would undoubtedly fall within the ambit of food as defined under the PFA. The relevant parts of the aforesaid judgment are reproduced hereinbelow: -

> **"8.** After giving our careful consideration to the facts and circumstances of the case it appears to us that at the relevant time when the samples of the pan masala and the mouth freshner were taken, the saccharin content as found by the public analyst in the said articles of food was in violation of Rule 47 of the Prevention of Food Adulteration Rules. The pan masala and the mouth freshner are undoubtedly within the meaning of 'food' under Section 2(*v*) of the Prevention of Food Adulteration Act. 'Food' under the said Act has been defined very widely. The validity of Rule 47 prior to its amendment in 1993 restricting the user of saccharin in pan masala cannot be challenged on the ground of arbitrary and capricious exercise of power by the rule-making authority. It has not been demonstrated that despite widely accepted view by the experts about the effect on saccharin on human system on the basis of information flowing from research and analysis, the restriction of user of saccharin in pan masala or mouth freshner as imposed in Rule 47 of the Rules at the relevant time was wholly arbitrary, unjust and capricious. Human knowledge is not static. The conception about the harmful effect of saccharin on human system has undergone changes because of information derived from further research and analysis. The knowledge about the effect of saccharin on human system as accepted today may undergo a change in future on the basis of further knowledge flowing from subsequent research and analysis and it may not be unlikely that previous view about saccharin may be found to be correct later on. If the rule-making authority on the basis of human knowledge widely accepted by the expert framed rule by imposing restriction of user of saccharin in pan masala or mouth freshner at a particular point of time, such exercise of power must be held to have been validly made, founded on good reasons; and challenge of the Rule on the score of arbitrary and capricious exercise of power must fail. In this connection, reference may be made to the decision of a Constitution Bench of this Court in *Pyarali K. Tejani* v. *Mahadeo Ramchandra Dange* [(1974) 1 SCC 167 : 1974 SCC (Cri) 87 : (1974) 2 SCR 154] . In the said case, a

[17] (1996) 4 SCC 513

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> dealer in scented 'supari' was charged for the offence of having sold and retained for selling scented 'supari' with saccharin and cyclamate, in contravention of Section 7(*i*)(*ii*) and Rule 47 of Prevention of Food Adulteration Rules. In the said case, because of such contravention, the dealer was prosecuted for an offence punished under Section 16(1)(*a*)(*i*) of the Prevention of Food Adulteration Act. The dealer was convicted by the learned Magistrate by imposing a fine of Rs 100. On revision, the High Court enhanced the punishment to the statutory minimum of six months' imprisonment and a fine of Rs 1000. At the hearing of the appeal before this Court, there was no dispute that the article in question which was sold contained saccharin and cyclamate. It was however urged that Section 23(*i*)(*b*) empowered the framing of Rules regarding the articles of food for which standards were to be prescribed. It was contended that 'supari' was not a food. It was further contended that neither saccharin nor cyclamate was a biochemical risk and the blanket ban on the use of those substances was unconstitutional amounting to unreasonable restriction on the freedom of trade guaranteed under Article 19 of the Constitution. It was also urged that although saccharin was permitted to be used in carbonated water, restriction of user of saccharin in 'supari' amounted to hostile discrimination."

50. Mr. Narayan further submitted that if any doubt could be said to be existing on this issue, the same clearly came to be rendered a quietus by the Supreme Court in its decision in *Godawat*. Reliance was placed on the following observations as entered in that decision: -

> **"65.** In his submission, the expression "food" as defined in the *Lexicon* could only be "a substance taken into the body to maintain life and growth". No one in his right mind would consider that pan masala or *gutka* would be consumed for maintenance and development of health of human being. In *Pyarali K. Tejani* v. *Mahadeo Ramchandra Dange* [(1974) 1 SCC 167 : 1974 SCC (Cri) 87 : AIR 1974 SC 228, a case arising under the Prevention of Food Adulteration Act, 1954.] this Court held that the word "food" is a very general term and applies to all that is eaten by men for nourishment and takes in also subsidiaries. Since pan masala, *gutka* or *supari* are eaten for taste and nourishment, they are all food within the meaning of Section 2(*v*) of the Act.
>
> **66.** The learned counsel relied on a judgment of a Division Bench of this Court in CAs Nos. 12746-47 of 1996 (decided on 6-

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> 11-2003) [*S. Samuel, M.D., Harrisons Malayalam* v. *Union of India*, (2004) 1 SCC 256] . 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* [(1974) 1 SCC 167 : 1974 SCC (Cri) 87 : AIR 1974 SC 228, a case arising under the Prevention of Food Adulteration Act, 1954.] was a judgment of the Constitutional Bench 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 the definition in Section 2(*v*) of the Act. However, we do not rest our decision solely on this issue."

51. Turning then to the judgments rendered by various High Courts on the subject, Mr. Narayan, firstly drew the attention of the Court to the decision rendered by a Division Bench of the Bombay High Court in **Dhariwal Industries Limited & Anr. v. State of Maharashtra & Ors.**[18] *Dhariwal Industries* was dealing with the validity of an order issued by the Commissioner of Food Safety, Maharashtra, in terms of which by invoking Section 30(2)(a), it had prohibited the manufacture, storage, distribution and sale of gutka or pan masala containing either tobacco and nicotine. Dealing firstly with the aspect

[18] 2013(1)Mh.L.J. 461

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of food as defined under the FSSA, the Bombay High Court held as follows: -

> **"19.** While the definition in the 1954 Act excluded 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 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.
>
> **20.** The next question is whether the provisions of the Food Safety Act, 2006 make any difference to the legal position which was laid down by the Supreme Court in *Ghodawat* case. Before proceeding further, we must note that even while holding the Cigarettes Act to be a special Act, the Supreme Court did not accept the contention of the petitioners that the PFA Act had no role to play in the matter of regulation of manufacture and sale of gutka and pan masala. In fact, the Supreme Court in terms held that the power to ban gutka or pan masala under the PFA Act, 1954 was vested in the Central Government under section

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> 23(1A)(f) thereof and not in the State Government under section 7(iv) thereof. The Supreme Court thus did not accept the petitioners' contention in *Ghodawat* case that Cigarettes Act was the only legislation occupying the field of tobacco and tobacco products and that PFA Act had nothing to do with any tobacco product."

52. Their Lordships then proceeded to hold on the validity of the ban in the following terms: -

> **"26.** Since we have already held that the definition of "food" in the Food Safety Act is wide enough to include gutka and pan masala, it is obvious that the above regulations also apply to gutka and pan masala, Apart from, and even before, conferring powers of enforcement on the authorities under the Act in Chapter VII, Parliament has in Chapter VI of the Act cast special responsibilities as to food safety on the food business operators, manufacturers, workers, distributors and sellers. Food business operator is defined by section 3(o) as a person by whom food business is carried on or owned and is responsible for ensuring the compliance. Food business is defined as any undertaking carrying out any of the activities related to any stage of manufacture, processing, packaging, storage, transportation, distribution of food. Section 26(1) provides that every food business operator shall ensure that the articles of food satisfy the requirements of the Act and the rules and regulations made thereunder at all stages of production etc. within the businesses under his control. The Parliament has not stopped at requiring the food business operator to comply with the legal requirements in such general terms alone. Clause (i) of sub-section (2) further casts a duty on the food business operator in the following express terms:-
>
> *No food business operator shall himself or by any person on his behalf manufacture, store, sell or distribute any article of food-*
>
> (i) which is unsafe; or (ii). ..... or (iii) or (iv) which is for the time being prohibited by the Food Authority or the Central Government or the State Government in the interest of public health. (Emphasis supplied)

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> It is, thus, clear that it is for the food business operators (which would include the petitioners manufacturing gutka and pan masala) to ensure that they do not manufacture any article or food which is unsafe. The Parliament does not require the manufacturers like the petitioners to wait for any declaration to be made by the Food Authority or the Central Government or the State Government to declare any food as injurious to health or unsafe. It is the statutory duty of the manufacturers to ensure that they do not manufacture any article of food which is unsafe. We may, therefore, proceed now to deal with the question of the harmful effects of the ingredients of gutka and pan masala on public health about which ample material has been placed on record by the respondents and the intervenors and which is not seriously disputed at the hearing of interim relief."

53. The orders passed in *Ankur Gutka* were also taken into consideration as would be evident from the following passage of the aforesaid decision. Their Lordships ultimately proceeded to hold as under:-

> **"30.** As already noticed above, 2011 Regulations have come on the statute book long after the Supreme Court judgment in *Ghodawat case*. The 2011 Regulations have been made by the Food Authority of India in exercise of the powers under sections 16 and 92 of the Act after previous consultation with the Central Government and have been placed before each House of Parliament without any modifications having been made by Parliament. Section 30(2)(a) confers independent power on the Food Safety Commissioner in the State. As already noticed by us, section 26 of the Food Safety Act directs that every food business operator shall not manufacture or distribute any article of food which is unsafe and that it is not necessary for the said obligation to be enforced that such a food article must be first prohibited by the Food Authority of India or the Central Government or the State Government. The Food Safety Commissioner in the State of Maharashtra noticed that 98% out of more than 1000 samples collected during the last seven years contained tobacco, nicotine or magnesium carbonate which are injurious to health and that the Food Authority of India had by statutory Regulations of 2011 already banned the manufacture of any product containing tobacco, nicotine or magnesium carbonate (excluding specific product like salt powder which could have upto 2% magnesium carbonate). The Food Safety Commissioner, State of Maharashtra was, thus, acting well within his powers to ensure that

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> manufacturers, distributors and sellers of gutka and pan masala shall not be allowed to contravene the statutory provisions contained in 2011 Regulations, such as Regulation 2.3.4, 3.1.7 and 2.11.5. We, therefore, do not find any substance in the petitioners' submission that the impugned order dated 19 July, 2012 was beyond the authority of the Food Safety Commissioner of the State of Maharashtra.
>
> **30A.** Having examined the scheme of PFA Act, 1954, Cigarettes Act, 2003 and the Food Safety Act, 2006 and 2011 Regulations framed thereunder, which were laid before Parliament and not modified and having regard to the fact that Food Safety Act, 2006 is a later Act and a comprehensive legislation on food safety and contains a non-obstante clause in section 89 thereof, we are of the prima facie view that in the field of safety and standards of food (which includes gutka, pan masala and supari) the Food Safety Act, 2006 occupies the entire field."

54. Mr. Narayan also sought to draw sustenance from the decision rendered by the Madras High Court in **J. Anbazhagan v. The Union of India & Ors.**[19] The said decision was rendered on a Public Interest Litigation which came to be instituted before the said High Court and sought the constitution of a Special Investigating Team to take steps to cease banned articles such as gutka and pan masala. While dealing with the aforesaid issue, the Madras High Court referred to Regulation 2.3.4 and also took notice of the orders passed in *Ankur Gutka* and *Central Arecanut*. It then proceeded to observe as follows: -

> **"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

[19] 2018 SCC OnLine Mad 1231

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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.

75. Significantly, in *Godawat Pan Masala Products I.P. Ltd. v. Union of India*,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 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, Tejram Dharam Paul, Maurmandi, Bhatinda District, Punjab v. The Food Safety Inspector Ambasamudram*] dated 27.04.2015.

80. In *Dhariwal Industries Limited v. State of Maharashtra*, 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 drugs and water, the definition in the Food Safety

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> 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 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.

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> **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.
> **83**. Considering the harmful effects of consumption of chewable tobacco, such as gutkha, which leads to fatal ailments such as cancer, this court cannot shut its eyes to the malaise of illegal manufacture and sale of gutkha within the jurisdiction of this High Court, i.e., the State of Tamil Nadu and the Union Territory of Puducherry."

55. The aforesaid passages from the judgment rendered by the Madras High Court would clearly establish that the view taken in *Dhariwal Industries* was adopted and affirmed. Mr. Narayan also highlighted the fact that the decision in *J. Anbazhagan* ultimately came to be affirmed by the Supreme Court in **E. Sivakumar v. Union of India**[20]. The attention of the Court was also drawn to the decisions in **Jeetmal Ramesh Kumar v. Commissioner, Food Safety and Drug Administration Departmnet & Ors.**[21] and **Urmin Products Pvt. Ltd. V. The Commissioner of Food Safety & Anr.**[22] in which *J. Anbazhagan* was followed

56. Mr. Narayan also placed reliance upon the judgment rendered by the Telangana High Court in **Sri Kamadhenu Traders v. State of**

[20] (2018) 7 SCC 365
[21] 2019 SCC OnLine Madras 18993
[22] W.No. 3351/2019

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Telangana[23] where while dealing with an identical banning order the said High Court had held as under: -

> **"40.** The aforesaid statutory provisions make it very clear that '*food'* as defined under Section 3(j) of FSS Act 2006, 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 3 (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. Keeping in view the aforesaid definition of '*food'*, which is a very wide and exhaustive definition and includes any substance whether processed, partially processed or unprocessed, which is intended for human consumption, certainly includes smokeless tobacco products like gutka, pan masala, kharra, khaini or any other similar product like chewing tobacco/flavoured tobacco within the definition of '*food'* under the FSS Act 2006.
>
> **41.** The Hon'ble Supreme Court in the case of *R. Krishnamurthy* (supra) has held that all that is required to classify a product as '*food'* is that it has to be used commonly for human consumption or in preparation of human food. Not only this, the Hon'ble Supreme Court in the case of *Godawat Pan Masala Products* (supra) has held that gutka, pan masala and supari as food articles. The Allahabad High Court in the case of *Manohar Lal* v. *State of U.P.*, (Criminal Revision No. 318 of 1982) and in the case of *Khedan Lal and Sons* (supra) has held that '*chewing tobacco'* is an article of food.
>
> **42.** The Food Safety Regulations, 2011 was notified on 01.08.2011 in exercise of powers conferred under Section 92 read with Section 26 of the FSS Act 2006 and Regulation 2.3.4 of the said Regulations expressly prohibits use of tobacco and nicotine in all food products and the same is reproduced as under.

[23] 2021 SCC OnLine TS 3592

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> "2.3.4 Product not to contain any substance which may be injurious to health : Tobacco and nicotine shall not be used as ingredients in any food products."
>
> **43.** Not only this, the FSS Act 2006 defined '*ingredient'* and '*food additive'* and therefore, gutka/pan masala which contains tobacco and other kinds of tobacco products like chap tobacco, pure tobacco, khaini, kharra, scented tobacco or flavoured tobacco do fall within the definition of '*food'*."

57. In so far as the contrarian views which had been taken by the various other High Courts, Mr. Narayan referred to Annexure A to his written submissions and sought to distinguish those judgments along the following lines. While dealing with the decision rendered by the Patna High in **M/s Omkar Agency v. The Food Safety and Standards Authority of India**[24]**,** it was submitted that the notification which had been impugned in those proceedings had banned all forms of pan masala and the same clearly did not stand restricted to those which contained tobacco or nicotine. It was further pointed out that the aforesaid decision was, in any case, rendered prior to the order passed by the Supreme Court on 23 September 2016 in terms of which the prohibition on chewing tobacco had been reiterated. Learned counsel also the sought to assail the correctness of the view expressed in that decision since it had failed to notice the judgment rendered by a learned Judge of that High Court itself in **Lal Babu Yadav v. State of Bihar**[25] which had upheld the ban.

[24] 2016 SCC OnLine Pat 9231
[25] 2012 SCC OnLine Pat 1265

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58. Turning then to the judgment rendered by the Calcutta High Court in **Sanjay Anjay Stores v. Union of India & Ors.**[26]**,** learned counsel submitted that the aforesaid decision proceeds on the premise that tobacco is not food, and that food must be construed as only those products which are a source of nutrition or energy. According to Mr. Narayan, the aforesaid view is clearly contrary to the expansive interpretation as placed upon the said word by the Supreme Court in the decisions aforenoted and which had held that all articles which are usually used for human consumption would be liable to be understood as food and that the said expression could not stand restricted only to those articles which may have a nutritive value or function.

59. Insofar as the judgment of the Calcutta High Court in **Prabhat Zarda Factory India Pvt. Ltd. v. The LG & Ors.**[27] is concerned, it was the submission of Mr. Narayan that the same had merely followed the judgment in *Sanjay Anjay Stores*. Drawing the attention of the Court to the decision rendered by the Gauhati High Court in **Dharampal Satyapal Ltd. & Anr. v. State of Assam & Anr.**[28], Mr. Narayan submitted that the Gauhati High Court had struck down a State legislation which sought to regulate chewing tobacco on the ground that COTPA occupied the entire field. According to Mr. Narayan, the said decision clearly fails to bear in consideration the provisions of Regulations 2.3.4 and the obligation of the State Governments to enforce the same in light of the orders passed by the

[26] 2017 SCC OnLine Cal 16323
[27] 2017 SCC OnLine Cal 6957
[28] 2017 SCC OnLine Gau 1196

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Supreme Court in *Ankur Gutka* and *Central Arecanut*. It was submitted that as would be evident from a reading of the aforesaid judgment, those orders were neither noticed nor considered.

60. Mr. Narayan also assailed the correctness of the view expressed by a learned Single Judge of the Kerala High Court in **Joshy KV & Ors. v. State of Kerala & Ors.**[29] and contended that aforesaid judgment clearly does not merit acceptance since it was rendered per incuriam and fails to notice the judgment pronounced by another Single Judge of the same High Court in **All Kerala Tobacco Dealers' Association v. State of Kerala**[30].

61. Mr. Narayan also assailed the correctness of the judgment rendered by the learned Single Judge of the Andhra Pradesh High Court in **Uppara Veerendra v. State of Andhra Pradesh**[31] on the ground that the said judgment also failed to take into consideration the orders passed by the Supreme Court and in any case fails to notice the judgment rendered by the Division Bench of that Court itself in **Dasa Shekar v. State of Andhra Pradesh**.[32]. According to Mr. Narayan, *Godawat* as well as the judgments rendered by the Bombay, Madras and Telangana High Courts clearly commend acceptance since they had upon a due consideration of the various decisions rendered in the backdrop of the provisions contained in the FSSA come to the conclusion that "food" is a word of very wide import coupled with the

[29] (2013) 1 KL3 244
[30] (2016) 2 SCC 161
[31] 2021 SCC OnLine AP 4005
[32] 2021 SCC OnLine AP 2907

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fact that pan masala had, in any case, been recognized as falling within its ambit by the Supreme Court in *Godawat* itself. It was Mr. Narayan's submission that the judgments which have taken a divergent view have failed to appreciate the intent of Regulation 2.3.4 which clearly prohibited the introduction, incorporation or mixing of tobacco or nicotine in any food product. Learned counsel submitted that the moment tobacco or nicotine is introduced in pan masala, a product which is undoubtedly covered under the FSSA, the result would clearly be contrary to the unambiguous statutory injunct comprised in Regulation 2.3.4 of the Prohibition Regulations 2011.

62. According to learned counsel, the learned Single Judge clearly erred in defining the inquiry to be "*Whether tobacco would fall within the definition of food*". Mr. Narayan submitted that the entire focus of the impugned Notification was on the introduction of tobacco in a food article and thus falling foul of the statutory injunction placed by Regulation 2.3.4. According to learned counsel, the learned Single Judge has clearly embarked on a wholly incorrect path while proceeding to test whether tobacco could be construed or interpreted as "food". This, according to Mr. Narayan, is palpably clear from the findings as recorded in paragraph 218. According to learned counsel, the issue of whether FSSA and the Regulations framed thereunder were intended to regulate or prescribe standards for the use tobacco was clearly misplaced. That, according to learned counsel, was clearly neither the scope nor the intent of the Impugned Notifications. It was his submissions that the solitary question which could be recognized

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to have arisen was whether pan masala when mixed along with tobacco or nicotine could be said to be an article which would fall within the ambit of Regulation 2.3.4 and consequently whether the Food Safety Authority could in exercise of powers conferred by Section 30(2)(a) have issued an order banning its manufacture, distribution, and sale.

63. Mr. Narayan further submitted that the view taken by the learned Judge that the power to prohibit as contained in Section 30(2)(a) is temporary and fleeting in character is also untenable. According to learned counsel, the reliance placed by the Court on the decision in **Himat Lal K. Shah v. Commissioner of Police, Ahmedabad & Anr.**[33] as well as *Omkar Agency* was clearly misconceived since those were decisions rendered in a wholly different statutory context. According to learned counsel, the ultimate findings returned on this score failed to bear in mind the undisputed fact that Section 30(2)(a) expressly confers a power on the Food Safety Authorities to prohibit and ban the manufacture, storage, distribution or sale of any food article in the interest of public health.

64. Mr. Narayan also questioned the correctness of the view expressed by the learned Single Judge while dealing with the interplay between the provisions of COTPA and FSSA. It was at the outset submitted that the appellants had never contended before the learned Single Judge that COTPA stood impliedly repealed by the FSSA. In

[33] (1973) 1 SCC 227

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fact, it was vehemently contended that the aforesaid findings have come to be returned by the learned Single Judge even though no such submission had been addressed or made by the appellants in that regard.

65. Mr. Narayan then submitted that notwithstanding the fact that COTPA does itemise pan masala and gutka in its Schedule, that alone would not justify the prohibition in Regulation 2.3.4 being disregarded. According to Mr. Narayan, on a due consideration of the two legislations, it would be apparent that they clearly operate upon different subject matters and over well-defined fields. According to Mr. Narayan, it would be wholly incorrect to interpret or construe the provisions of COTPA in a manner which would either defeat the intent of the FSSA or render its provisions or the regulations framed thereunder as being otiose.

66. It was submitted that the learned Single Judge also failed to appreciate the overriding effect conferred upon the provisions of the FSSA by virtue of Section 89 thereof. It was urged that undisputedly FSSA came to be promulgated later in point of time to COTPA. According to Mr. Narayan, the FSSA being a later special food law would clearly override COTPA. Reliance in this respect was placed on the judgment of the Supreme Court in **Ashoka Marketing v. Punjab National Bank**[34].

[34] (1994) 4 SCC 406

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67. Turing then to the question of whether the Impugned Notifications could be said to be violative of Article 14, Mr. Narayan addressed the following submissions. It was submitted that the writ petitioners had contended that even though it may be asserted that "smoking tobacco" is a more benign substance and poses lesser dangers to health than smokeless tobacco, the appellants have chosen to ban only the latter and thus offending Article 14. It was submitted that undisputedly both smoking as well as smokeless tobacco have a deleterious effect on health and welfare of individuals. According to Mr. Narayan, if the contentions addressed on this score were to be accepted, it would essentially amount to the principle of negative equality being invoked. It was submitted that the respondents had on due consideration of the Expert Committee Reports taken note of the larger impact which smokeless tobacco had on consumers and, consequently, compelling the respondents to take emergent steps in respect of that category. Mr. Narayan submitted that the appellant had borne in consideration the number of users of smokeless tobacco which were almost double in number compared to those using other smoking products, the Quit Ratio for users of smokeless tobacco being much lower, the GATS survey which was undertaken all of which clearly evidenced and justified the ban being introduced.

68. It was submitted that the classification and subcategories which were made by the respondents were not only was based on intelligible differentia but had a clear nexus with the object sought to be achieved. It was his submission that the balancing of competing imperatives and

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the nature of regulatory measures which are to be adopted is one which clearly lay within the province of the executive. According to Mr. Narayan, the respondents had taken into consideration the findings and conclusions recorded in various scientific reports and studies and which clearly warranted emergent steps being taken to curb the use of smokeless tobacco. In any case it was his submission that in the absence of the classification suffering from patent or manifest arbitrariness, the Notification clearly did not warrant being set aside on this score.

D. SUBMISSIONS ADDRESSED ON BEHALF OF UOI

69. Mr. Singh, the learned CGSC advanced submissions on the connected appeal on behalf of the Union which too has assailed the correctness of the view expressed by the learned Single Judge in the impugned judgment. According to Mr. Singh, the principal question which formed the subject matter of the present dispute was whether the products which were sought to be prohibited and regulated in terms of the Impugned Notifications could be said to be "food" within the meaning of Section 3(1)(j) of the FSSA. According to Mr. Singh, the learned Single Judge proceeded to frame a question as to whether tobacco and tobacco products could be termed as "food". It was his submission that the question as framed itself loses sight of the fundamental question which arose and which was whether the use of tobacco in any food product could be permitted under the FSSA.

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70. According to Mr. Singh, the definition of food under the FSSA takes within its fold any item which is intended for human consumption. Learned counsel submitted that both under the PFA as well as the FSSA, courts have consistently adopted the aforesaid test. It was also highlighted that Section 3(1)(j) of the FSSA is clearly couched in more expansive terms than the definition of 'food' as it appeared in the repealed PFA. Mr. Singh submitted that Section 2(v) of the PFA had defined it to mean any article which ordinarily enters into or is used in the composition or preparation of human food. The FSSA, according to learned counsel, on the other hand, adopts the principle of any substance intended for human consumption to be the primary test for understanding whether any article would constitute food for the purposes of the said enactment. This, according to Mr. Singh, is in tune with the principles which had been enunciated by the Supreme Court in *Pyarli K. Tejani* and *R. Krishnamurthy*.

71. Learned counsel further submitted that any doubt which may have existed on the question of whether pan masala would constitute food in any case stands definitively laid to rest in light of the judgment in *Godawat*. Mr. Singh then submitted that both in *Dhariwal Industries* as well as *J. Anbazhagan*, it was the aforenoted principles which were borne in consideration by the respective High Courts who held that gutka would constitute food. Learned counsel also placed reliance on the decision rendered by the Telangana High Court in *Sri Kamadhenu Traders* which had categorically concluded that gutka / pan masala which contains tobacco would all fall within the ambit of

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food as defined under the FSSA. Mr. Singh also sought to draw sustenance from the decision of the Bombay High Court in **Mohammad Yamin Naeem Mohammad vs. The State of Maharashtra**[35] which too had returned findings consistent with the same line of reasoning and had in clearly and unequivocal terms expressed its dissent from decisions of other High Courts which had held to the contrary.

72. It was further submitted that the correctness of the judgment rendered by the learned Single Judge is also liable to be tested bearing in mind the undisputed fact that the validity of Regulation 2.3.4 had neither been questioned nor assailed. It was Mr. Singh's contention that once the said Regulation was recognised as constituting the principal plank for examining the validity of the challenge which stood raised, it would be evident that as soon as tobacco or nicotine came to be added to pan masala, it must necessarily be accepted to be food and the statutory prohibition as enshrined in Regulation 2.3.4 would be violated.

73. Turning then to the scheme and the ambit of COTPA and FSSA, learned counsel submitted that the former essentially seeks to regulate a host of tobacco products. It was his submission that the regulatory measures which constitute the body of COTPA have clearly been misunderstood by the petitioners as a source of entitlement to manufacture and sell tobacco products. Mr. Singh

[35] 2021 SCC OnLine Bom 26

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submitted that as would be apparent from the various provisions of COTPA, the said enactment is clearly aimed at discouraging the public at large from consuming tobacco-based products. That, according to learned counsel, cannot be read conversely to amount to a conferment of a right upon the petitioners to engage in the manufacture, distribution and sale of tobacco products.

74. Mr. Singh then traced the history of the promulgation of PFA, COTPA and FSSA to submit that PFA recognized different categories of food including those for which standards had been fixed as also those for which no parameters stood prescribed. Mr. Singh highlighted the fact that pan masala was identified as a standardized food items in terms of Rule 5 read with A.30 of Appendix-A. This, according to Mr. Singh clearly established that the manufacture and sale of chewing tobacco or pan masala as an item of food always stood regulated even under PFA and was subject to appropriate permissions and licenses being obtained from the competent authority.

75. Mr. Singh submitted that trade and commerce as well as production, supply and distribution of cigarettes is essentially regulated by the **Cigarettes (Regulation of Production, Supply & Distribution) Act, 1975**[36]. It was submitted that upon a subsequent review of the said legislation, a Parliamentary Committee had found that the aforesaid statute had proven to be ineffective since it had failed to have an impact on the avowed objective of making the

[36] The 1975 Act

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smoking public aware of the numerous health hazards connected therewith. According to Mr. Singh, it was the recommendations framed by this committee for promulgation of a broader and more effective legislation which formed the percussor for the enactment of COTPA. Learned counsel submitted that COTPA which came to be promulgated in 2003, adopted a different strategy in order to educate people who consumed tobacco and consequently framed novel and broader regulatory provisions to achieve the stated goal. It was also pointed out that the insertion of Rule 44J of the PFA Rules with effect from 21 August 2006 was a categorical reiteration of the intent of the statute to ensure that the use of tobacco and nicotine as ingredients in food products is prohibited. Mr. Singh submitted that the aforesaid statutory imperative was only reiterated by Regulation 2.3.4.

76. It was then submitted that COTPA was enacted primarily for discouraging the use and consumption of products that contained tobacco. FSSA on the other hand, according to Mr. Singh, is a comprehensive legislation which deals with food and all aspects relating thereto. Assailing the findings returned by the learned Single Judge who had held that COTPA would prevail over FSSA insofar as tobacco is concerned, it was the submission of Mr. Singh that there is, in fact, no conflict whatsoever between the two legislations which operate in separate and distinct fields. Mr. Singh submitted that while FSSA is concerned with matters relating to safe and wholesome food, COTPA introduces regulatory measures which are concerned with the sale, purchase and advertising of various tobacco products specified in

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the Schedule. According to Mr. Singh, the field of food is to be governed solely by the provisions of the FSSA and the various Regulations framed thereunder and thus it would be wholly incorrect to assume that COTPA would override the provisions of the former or that it would sanction the addition of tobacco or nicotine in a food article.

77. Mr. Singh also questioned the correctness of the conclusions recorded by the learned Judge in light in light of *Dhariwal Industries* and *Mohammad Yamin* to submit that gutka and pan masala with tobacco or nicotine would clearly be governed by the FSSA by virtue of being articles of food. Stress was also laid upon the aforenoted two decisions which had also alluded to the overriding effect conferred by Section 89 on the provisions of the FSSA.

78. The validity of the impugned notification was also sought to be sustained by Mr. Singh referring to Article 144 of the Constitution and the obligation of all authorities to act in aid of orders passed by the Supreme Court. According to Mr. Singh, the various orders passed in *Ankur Gutka and Central Arecanut* were liable to be strictly implemented and enforced by all authorities throughout the territory of India. It was his submission that all States and Union Territories were obliged and in fact placed under a duty to ensure that the ban as imposed by the Supreme Court was effectively enforced and implemented.

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79. Mr. Singh also questioned the conclusions recorded by the learned Judge who had held that tobacco was a subject which would stand governed exclusively by COTPA by virtue of the declaration of expediency as enshrined therein. Mr. Singh submitted that a declaration in terms of Entry-52 of List I cannot possibly be read as an intent to exercise monopoly over the entire field and of no other legislation being framed in a legitimate exercise of legislative powers. It was his submission that if the aforesaid argument were to be accepted, the various provisions which are made with respect to tobacco and nicotine under the **Environment (Protection) Act, 1986**[37] and the rules made there under the **Drugs and Cosmetics Act 1940**[38] would also be rendered ultra vires and illegal. Reliance in this respect was placed upon the following pertinent observations as rendered by the Madras High Court in **Designated Officer, food safety & Drugs Control Dept. v. Jayavilas Tobacco Traders LLP**[39]**:-**

> "**20.** 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

[37] The 1986 Act
[38] The 1940 Act
[39] 2023 SCC Online Mad 408

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 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)

21. 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.

22. 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

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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.

23. 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 overlapping of the provisions of the two enactments."

80. Mr. Singh also placed reliance upon the following observations as appearing in the aforenoted decision and which while dealing with the aspect of incidental entrenchment had observed as under: -

"**24.** 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.

25. The objects of these two enactments are by and large different. Of course there is a possibility of over lapping, of the provisions of

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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).

26. 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.

27. A Division Bench of this Court in Government of Tamil Nadu v. K. Sevanthinatha Pandarasannathi, reported in 2009 SCC OnLine Mad 597, 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."

81. Mr. Singh, lastly argued that numerous scientific and authoritative reports had repeatedly expounded on the irreversible and harmful effects flowing from the consumption of gutka, chewing tobacco and other like products. It was submitted that it would be a

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travesty of justice if the writ petitioners were recognized to have a right to carry on trade and business in such products.

82. Mr. Singh submitted that after the Supreme Court came to render its decision in *Godawat*, various questions were raised in Parliament with respect to the proposed course of action liable to be adopted by the Union Government. Referring to the 14th Lok Sabha Debates and which records the proceedings as they unfolded on 10 May 2006, it was pointed that the House was informed that the Union Government was proposing an appropriate amendment in the 1955 Rules in order to empower the Union Government to effectively introduce a ban. According to Mr. Singh, the introduction of Rule 44J in the 1955 Rules was in implementation of the aforesaid policy decision taken by the Union Government.

83. Reliance was also placed on a decision rendered by this Court in **Nava Bans Sar Vyapar Association v. Union of India & Ors.**[40] to submit that tobacco was considered to be a substance so perniciously harmful that trade in the same was liable to be considered as *res extra commercium.* Mr. Singh placed reliance upon the following passages from the aforesaid decision: -

> "**11.** Though the High Court of Allahabad in Varshney General Sales v. State of U.P. MANU/UP/0148/1994 has held that tobacco could not be placed at par with liquor, as hazardous to health, and to trade wherein there could be said to be no fundamental right and which aspect remained undealt in the appeal therefrom reported as Godfrey Phillips India Ltd. v. State of U.P. (2005) 2 SCC 515 but over the time the hazards of tobacco seem to have overtaken the

[40] 2012 SCC Online Del 5714

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> hazards of liquor, leading to the legislation such as COTPA. The Supreme Court in Khoday Distilleries Ltd. v. State of Karnataka (1995) 1 SCC 574 observed that what may not be considered harmful today, may be considered so tomorrow and what articles and goods should be allowed to be produced, possessed, sold and consumed, is to be left to the judgment of the legislative and executive wisdom. Similarly, in Madras City Wine Merchants' Assn. v. State of T.N. (1994) 5 SCC 509 and in Ramesh Chandra Kachardas Porwal v. State of Maharashtra (1981) 2 SCC 722 it was held that nothing can be expected to remain static in this changing world of ours and a market which is suitable and conveniently located today may be found to be unsuitable and inconvenient tomorrow on account of the development, congestion or for a variety of other reasons. The Parliament, in the year 2003, while enacting COTPA, in the Statement of Objects and Reasons thereof noted that tobacco is responsible for an estimated eight lakh deaths annually in the country, that the treatment of tobacco related diseases and loss of productivity caused therefrom was costing the country almost Rs. 13,500 crores annually, offsetting completely the revenue and employment generated by tobacco industry and described the objective of COTPA as to prevent the sale of tobacco products to minors and to protect them from becoming victims of misleading advertisements, all to achieve a healthier lifestyle and protection of right to life enshrined in the Constitution. Undoubtedly, the Supreme Court in Godawat Pan Masala Products I.P. Ltd. (supra) maintained that the legislature/government having chosen not to ban the sale of tobacco products except to minors, trade in tobacco could not be classified as res extra commercium i.e. a business in crime, but the principles laid down in Cooverjee B. Bharucha v. Excise Commr., Ajmer AIR 1954 SC 220 and P.N. Krishna Lal v. Govt. of Kerala 1995 Supp (2) SCC 187, that there is no fundamental right to trade in dangerous and noxious substances, would nevertheless apply to tobacco which has now been universally accepted as a major public health hazard."

84. Mr. Singh also sought to buttress the aforesaid contention in terms of the following observations as rendered by the Supreme Court in an interim order passed upon **Health for Millions Trust v. Union of India**[41]**:-**

[41] (2018 SCC OnLine SC 49

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> "**9.** Considering the rivalised submission advanced at the Bar and keeping in view the Objects and Reasons of the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 and the measures taken by the State, we think it appropriate to direct stay of operation of the judgment and order passed by the High Court of Karnataka. Though a very structural submission has been advanced by the learned counsel for the respondents that it will affect their business, we have remained unimpressed by the said proponement as we are inclined to think that health of a citizen has primacy and he or she should be aware of that which can affect or deteriorate the condition of health. We may hasten to add that deterioration may be a milder word and, therefore, in all possibility the expression "destruction of health" is apposite."

85. The attention of the Court was also drawn to the following passages from the judgment of the Supreme Court in **Union of India & Ors. v. Unicorn Industries**[42]:-

> "**27.** Judicial notice can be taken of the fact that by various scientific studies on betel quid and substitutes, tobacco and their substitutes i.e. pan masala with tobacco and without tobacco, these products have been found to be one of the main causes for oral cancer. A detailed study has been considered by three experts, namely, Urmila Nair, Helmut Bartsch and Jagadeesan Nair in the Division of Toxicology and Cancer Risk Factors, German Cancer Research Centre (DKFZ), Heidelberg, Germany. The research paper is titled as "Alert for an epidemic of oral cancer due to use of the betel quid substitutes gutkha and pan masala: A review of agents and causative mechanisms [Mutagenesis, Vol. 19 No. 4.] ". After considering the entire material in detail and considering the various earlier studies, the paper observes thus:
>
> **"Perspectives**
>
> Banning of gutkha and pan masala has been strongly advocated by oncologists as a preventive measure to reduce

[42] (2019) 10 SCC 575

oral cavity cancers. Recently, a number of States in India have banned the manufacture and sale of both products and this should reduce the incidence rate. Similar regulations regarding other health-impairing tobacco products which have been on the market for centuries, together with cigarettes and bidis (an indigenous smoking product), should also be reinforced.

However, for those who are addicted to these products or are already affected by premalignant lesions, educational interventions to encourage stopping the habit are essential. Additionally, chemopreventive interventions are being explored. Retinoids, NSAIDS and green tea are among the promising agents (Garewal, 1994; IUSHNCC, 1997; Papadimitrakopoulou and Hong, 1997; Lin et al., 2002a). Although a large percentage of lesions did respond to treatment, recurrence after terminating the chemopreventive regime was also observed (Sankaranarayanan et al., 1997), perhaps due in part to continuation of the addictive habit.

As with all cancers, early diagnosis is important for successful treatment of oral cancer, as its prognosis is still very poor. There is, nowadays, a strong drive to apply proteomics technology to molecular diagnosis of cancer. Expression profiling of tumour tissues, molecular classification of tumours and identification of markers to allow early detection, sensitive diagnosis and effective treatment are now being explored for oral cancers. Genes with significant differences in expression levels between normal, dysplastic and tumour samples have been reported and this should help in better understanding the progression of oral squamous cell carcinoma (Kuo et al., 2002; Leethanakul et al., 2003).

DNA aneuploidy in oral leucoplakia in Caucasian tobacco users has been found to signal a very high risk for subsequent development of oral squamous cell carcinomas and associated mortality (Sudbo and Reith, 2003; Sudbo et

al., 2004). A risk assessment model to predict progression of premalignant lesions that includes histology and a score combining chromosomal polysomy, expression and loss of heterozygosity on 3p or 9p has also been described (Lee et al., 2000; Rosin et al., 2002). Once diagnosed, these premalignant lesions could be treated at a much earlier stage by chemopreventive agents, surgery, chemotherapy and/or intense radiotherapy to prevent new lesions and premalignant lesions from progressing to invasive cancer.

Conclusions

Gutkha and pan masala have flooded the Indian market as cheap and convenient BQ substitutes and become popular across all age groups wherever this habit is practised. There is sufficient evidence that chewing of tobacco with lime, BQ with tobacco, BQ without tobacco and areca nut are carcinogenic in humans (IARC, 1985, 2004). These evaluations in conjunction with the available evidence on the BQ substitutes gutkha and pan masala implicates them as potent carcinogenic mixtures that can cause oral cancer. Additionally, these products are addictive and enhance the early appearance of OSF, especially so in young users who could be more susceptible to the disease. Although recently some curbs have been put on the manufacture and sale of these products, urgent action needs be taken to permanently ban gutkha and pan masala, together with the other well-established oral cancer-causing tobacco products. Finally, as the consequences of these habits are significant and likely to intensify in the future, an emphasis on education aimed at reducing or eliminating the use of these products as well as home-made preparations should be accelerated."

28. Recently, the Department of Oral Medicines and Radiology, Dental Institute, Rajendra Institute of Medical Sciences, Ranchi has through its experts, namely, Anjani Kumar Shukla, Tanya Khaitan, Prashant Gupta and Shantala R. Naik conducted a study on the subject "Smokeless Tobacco and Its Adverse Effects on Haematological Parameters: A Cross-Sectional Study [Advances

in Preventive Medicine 2019.] ". The study paper considered the consumption of smokeless tobacco (SLT) in various forms in India such as pan (betel quid) with tobacco, zarda, pan masala, khaini, arecanut. After conducting an in-depth analysis, the paper concludes and recommends as under:

> **"Conclusion and Recommendation**
>
> SLT use has severe adverse effects on haematological parameters. The present study might serve as an early diagnostic tool in any systemic diseases and be helpful in spreading awareness on the deleterious effect in the populace consuming SLT. Timely intervention among students can prevent the initial experimentations with tobacco from developing into addiction in adulthood. People should be counselled to avoid all habits of tobacco and undergo nicotine replacement therapy along with antioxidants. Knowledge and awareness about systemic and oral ill-effects of tobacco should be spread through tobacco control programs in the pursuit for a tobacco-free world."

29. It was sought to be argued on behalf of the manufacturers of pan masala without tobacco, that the pan masala without tobacco stands on a different pedestal than the pan masala with tobacco. It was sought to be argued that, pan masala without tobacco cannot be considered to be hazardous to health. The Department of Head and Neck Surgery, Tata Memorial Hospital, Mumbai through its experts Garg A., Chaturvedi P. Mishra A. and Datta S. had conducted a study on "A Review on Harmful Effects of Pan Masala [Indian Journal of Cancer (October-December 2015), Vol. 52, Issue 4.] ". It is to be noted that this study is of "pan masala without tobacco". It will be apposite to refer to the following observations of the said report:

> **"Policy issues concerning Pan Masala**
>
> Pan masala use is rampant in India by all the sections and age groups of the society. It has emerged as a major cause of oral cancer in India. National Family Health Survey-2

showed that 21% of people over 15 years of age consumed PM or tobacco. Study in the State of Tamil Nadu showed that the age at which people start consuming areca nut products ranges from 12 to 70 years. 58% of the subjects chewed the products more than twice a day. Advertising tobacco products including PM containing tobacco is banned in India since 1-5-2004. To bypass this ban tobacco companies are advertising PM ostensibly without tobacco, heavily in all forms of media. PM is surrogate for tobacco products as the money spent on marketing, and advertising is many times of the revenue generated from the sale of PM. In Mumbai after the ban on PM and gutka the sale has come down and the percentage of users quitting and reducing the habit was 23.53% and 55.88% respectively. The main reason of quitting and reduction in consumption was non-availability of these products. In spite of the ban gutka was still available but in different forms or at increased cost. Strict law in the form of Cigarettes and Other Tobacco Products Act, 2003 has been made in India, but the enforcement and compliance is lax. There is a need for strong enforcement and compliance of laws throughout the country. The genotoxic, carcinogenic properties and numerous other harmful effects of PM need immediate and strict action by the Government on PM without tobacco as it has banned PM with tobacco. The consumers should also be made aware of the harmful effects of PM as they are under a false impression that it is not harmful.

Conclusion

Pan masala is widely used across all the strata of society and is freely available in many parts of the country. It is carcinogenic, genotoxic, and has harmful effects on the oral cavity, liver, kidneys and reproductive organs. Government action is immediately required to restrict the consumption and to make the people aware about its harmful effects."

30. The study which has been conducted in 2004, found that gutkha and pan masala have been one of the major causes of oral

cancer. The Oncologists as early as in 2004 had strongly advocated banning of gutkha and pan masala. They further find that banning the manufacture and sale of these products would reduce oral cancer incidence rates. It is found that gutkha and pan masala have flooded the Indian markets and become popular amongst all age groups. It is observed that pan masala with tobacco as well as without tobacco have been found to be having a potent carcinogenic mixtures that can cause oral cancer. It further found that, these products are an addictive and enhance the early appearance of oral sub-mucous fibrosis (OSMF). It is especially so in the young users who could be more susceptible to the disease.

31. The report further finds that, in the National Family Health Survey-2, it has been found that 21% of people over 15 years of age consumed pan masala or tobacco. The report finds that, though advertising tobacco products including pan masala containing tobacco is banned in India since 1-5-2004, to bypass this ban, tobacco companies are advertising pan masala ostensibly without tobacco, heavily in all forms of media. It has been found that, after the ban on pan masala and gutkha, the sale has come down. The 2016 report finds that, in Mumbai, after the ban on pan masala and gutkha, the sale has come down and the percentage of users quitting and reducing the habit was 23.53% and 55.88% respectively.

32. It could thus be seen that, by scientific research conducted by experts in the field, it has been found that the consumption of pan masala with tobacco as well as pan masala sans tobacco is hazardous to health. It has further been found that, the percentage of teenagers consuming the hazardous product was very high and as such exposing a large chunk of young population of this country to the risk of oral cancer. Taking into consideration this aspect, if the State has decided to withdraw the exemption granted for manufacture of such products, we fail to understand as to how it can be said to be not in the public interest.

36. The Appellate Bench of the High Court observed that some of the notifications providing modalities for exemption were issued subsequent to the enactment of Section 154 of the Finance Act,

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> 2003 and, therefore, Section 154 of the Finance Act, 2003 has no relevance in the said case. However, the Appellate Bench does not find it necessary to even make a reference to the judgment of this Court which was relied on by the learned Single Judge while dismissing the writ petitions and which is specifically put in service by the Union of India. We are unable to appreciate as to how the Appellate Bench of the Gauhati High Court finds that withdrawal of exemption in respect of "pan masala with tobacco" is not in the public interest. The legislative policy as reflected in Section 154 of the Finance Act was to withdraw the exemption granted to the manufacturers of cigarettes as well as pan masala with tobacco and that too with retrospective effect. Apart from the fact that, it is a common knowledge that tobacco is highly hazardous, the legislative intent was also unambiguous. In these circumstances, the finding of the High Court that the withdrawal of exemption for tobacco products was not in the public interest, to say the least is shocking. We find that the approach of the Appellate Bench of the High Court was totally unsustainable.
>
> **37.** As already discussed hereinabove, we have no hesitation to hold that the withdrawal of the exemption to the pan masala with tobacco and pan masala sans tobacco is in the larger public interest. As such, the doctrine of promissory estoppel could not have been invoked in the present matter. The State could not be compelled to continue the exemption, though it was satisfied that it was not in the public interest to do so. The larger public interest would outweigh an individual loss, if any. In that view of the matter we find that the appeals deserve to be allowed."

86. In view of the aforesaid, it was Mr. Singh's submission that in light of the unanimity of scientific and judicial opinion, the subject products must clearly be recognized as being hazardous, dangerous and harmful to public health and the trade business and commerce in the same cannot be accorded the status of a fundamental right.

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E. STAND OF THE WRIT PETITIONERS

87. Supporting the judgment rendered by the learned Judge and appearing for the writ petitioners, Mr.Vaidyanathan, Mr. Singhvi and Mr. Kohli, learned senior counsels, addressed the following submissions.

88. Mr. Vaidyanathan, learned senior counsel appearing for the writ petitioners had principally addressed submissions relating to the declaration of expediency as embodied in COTPA, the doctrine of occupied field and the contention of the writ petitioners that the entire gamut of activities pertaining to tobacco stand governed exclusively by COTPA. As would be evident from the written submissions which were filed in the writ petition as well as those which have been tendered in these proceedings, the scope and ambit of COTPA and FSSA, the argument of occupied field was principally addressed in the backdrop of Entry 52 falling in List I, Entries 24, 26 and 27 falling in List II and Entry 33 of List III as placed in the Seventh Schedule to the Constitution. The submissions on this aspect proceeded along the following lines.

89. Mr. Vaidyanathan taking the Court through the Statement of Objects and Reasons as well as the Preamble of COTPA submitted that it is a legislation which is aimed at prohibiting the advertisement of cigarettes and other tobacco products as well as for the regulation of trade and commerce in and production, supply and distribution of the aforesaid. Learned senior counsel laid emphasis on the declaration

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of Parliament as embodied in the Act and evincing its intent to take over the tobacco industry as a whole. Bearing in mind the provisions made by Entries 52 and 33, it was submitted that upon a declaration being made in terms of Entry 52 of List I, it is permissible for Parliament to take over an entire industry and which would include the manufacturing and production activities related thereto as well as trade and commerce, production, supply and distribution activities relating to the said industry.

90. It was in the alternative submitted that in light of the language employed in Entries 52 and 33 falling in Lists I and III respectively, Parliament may choose to exercise the authority conferred by the aforementioned two entries and take over only some facets pertaining to the concerned industry while leaving the rest for the competent Legislature. The interplay between Entry 52 falling in List I read with Entries 26 and 27 falling in List II and Entry 33 comprised in List III, was explained with Mr. Vaidyanathan submitting that while under the constitutional framework the State Legislatures stand empowered to enact laws relating to trade and commerce within the State as well as for production, supply and distribution of goods under Entries 26 and 27 of List II, that power becomes subject to Entry 33 of List III, once Parliament has evinced its intent to take over an industry in exercise of the legislative power conferred by Entry 52 in List I.

91. The petitioners, as would be evident from the written submissions filed in the original writ proceedings, concede the legal

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position that upon such a declaration being made and Parliament taking over control of an industry in public interest, the scope of the control would ultimately have to be evaluated based on the provisions of COTPA itself. Mr. Vaidyanathan submitted that a reading of the provisions of COTPA would unerringly establish that Parliament had in fact taken over all matters pertaining to trade and commerce in and production, supply and distribution of cigarettes and other products by virtue of the authority conferred by Entry 33 falling in List III of the Seventh Schedule. It was contended that COTPA being especially enacted with reference to Entry 52 of List I read with Entry 33 of List III, it would be manifest that Parliament not only took under its control the tobacco industry as a whole, it consequently denuded the States of the jurisdiction to legislate with respect to the various products set out in the Schedule to the aforesaid enactment.

92. Mr. Vaidyanathan drew the attention of the Court to the definition of "tobacco products" as contained in Section 3(p) to submit that undisputedly pan masala and gutka are clearly included in the aforesaid expression. Learned senior counsel submitted that COTPA is an all-inclusive and a "fully occupying seamless" statute, regulating the entire field and every aspect relating to the defined tobacco products. Mr. Vaidyanathan referred to the statutory prohibition as contained in Sections 4, 5 and 6 of COTPA, the restrictions introduced in terms of Section 7 and the aspect of regulation which is embodied in Sections 8, 9 and 10 of the said enactment. It was submitted that since COTPA occupies the entire field relating to tobacco products,

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any regulation or prohibition in respect of a tobacco product or activities relating thereto must be found in COTPA alone. It was submitted that the Impugned Notifications cannot possibly be construed or read as having been promulgated in exercise of any power traceable to the provisions of COTPA. Viewed in that light Mr. Vaidyanathan would submit that the Impugned Notifications have clearly transgressed into an occupied field and consequently the learned Single Judge has correctly come to conclude that the impugned action of the appellants cannot be sustained in law.

93. Mr. Vaidyanathan further submitted that as per the submission of the appellant itself, neither raw tobacco nor pure tobaccos are products which could be regulated by them. According to learned senior counsel, if the aforesaid submission were to be accepted it would be sufficient for the Court to uphold the quashing of the Impugned Notifications since they clearly purport to deal with the aforesaid products. It was contended that the submissions addressed in this regard by the appellants are clearly untenable since they proceed on the incorrect premise that raw tobacco or pure tobacco has been taken over by Parliament under COTPA. Mr. Vaidyanathan sought to highlight the fact that COTPA evidences the intent of Parliament to take over the tobacco industry as a whole. It was submitted that scented tobacco, chewing tobacco, cigarettes and other like products would clearly fall within the expanse of the phrase "tobacco industry". Learned senior counsel contended that once Parliament had taken over legislative competence with respect to the

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tobacco industry and COTPA covered the entire field, no authority purporting to exercise powers under the FSSA can possibly legislate in respect of those products.

94. It was the submission of Mr. Vaidyanathan that the term food industry as occurring in the declaration which finds place in Section 2 of the FSSA must thus be understood as not including products which are already covered by a separate legislation dealing exclusively with products of the tobacco industry. The submission in essence was that any product of the tobacco industry can neither be regulated nor its production, sale or distribution be prohibited by exercise of powers conferred by FSSA.

95. Turning then to the question of whether tobacco could be said to be food or a food product, learned senior counsel submitted that the aforesaid issue stands conclusively settled in light of the judgment rendered by the Constitution Bench of the Supreme Court in **ITC Ltd. v. Agricultural Produce Market Committee**[43]**,** where it came to be categorically held that tobacco is not foodstuff and thus would not be governed by Entry 33 of List III. The aforesaid submission was addressed in the backdrop of the following observations as appearing in that decision: -

> **"63.** The subject-matter of the issue here is about the interpretation of Entry 52 in List I of the Seventh Schedule. It requires Parliament to make a declaration by law identifying an industry, the control of which by the Union is expedient in the public interest. Under the said entry only an "industry" can be

[43] (2002) 9 SCC 232

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> declared as an industry, the control whereof by the Union is regarded as expedient in public interest. It is, therefore, implicit that if an activity cannot be regarded as industry, Entry 52 will have no applicability to that activity. The question is about the concept of "industry" in Entry 52 of List I. As already stated, the entries in the legislative list have to be construed in the widest sense cannot be disputed but it has also to be borne in mind that such construction should not make other entries totally redundant. The meaning of the word "industry" in various dictionaries, reliance on which was placed by Mr Shanti Bhushan, is not of any assistance while considering the constitutional meaning of the said term. There may not be any embargo or limitation on the power of Parliament to enact the law in respect of activities other than manufacturing activities but that power is non-existent in Entry 52 of List I. It may be elsewhere. Reference in this regard can be made to Entry 33 of List III including in its ambit foodstuff and certain raw materials. Tobacco, however, is admittedly not a foodstuff.

96. Mr. Kohli learned senior counsel submitted that the Supreme Court in **S. Samuel, M.D., Harrisons Malayalam & Anr. v. Union of India & Ors.**[44]**,** had used the word "foodstuff" interchangeably with "food". In view of the aforesaid it was contended that the decision of the Supreme Court in *ITC Ltd.* and the passage extracted above, cannot be understood as the Supreme Court intending foodstuff to be different from food. It was additionally urged that the aforesaid decision had also enunciated the essential elements and characteristics of food to mean a product which is used for nourishment or one which satiates hunger. It was submitted that the Supreme Court had held that a stimulant like tea cannot be food. In view of the aforesaid, it was submitted by learned senior counsel that once tobacco has been found

[44] (2004) 1 SCC 256

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not be food or foodstuff, then its addition to any product cannot be considered to be violative of Regulation 2.3.4.

97. From the written submissions which had been filed in the writ proceedings, the Court notes that it was the case of the petitioners that the basic characteristic of food are nutritive, restitutive, and promotive. Tested on the aforesaid factors, it was contended that tobacco cannot possibly be construed as food. While reiterating the aforesaid submissions before us, learned senior counsel submitted that the fundamental understanding of food cannot be expanded to include tobacco.

98. Proceeding then to the scope of Regulation 2.3.4, it was submitted by Mr. Kohli, that the said provision prohibits the usage of tobacco and nicotine as ingredients in any food product. It was submitted that on a plain reading of the said Regulation, it is manifest that it does not seek to prohibit tobacco or nicotine. Mr. Kohli further contended that pan masala, a product which is covered under the FSSA and chewing tobacco which is governed by COTPA, on their own cannot possibly be viewed as violating Regulation 2.3.4. According to him, the Impugned Notifications are based on a complete misconstruction of Regulation 2.3.4 since tobacco in light of the submissions noted above is not a food product and consequently, the impugned Notifications were liable to be struck down on this fundamental ground itself.

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99. The orders passed by the Supreme Court in *Ankur Gutka* and *Central Arecanut* were sought to be explained with learned senior counsel arguing that those were concerned only with gutka and pan masala mixed with chewing tobacco. It was submitted that those orders do not relate to the principal product namely, tobacco.

100. Learned senior counsel also assailed the Impugned Notifications on the ground of them being ultra vires Section 30(2)(a) of the FSSA. It was submitted that on a plain reading of the said provision, it is manifest that the same cannot be resorted to for the purposes of repeated or yearly prohibitory orders being issued. It was contended that Section 30(2)(a) only contemplates a *pro tem* power being exercised. It was in the aforesaid light that the writ petitioners had argued before the learned Single Judge that the Impugned Notifications had been issued in colourable exercise of powers and in manifest violation of the scope and intent of Section 30(2)(a). The ambit of Section 30(2)(a) was explained with learned senior counsel submitting that on a reading of the said provision it clearly appears to embody three separate dimensions. According to the writ petitioners, the said aspect is evident from the said statutory provision comprising of the element of territory (either in the whole of the State or any area or part thereof), time (not exceeding one year) and scope (interest of public health, the manufacture, storage, distribution or sale and an article of food). Mr. Kohli contended that even if it were assumed for the sake of argument that Section 30(2)(a) could be resorted to for issuance of the Impugned Notifications, it would clearly be subject to

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the limitations expressly embodied in that provision itself and therefore the prohibitory order could not have run beyond a period of one year. It was submitted that the appellants have in complete violation of the aforenoted express limitation repeatedly exercised that power on a yearly basis. This, according to Mr. Kohli, is one which has been correctly answered by the learned Single Judge in their favour and warrants no interference.

101. Dr. Singhvi, learned senior counsel appearing for the writ petitioners, addressed submissions on Article 14 of the Constitution and in light of the ban being restricted to smokeless tobacco. Dr. Singhvi submitted that the respondents have clearly discriminated against manufactures of smokeless tobacco since undisputedly, smoking tobacco products are equally harmful and deleterious to public health. It was his submission that the Impugned Notifications create an artificial sub-class of products and which classification cannot be sustained on any reasonable or rationale differentia. It was his submission that while Regulation 2.3.4 prohibits the use of tobacco and nicotine as ingredients, the respondents have arbitrarily created an artificial distinction by applying its provisions only to smokeless tobacco.

102. Dr. Singhvi further submitted that no plausible reason has been proffered by the appellants as to why tobacco should not be used and understood in its plenary sense and be limited to smokeless tobacco. It was his contention that the larger constitutional issue which arises is

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the burden of proof which stands placed upon the appellant to justify the artificial "intra tobacco" class that stands created. Dr. Singhvi urged that there is no justification or rationale to artificially segregate ingested tobacco from inhaled tobacco for the purposes of banning, especially when both are tobacco products which are consumed by users as mild intoxicants to achieve identical results. It was thus submitted that the impugned action fails the test of a valid classification as enunciated by various precedents rendered on the scope of Article 14. It is these rival submissions which fall for consideration.

103. Since elaborate submissions appear to have been addressed before the learned Single Judge and were reiterated before us in respect of the impact of the declaration of expediency made by Parliament by virtue of Entry 52 of List I, it would be appropriate to consider the aforesaid question at the very outset.

104. However, and before proceeding ahead to do so, we deem it necessary to underline the fact that unlike the various decisions which were cited for our consideration on this aspect, and which had dealt with a conflict between a Parliamentary legislation and a State enactment, in the present case we are called upon to deal with two Parliamentary statutes and both of which carry the declaration contemplated under Entry 52 of List I.

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F. ENTRY 52 & DECLARATION OF EXPEDIENCY

105. In order to appreciate the arguments addressed and centering around the various entries in the Seventh Schedule and more particularly Entry 52 falling in List I thereof, it would be beneficial to articulate some of the fundamental and well settled principles of interpretation which govern the subject of constitutional entries. As has been repeatedly held, entries in the Seventh Schedule are not a source of legislative power. They merely delineate and broadly indicate the field of legislation. The power to legislate flows essentially from Article 246 of the Constitution. The entries broadly define the areas or the subjects in respect of which a legislation may be framed. While entries are to be conferred the widest permissible and plausible interpretation, no particular entry should be interpreted in a manner which would deprive any other entry of its content or render it ineffectual or insubstantial. When questions of conflict are raised, it is the bounden duty of the Court to strike a just balance between the scope of legislation falling in respective entries in the Lists ensuring that no entry is rendered meaningless or devoid of substance. Regard must also be had to the fact that Entry 52 erodes the power that may otherwise be exercised by a competent legislature. Courts are thus obliged to carefully discern and identify the extent and scope of the legislation that comes to be consequently framed pursuant to that declaration. This since the Constitution seeks to strike a just balance between Parliament and the individual States and thus

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ensuring that the meaning that we ascribe represents federalism in its truest form.

106. The interplay between Entry 52 of List I, Entries 26 and 27 comprised in List II and Entry 33 falling in List III was succinctly explained by the Constitution Bench in **Ch. Tika Ramji vs. State of U.P.**[45] as follows: -

> "**18.** Production, supply and distribution of goods was no doubt within the exclusive sphere of the State Legislature but it was subject to the provisions of Entry 33 of List III which gave concurrent powers of legislation to the Union as well as the States in the matter of trade and commerce in, and the production, supply and distribution of, the products of industries where the control of such industries by the Union was declared by Parliament by law to be expedient in the public interest. The controlled industries were relegated to Entry 52 of List I which was the exclusive province of Parliament leaving the other industries within Entry 24 of List II which was the exclusive province of the State Legislature. The products of industries which were comprised in Entry 24 of List II were dealt with by the State Legislatures which had under Entry 27 of that List power to legislate in regard to the production, supply and distribution of goods, goods according to the definition contained in Article 366(12) including all raw materials, commodities and articles. When, however it came to the products of the controlled industries comprised in Entry 52 of List I, trade and commerce in, and production, supply and distribution of, these goods became the subject-matter of Entry 33 of List III and both Parliament and the State Legislatures had jurisdiction to legislate in regard thereto. The amendment of Entry 33 of List III by the Constitution Third Amendment Act, 1954, only enlarged the scope of that Entry without in any manner whatever detracting from the legislative competence of Parliament and the State Legislatures to legislate in regard to the same. If the matters had stood there, the sugar industry being a controlled industry, legislation in regard to the same would have been in the exclusive province of Parliament and production, supply and distribution of the product of sugar industry viz. sugar as a finished product would have been within

[45] (1980) 4 SCC 136

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Entry 33 of List III. Sugarcane would certainly not have been comprised within Entry 33 of List III as it was not the product of sugar industry which was a controlled industry. It was only after the amendment of Entry 33 of List by the Constitution Third Amendment Act, 1954 that foodstuffs including edible oilseeds and oils came to be included within that List and it was possible to legislate in regard to sugarcane, having recourse to Entry 33 of List III. Save for that, sugarcane, being goods, fell directly within Entry 27 of List II and was within the exclusive jurisdiction of the State Legislatures. Production, supply and distribution of sugarcane being thus within the exclusive sphere of the State Legislatures, the U.P. State Legislature would be, without anything more, competent to legislate in regard to the same and the impugned Act would be intra vires the State Legislature.

19. The argument, however, was that the word 'industry' was a word of wide import and should be construed as including not only the process of manufacture or production but also activities antecedent thereto such as acquisition of raw materials and subsequent thereto such as disposal of the finished products of that industry. The process of acquiring raw materials was an integral part of the industrial process and was, therefore, included in the connotation of the was 'industry' and when the Central Legislature was invested with the power to legislate in regard to sugar industry which was a controlled industry by Entry 52 of List I, that legislative power included also the power to legislate in regard to the raw material of the sugar industry, that is sugarcane, and the production, supply and distribution of sugarcane was, by reason of its being the necessary ingredient in the process of manufacture or production of sugar, within the legislative competence of the Central Legislature. Each entry in the Lists which is a category or head of the subject-matter of legislation must be construed not in a narrow or restricted sense but as widely as possible so as to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it (Vide *The United Provinces* v. *Mst. Atiqa Begum* [(1940) FCR 110, 134] , *Thakur Jagannath Baksh Singh* v. *The United Provinces* [(1946) FCR 111, 119] , and *Megh Raj* v. *Allah Rakhia* [(1947) FCR 77] , and the topic 'industries' should, therefore, be construed to include the raw materials which are the necessary ingredients thereof and which form an integral part of the industrial process.

24. It is clear, therefore, that all the Acts and the notifications issued thereunder by the Centre in regard to sugar and sugarcane were enacted in exercise of the concurrent jurisdiction. The

exercise of such concurrent jurisdiction would not deprive the Provincial Legislatures of similar powers which they had under the Provincial Legislative List and there would, therefore, be no question of legislative incompetence qua the Provincial Legislatures in regard to similar pieces of legislation enacted by the latter. The Provincial Legislatures as well as the Central Legislature would be competent to enact such pieces of legislation and no question of legislative competence would arise. It also follows as a necessary corollary that, even though sugar industry was a controlled industry, none of these Acts enacted by the Centre was in exercise of its jurisdiction under Entry 52 of List I. Industry in the wide sense of the term would be capable of comprising three different aspects : (1) raw materials which are an integral part of the industrial process, (2) the process of manufacture or production, and (3) the distribution of the products of the industry. The raw materials would be goods which would be comprised in Entry 27 of List II. The process of manufacture or production would be comprised in Entry 24 of List II except where the industry was a controlled industry when it would fall within Entry 52 of List I and the products of the industry would also be comprised in Entry 27 of List II except where they were the products of the controlled industries when they would fall within Entry 33 of List III. This being the position, it cannot be said that the legislation which was enacted by the Centre in regard to sugar and sugarcane could fall within Entry 52 of List I. Before sugar industry became a controlled industry, both sugar and sugarcane fell within Entry 27 of List II but, after a declaration was made by Parliament in 1951 by Act 65 of 1951, sugar industry became a controlled industry and the product of that industry viz. sugar was comprised in Entry 33 of List III taking it out of Entry 27 of List II. Even so, the Centre as well as the Provincial Legislatures had concurrent jurisdiction in regard to the same. In no event could the legislation in regard to sugar and sugarcane be thus included within Entry 52 of List I. The pith and substance argument also cannot be imported here for the simple reason that, when both the Centre as well as the State Legislatures were operating in the concurrent field, there was no question of any trespass upon the exclusive jurisdiction vested in the Centre under Entry 52 of List I, the only question which survived being whether, putting both the pieces of legislation enacted by the Centre and the State Legislature together, there was any repugnancy, a contention which will be dealt with hereafter."

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107. While dealing with the issue of the meaning to be ascribed to the word "*industry*" as appearing in the aforenoted entries comprised in the different Lists placed in the Seventh Schedule to the Constitution, the Supreme Court in *Tika Ramji* had explained it to be a term which was capable of being understood as comprising of three different aspects, namely, (a) raw materials forming an integral part of the industrial process (b) process of manufacture or production and (c) the distribution of products of that industry. On facts in *Tika Ramji*, the Constitution Bench had ultimately held that raw materials being goods would fall within the scope of Entry 27 of List II, the process of manufacture would stand comprised in Entry 24 of List II except in a case where the same be a controlled industry in which case it would fall within Entry 52 of List I. Similarly, the Supreme Court had explained that the products of the industry would be comprised in Entry 27 of List II except where it were a controlled industry in which case both Parliament as well as the State Legislatures would have concurrent jurisdiction since those products would fall within Entry 33 of List III.

108. The Constitution Bench went on further to observe that by virtue of the declaration made by Parliament with respect to the sugar industry, it became a controlled industry and the products of that industry would thus fall under the ambit of Entry 33 of List III and consequently be carved out from Entry 27 of List II. However, the Constitution Bench held that sugar and sugarcane which were merely raw products could not be said to fall under Entry 52 of List I and the

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declaration that was made by Parliament. The authority of the State Legislature to promulgate the enactment, the validity whereof had been questioned, was ultimately upheld. The principles enunciated in *Tika Ramji* have been consistently followed by the Supreme Court in various judgments rendered thereafter and constitutes the *locus classicus* on the subject. However, for the purposes of understanding the essence of the principles which came to be enunciated in that decision, it would be apposite to advert to some of the observations which appear in the judgment of yet another Constitution Bench in *ITC Ltd.*

109. The opinions penned by Y.K. Sabharwal, J., Ms. Ruma Pal, J., and Brijesh Kumar, J. constituted the majority. In *ITC Ltd.***,** the Constitution Bench was called upon to consider the correctness of the earlier decision rendered in **ITC limited versus State of Kartnatka**[46] which had held that the Bihar Agricultural Produce Markets Act, 1960 insofar as it levied market fee on the sale of tobacco was ultra vires and beyond the legislative competence of the State in light of the Tobacco Board Act, 1975 and the declaration referable to Entry 52 on which the said enactment was founded.

110. While answering the question which arose, Sabharwal, J. while reiterating the interpretation accorded by *Tika Ramji* to the competing entries falling in the three Lists comprised in Seventh Schedule held as follows: -

[46] (2002) 9 SCC 232

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"**61.** Now, in the Seventh Schedule part of Entry 27 is in Entry 26 of the State List; markets and fairs is Entry 28 of List II; moneylending and moneylenders (Entry 30 List II); production, supply and distribution of goods subject to the provisions of Entry 33 of List III (Entry 27 List II); industries subject to the provisions of Entries 7 and 52 of List I (Entry 24 List II). It would, thus, be seen that under the 1935 Act, both production, supply and distribution of goods as well as development of industries were subject to the provisions of List I as provided in Entry 29. Our Constitution-makers, however, bifurcated Entry 29 into two parts. Industries were put in Entry 24 of List II subject to the provisions of Entries 7 and 52 of List I. The production, supply and distribution of goods was put in Entry 27 of List II and made subject to Entry 33 of List III. The acceptance of the argument of Mr Shanti Bhushan would mean that no object was sought to be achieved by such a bifurcation. It is clear that the two entries have been separated. One made subject to the provisions of Entry 33 of List III and the other subject to the provisions of Entries 7 and 52 of List I. Therefore, to interpret the expression "industry" to include in it the aspect of raw material would mean that by the same analogy the subject-matter of production, supply and distribution of goods should also be included therein and in fact that was the argument of Mr Shanti Bhushan. Would the acceptance of that argument not negate the will of the Constitution-makers? I think it would. Therefore, the argument cannot be accepted. The same argument would equally apply to Entry 14 of List II in respect of agriculture which is not subject to any list. It would so become if we accept the contention of Mr Shanti Bhushan. Further, earlier when Parliament felt the need to control raw material, it included "raw jute and raw cotton" in Entry 33 List III by the Constitution (Third Amendment) Act, 1954. Even Article 369 indicates that agricultural raw material is in the State List for it refers to raw cotton, cotton seed and edible oilseeds and seeks to temporarily place it, by fiction, in the Concurrent List to enable Parliament to make laws. The expression "industries" in Entry 24 List II or Entry 52 List I, cannot be interpreted in a manner that would make other entries of List II of the Seventh Schedule subject to Union control, which in fact they are not. Wherever it was intended to be made subject to such control, whether of List I or that of List III, it was said so. A perusal of List II shows that whenever a particular entry was intended to be made subject to an entry in List I or III, it has been so stated specifically. Therefore, an interpretation which tends to have the effect of making a particular entry subject to any other entry, though not so stated in the entry,

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deserves to be avoided unless that be the only possible interpretation. We do not think that such an interpretation on the entries in question, namely, Entry 52 of the Union List and Entry 24 of the State List deserves to be placed.

62. The principles of interpretation are well settled. There is no doubt that the entries in the lists in the Seventh Schedule do not provide competence or power to legislate on the legislature for which the source of power is contained in Article 246 of the Constitution. In deciding the question of legislative competence, it has to be kept in view that the Constitution is not required to be considered with a narrow or pedantic approach. It is not to be construed as a mere law but as a machinery by which laws are made. The interpretation should be broad and liberal. The entries only demarcate the legislative field of the respective legislature and do not confer legislative power as such and if it is found that some of the entries overlap or are in conflict with the other, an attempt to reconcile such entries and bring about a harmonious construction is the duty of the Court. When, however, reconciliation is not possible, as here, then the Court will have to examine the entries in relation to legislative power in the Constitution."

111. Ruma Pal, J. in her concurring opinion made the following pertinent observations: -

"**112.** The underlying rationale of *Tika Ramji's* [AIR 1956 SC 676 : 1956 SCR 393] definition of the word "industry" is that the Constitution having expressly provided for particular fields of legislation in the three lists, each field must be given a meaning. Entry 24 of List II cannot be read so as to subsume within itself the other entries in List II. It must be given a meaning which allows the other entries to survive and be defined to that extent with reference to what it is not.

113. Thus in *Calcutta Gas* [AIR 1962 SC 1044 : 1962 Supp (3) SCR 1] it was held that the word "industry" in Entry 24 of List II and Entries 7 and 52 of List I did not include gas and gasworks which was in terms provided for in Entry 25. The argument in that case was that the State was incompetent to enact the Oriental Gas Company Act, 1960 under Entry 25 of List II because Parliament had passed the Industries (Development and Regulation) Act, 1951 by virtue of Entry 52 of List I. The Central Act in that case had, under Section 2 declared that it was expedient in the public interest

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that the Union should take under its control inter alia industries of " 'fuel gas' (coal gas, natural gas and the like)". For the purpose of promoting and regulating these industries, the Central Act enabled the Central Government to investigate into the affairs of an undertaking, to regulate its production, supply and distribution, and, if necessary to take over the management of the undertaking. The Court said that if the word "industry" in Entry 24 of List II and, therefore, Entry 52 of List I were interpreted to include "gas and gasworks" which were expressly covered by Entry 25 List II, Entry 25 may become redundant and it would amount to attributing to the authors of the Constitution "inaptitude, want of precision and tautology". As a result, the challenge to the State Act was negatived and the Central Act, insofar as it purported to deal with the gas industry, was held to be beyond the legislative competence of Parliament.

119. It is unnecessary to multiply instances of the numerous decisions which have followed the logic of *Tika Ramji* [AIR 1956 SC 676 : 1956 SCR 393] and accepted its conclusion that for the purposes of Entry 24 of List II and consequently Entry 52 of List I, "industry" means "manufacture or production" and nothing more. It is sufficient to note that *Tika Ramji's* [AIR 1956 SC 676 : 1956 SCR 393] definition of industry has been affirmed and applied recently by a Constitution Bench in *Belsund Sugar Co. Ltd.* v. *State of Bihar* [(1999) 9 SCC 620] and is still good law. *Harakchand Banthia case* [(1969) 2 SCC 166 : (1970) 1 SCR 479] does not strike a discordant note.

122. This provides for States to generally legislate on production, supply and distribution of goods. Entry 33 of List III deals particularly with the production, supply and distribution of the products of industries where the control of such industry by the Union is declared by law to be expedient in the public interest under Entry 7 or 52 of List I. It would not have been necessary to have especially provided for trade and commerce in, and the production, supply and distribution of the products of a controlled industry in Entry 33 of List III, had the word "industry" in Entries 7 and 52 of List I covered the field. Similarly had the word "industry" in Entry 24 of List II been sufficient, why have a separate head under Entry 27 of the same list dealing with the production, supply and distribution of goods unless we concede that the framers of the Constitution were guilty of "inaptitude, want of precision and tautology"? The concept of a "general" and "particular" term is necessarily relative depending upon the context in which the term is considered. Entry 27 of List II is certainly a

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general entry but only in relation to Entry 33 of List III which deals with trade, commerce etc. in particular kinds of products, namely, the products of a controlled industry. Finally, it is clear from the passage quoted, that *Banthia* [(1969) 2 SCC 166 : (1970) 1 SCR 479] held that the Gold Act was legislatively competent under Entry 52 of List I because it dealt with the process of *manufacture or production* of gold i.e. it was within the sweep of industry as defined in *Tika Ramji* [AIR 1956 SC 676 : 1956 SCR 393] .

126. To sum up: the word "industry" for the purposes of Entry 52 of List I has been firmly confined by *Tika Ramji* [AIR 1956 SC 676: 1956 SCR 393] to the process of manufacture or production only. Subsequent decisions including those of other Constitution Benches have reaffirmed that *Tika Ramji case* [AIR 1956 SC 676 : 1956 SCR 393] authoritatively defined the word "industry" — to mean the process of manufacture or production and that it does not include the raw materials used in the industry or the distribution of the products of the industry. Given the constitutional framework, and the weight of judicial authority it is not possible to accept an argument canvassing a wider meaning of the word "industry". Whatever the word may mean in any other context, it must be understood in the constitutional context as meaning "manufacture or production".

127. Applying the negative test as evolved in *Tika Ramji* [AIR 1956 SC 676 : 1956 SCR 393] in this case it would follow that the word "industry" in Entry 24 of List II and consequently Entry 52 of List I does not and cannot be read to include Entries 28 and 66 of List II which have been expressly marked out as fields within the State's exclusive legislative powers. As noted earlier, Entry 28 deals with markets and fairs and Entry 66 with the right to levy fees in respect of, in the present context, markets and fairs. Entry 52 of List I does not override Entry 28 in List II nor has Entry 28 in List II been made subject to Entry 52 unlike Entry 24 of List II. This Court in *Belsund Sugar* [(1999) 9 SCC 620] has also accepted the argument that Entry 28 of List II operated on its own and cannot be affected by any legislation pertaining to industry as found in Entry 52 of List I."

112. Her Ladyship proceeded to record her conclusions as under: -

"**134.** Section 15 ["15. *Sale of agricultural produce*.—(1) No agricultural produce specified in notification under sub-section (1) of Section 4, shall be made, bought or sold by any person at any place within the market area other than the relevant principal

market yard or sub-market yard or yards established therein, except such quantity as may on this behalf be prescribed for retail or sale or personal consumption.(2) The sale and purchase of such agricultural produce in such areas shall notwithstanding anything contained in any law be made by means of open auction or tender system except in cases of such class or description of produce as may be exempted by the Board."] prohibits notified agricultural produce from being bought or sold by any person at any place in the market area other than the relevant principal market yard or sub-market yard or yards established therein unless it is for retail sale, personal consumption or exempted by the Marketing Board under Section 15(1) or (2). The mode of purchase and sale specified under Section 15(2) is by means of open auction or tender system. Sub-section (2) of Section 18 specifically authorises the Market Committee to issue licences to persons engaged in the purchase, storage or processing of agricultural produce to operate in the market area and also to control and regulate the admission of persons into the market yard or the sub-market yards and to prosecute persons trading without a valid licence. Section 27 empowers the Market Committee to levy and collect market fee from the buyer on the agricultural produce bought or sold in the market area at specified rates. The remaining sections of the Markets Act are omitted from consideration as they are not at all relevant. We are really concerned with Section 15 and more particularly Section 27. The setting up of market areas, market yards and regulating use of the facilities within such area or yards by levy of market fee is a matter of local interest and would be covered by Entry 28 of List II and thus within the legislative competence of the State. If any portion of the market area or the market yards is used for the sale or purchase of tobacco, that too will be within the State's competence. To hold to the contrary would be to ignore the exclusive powers of the States to legislate in respect of markets and fairs under Entries 28 and 66 of List II. The Markets Act does not seek to regulate either the "manufacture or production" of tobacco (assuming that agricultural produce can be manufactured) and thus does not impinge upon the Tobacco Act insofar as it is at all relatable to Entry 52 of List I. All the provisions of the Markets Act, in my view, are clearly relatable to Entry 28 of List II given the scope of the entry as discussed earlier. The State in the circumstances, was not incompetent to incidentally also legislate with regard to tobacco and "the semantic sweep of Entry 52 did not come in the way of the State Legislature making laws on subjects within its sphere and not directly going to the heart of the industry itself" [(1980) 1 SCC 223 : 1980 SCC (Tax)

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> 90] . (SCC p. 234, para 34) In my opinion therefore Sections 15 and 27 of the Markets Act in pith and substance are relatable to Entries 28 and 66 of List II and have been competently enacted by the State. Incidentally it is nobody's case that the fee charged under Section 27 does not represent a quid pro quo for the services rendered and the facilities afforded in the market area. It follows that Parliament is incompetent to legislate for the setting up or regulation of "markets and fairs" within the meaning of the phrase in Entry 28 of List II, even in respect of tobacco. It may of course incidentally trespass into the State's legislative field, provided (*1*) the trespass is an inseparable part of the provisions validly passed, and (*2*) the State has not already fully occupied its field with conflicting statutory provisions."

113. Brijesh Kumar, J., whose opinion formed part of the majority had held as follows: -

> "**163.** As noticed earlier the majority view in *ITC case* [1985 Supp SCC 476 : 1985 Supp (1) SCR 145] has been upheld in the judgment of Brother Pattanaik, on slightly different reasoning and the decisions of this Court in *M.A. Tulloch* [AIR 1964 SC 1284 : (1964) 4 SCR 461] and *Baijnath Kadio* [(1969) 3 SCC 838] dealing with legislation on mining and relied upon in the majority judgment of *ITC case* [1985 Supp SCC 476 : 1985 Supp (1) SCR 145] have been found to be not relevant for the decision. It is true, while legislating on any subject covered under an entry of any list, there can always be a possibility of entrenching upon or touching the field of legislation of another entry of the same list or another list for matters which may be incidental or ancillary thereto. In such eventuality, inter alia, a broad and liberal interpretation of an entry in the list may certainly be required. An absolute or watertight compartmentalization of heads of subject for legislation may not be possible but at the same time entrenching into the field of another entry cannot mean its total sweeping off even though it may be in the exclusive list of heads of subjects for legislation by the other legislature. As in the present case the relevant heads of subject in List II, other than Entry 24, cannot be made to practically disappear from List II and assumed to have crossed over in totality to List I by virtue of declaration of the tobacco industry under Entry 52 of List I, in the guise of touching or entrenching upon the subjects of List II."

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114. The law with respect to a declaration made under Entry 52 falling in List I can thus be said to have been conclusively settled to be that a declaration once made under that entry, results in denuding a State legislature of the competence to legislate on the subject of industries to the extent to which its control has been taken over by Parliament. As a consequence of that declaration, the products of that industry which would have otherwise fallen within the scope of production, supply and distribution of goods in Entry 27 of List II, become the subject matter of Entry 33 falling in List III. Similarly, the processes of production and manufacture of such an industry which would have ordinarily been comprised in Entry 24 of List II would then be governed by a legislation framed in terms of Entry 52 of List I. However, the extent of control that Parliament ultimately takes over, be it with respect to the industry as a whole, the aspect of production, supply and distribution of goods or mere facets of it are issues which would ultimately have to be answered on the basis of the actual provisions enacted by Parliament. This would be evident from the discussion which follows.

115. This the Court notes since it would be open to Parliament to take over only certain facets of that industry and refrain from exercising its complete legislative authority that may otherwise flow from Entry 33 falling in List III. Ultimately, the extent of control and the assumption of legislative authority would have to be evaluated

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based upon the statute and the specific measures that Parliament may deem appropriate to adopt.

116. The Constitution Bench of the Supreme Court in **Ishwari Khetan Sugar Mills (P) Ltd. v. State of U.P.**[47] extensively dealt with this aspect as would be evident from the following excerpts of that decision: -

> "**8.** Sugar is a declared industry. Is it, however, correct to say that once a declaration is made as envisaged by Entry 52 List I, that industry as a whole is taken out of Entry 24 List II? In respect of an identical Entry 54 List I in the passage extracted above it is said that to the extent declaration is made and extent of control laid, that much and that much alone is abstracted from the legislative competence of the State Legislature. It is, therefore, not correct to say that once a declaration is made in respect of an industry, that industry as a whole is taken out of Entry 24 List II. Similarly, in *State of Haryana* v. *Chanan Mal* [(1977) 1 SCC 340, 351 : AIR 1976 SC 1654 : (1976) 3 SCR 688, 700] while upholding the constitutional validity of the Haryana Minerals (Vesting of Rights) Act, 1973, after noticing the declaration made in Section 2 of the Mines and Minerals (Regulation and Development) Act, 1957, ("Mines and Minerals Act" for short), as envisaged by Entry 54 List I it was held : (SCC p. 351, para 24)
>
> > "Moreover, power to acquire for purposes of development and regulation has not been exercised by Act 67 of 1957. The existence of power of Parliament to legislate on this topic as an incident of exercise of legislative power on another subject is one thing. Its actual exercise is another. It is difficult to see how the field of acquisition could become occupied by a Central Act in the same way as it had been in the *West Bengal case* [*State of W.B.* v. *Union of India*, AIR 1963 SC 1241 : (1964) 1 SCR 371] even before Parliament legislates to acquire land in a State."
>
> These pronouncements demonstrably show that before State Legislature is denuded of power to legislate under Entry 24 List II in respect of a declared industry, the scope of declaration and consequent control assumed by the Union must be demarcated with

[47] (1980) 4 SCC 136

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precision and then proceed to ascertain whether the impugned legislation trenches upon the excepted field.

9. The declaration made in Section 2 of the IDR Act reads as under:

> "It is hereby declared that it is expedient in the public interest that the Union should take under its control the industries specified in the First Schedule."

11. Absence of the expression "to the extent hereinafter provided" was pressed into service to point out that while in respect of mines and minerals the Union has assumed control to the extent provided in the Mines and Minerals Act, in the case of declared industries the control is absolute, unlimited, unfettered or unabridged and, therefore, everything that would fall within the connotation of the word "control" would be within the competence of the Union and to the same extent and degree the State Legislature would be denuded of its power to legislate in respect of that industry. It was said that in respect of declared industries total control is assumed by the Union and, therefore, Entry 24 List II on its import must be read industry minus the declared industry because Entry 24 List II is subject to Entries 7 and 52 List I. Undoubtedly the Union is authorised to assume control in respect of any industry if Parliament by law considers it expedient in the public interest. The declaration has to be made by Parliament, but the declaration has to be by law and not a declaration simpliciter. The words of limitation on the power to make declaration are "by law". Declaration must be an integral part of law enacted pursuant to declaration. The declaration in this case is made in an Act enacted to provide for the development and regulation of certain industries. Therefore, the control was assumed not in abstract but for a specific and avowed object viz. development and regulation of certain industries. The industries in respect of which control was assumed for the purpose of their development and regulation have been set out in the schedule. This control is to be exercised in the manner provided in the statute viz. the IDR Act. The declaration for assuming control is to be found in the same Act which provides for the limit of control. The deducible inference is that Parliament made the declaration for assuming control in respect of declared industries set out in the Schedule to the Act to the extent mentioned in the Act. It is difficult to accept the submission that Section 2 has to be read de hors the Act and not forming part of the Act. This would be doing violence to the art of legislative draftsmanship. It is open to Parliament in view of Entry 52 List I, to make a declaration in

respect of industry or industries to the effect that the Union will assume its control in public interest. It is not to be some abstract control. The control has to be concrete and specific and the manner of its exercise has to be laid down in view of the well established proposition that executive authority must have the support of law for its action. In a country governed by rule of law, if the Union, an instrumentality for the governance of the country, has to exercise control over industries by virtue of a declaration made by Parliament, it must be exercised by law. Such law must prescribe the extent of control, the manner of its exercise and enforcement and consequence of breach. There is no such concept as abstract control. The control has to be concrete and the mode and method of its exercise must be regulated by law. Now, Parliament made the declaration not in abstract but as part of the IDR Act and the control was in respect of industries specified in the First Schedule appended to the Act itself. Sections 3 to 30 set out various modes and methodology, procedure and power to effectuate the control which the Union acquired by virtue of the declaration contained in Section 2. Industry as a legislative head finds its place in Entry 24 List II. The State Legislature can be denied legislative power under Entry 24 to the extent Parliament makes declaration under Entry 52 and by such declaration, Parliament acquires power to legislate only in respect of those industries in respect of which declaration is made and to the extent as manifested by legislation incorporating the declaration and no more. The Act prescribes the extent of control and specifies it. As the declaration trenches upon the State legislative power it has to be construed strictly. Therefore, even though the Act enacted under Entry 54 which is to some extent in pari materia with Entry 52 and in a parallel and cognate statute while making the declaration Parliament did use the further expression "to the extent herein provided" while assuming control, the absence of such words in the declaration in Section 2 would not lead to the conclusion that the control assumed was to be something in abstract, total and unfettered and not as per various provisions of the IDR Act. The lacuna, if any, is made good by hedging the power of making declaration to be made by law. Legislative intention has to be gathered from the Act as a whole and not by piece-meal examination of its provisions. It would, therefore, be reasonable to hold that to the extent Union acquired control by virtue of declaration in Section 2 of the IDR Act as amended from time to time, the power of the State Legislature under Entry 24 List II to enact any legislation in respect of declared industry so as to encroach upon the field of control occupied by the IDR Act would be taken away. This is clearly borne out not only

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by the decision in *Baijnath Kadio case* [(1969) 3 SCC 838, 847-848 : AIR 1970 SC 1436 : (1970) 2 SCR 100, 113] where undoubtedly while referring to the control assumed by the Union by a declaration made in Section 2 of the Mines and Minerals Act, it was said that to what extent such a declaration would go is for Parliament to determine and this must be commensurate with public interest, and once this declaration is made and the extent laid down, the subject of legislation to the extent laid down becomes an exclusive subject for legislation by Parliament. It is not merely some abstract control but the extent of the control assumed by the Union by the provisions of the IDR Act pursuant to declaration made by Parliament that the State Legislature to that extent, that is, to the extent the provisions of the IDR Act occupies this field, is denuded of its power to legislate in respect of such declared industry.

22. There is on the contrary a good volume of authority for the proposition that the control assumed by the Union pursuant to declaration to the extent indicated in the statute, making the declaration does not comprehend the power of acquisition if it is not so specifically spelt out. In *Kannan Devan Hills Produce Company Ltd.* v. *State of Kerala* [(1972) 2 SCC 218 : (1973) 1 SCR 356] constitutional validity of Kannan Devan Hills (Resumption of Lands) Act, 1971, was challenged on the ground of legislative competence of Kerala State Legislature to enact the legislation. It was urged that in view of the declaration made in Section 2 of the Tea Act, 1953, tea was a controlled industry and, therefore, the State Legislature was denuded of any power to deal with the industry. It was further contended that tea plantation required extensive land and that resumption of land by the impugned legislation would directly and adversely affect the control taken over by the Union and, therefore, the State Legislature was incompetent to enact the impugned legislation. This contention was repelled holding that the impugned legislation was in pith and substance one under Entry 18 of List II read with Entry 42, List III. In reaching this conclusion the Court held as under : (SCC p. 229, para 28)

> "It seems to us clear that the State has legislative competence to legislate on Entry 18 List II and Entry 42 List III. This power cannot be denied on the ground that it has some effect on an industry controlled under Entry 52, List I. Effect is not the same thing as subject-matter. If a State Act, otherwise valid, has effect on a matter in List I it does not cease to be a legislation with respect to an

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> entry in List II or List III. The object of Sections 4 and 5 seems to be to enable the State to acquire all the lands which do not fall within Categories (*a*), (*b*) and (*c*) of Section 4(1). These provisions are really incidental to the exercise of the power of acquisition. The State cannot be denied a power to ascertain what land should be acquired by it in the public interest."

24. It can, therefore, be said with a measure of confidence that legislative power of the States under Entry 24 List II is eroded only to the extent control is assumed by the Union pursuant to a declaration made by the Parliament in respect of declared industry as spelt out by legislative enactment and the field occupied by such enactment is the measure of erosion. Subject to such erosion, on the remainder the State Legislature will have power to legislate in respect of declared industry without in any way trenching upon the occupied field. State Legislature which is otherwise competent to deal with industry under Entry 24, List II, can deal with that industry in exercise of other powers enabling it to legislate under different heads set out in Lists II and III and this power cannot be denied to the State. In this connection it would be advantageous to refer to *Chanan Mal case* [(1977) 1 SCC 340, 351 : AIR 1976 SC 1654 : (1976) 3 SCR 688, 700] . In that case constitutional validity of Haryana Minerals (Vesting of Rights) Act, 1973, and the two notifications issued thereunder was challenged on the ground that the Act and the notifications issued thereunder were repugnant to the Mines and Minerals Act made by Parliament after making a declaration as contemplated by Entry 54 List I. The challenge was that the State Legislature was incompetent to legislate on the topic of mines and minerals under Entry 23, List II in view of the declaration made under Entry 54 List I and the enactment of Act 67 of 1957 (Mines and Minerals Act) by the Parliament. By the impugned Act and the notifications issued thereunder the State Government of Haryana purported to acquire rights to salt petre, a minor mineral in the land described in the schedule appended to the notification and by the second impugned notification the State Government announced to the general public that certain salt petre-bearing areas in the State of Haryana mentioned therein would be auctioned on the dates given there. Repelling the contention regarding legislative incompetence it was observed that it is difficult to see how the field of acquisition could become occupied by a Central Act in the same way as it had been in *West Bengal case* [*State of W.B.* v. *Union of India*, AIR 1963 SC 1241 : (1964) 1 SCR 371] even before Parliament legislates to acquire land in a

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State. At least until Parliament has so legislated as it was shewn to have done by the statute considered by this Court in the case from *West Bengal* [*State of W.B.* v. *Union of India*, AIR 1963 SC 1241 : (1964) 1 SCR 371] the field is free for State legislation falling under the express provisions of Entry 42 of List III. It was further observed as under : (SCC p. 355, para 36)

> "It seems difficult to sustain the case that the provisions of the Central Act would be really unworkable by mere change of ownership of land in which mineral deposits are found. We have to judge the character of the Haryana Act by the substance and effect of its provisions and not merely by the purpose given in the Statement of Reasons and Objects behind it. Such statements of reasons are relevant when the object or purpose of an enactment is in dispute or uncertain. They can never override the effect which follows logically from the explicit and unmistakable language of its substantive provisions. Such effect is the best evidence of intention. A Statement of Objects and Reasons is not a part of the statute, and, therefore, not even relevant in a case in which the language of the operative parts of the Act leaves no room whatsoever, as it does not in the Haryana Act, to doubt what was meant by the legislators. It is not disputed here that the object and effect of the Haryana Act was to acquire proprietary right to mineral deposits in 'land'."

25. There is thus a long line of decisions which clearly establishes the proposition that power to legislate for acquisition of property is an independent and separate power and is exercisable only under Entry 42 List III and not as an incident of the power to legislate in respect of a specific head of legislation in any of the three lists. This power of the State Legislature to legislate for acquisition of property remains intact and untrammelled except to the extent where on assumption of control of an industry by a declaration as envisaged in Entry 52 List I, a further power of acquisition is taken over by a specific legislation."

117. *Ishwari Khetan* thus holds in unambiguous terms that a declaration of expediency is not liable to be either viewed or understood as a complete erosion of the authority to legislate which

may otherwise be claimed under an entry which becomes subject to Entry 52. The Constitution Bench explains the constitutional position to be that the power to legislate under Entry 24 would stand eroded and effaced only to the extent that the statutory provisions enacted occupy the field. The principles adumbrated in *Ishwari Khetan* thus command us not to be boggled by a declaration made by virtue of Entry 52 but to delve further in order to discern the extent to which Parliament evinces its intent to occupy the field and the spectrum which the legislation seeks to occupy and cover.

G. COTPA & FSSA- FUNDAMENTAL TENETS

118. Having laid out the broad constitutional framework in the backdrop of which the questions which stand posited in these appeals are liable to be answered, we feel that this would be an appropriate stage to briefly allude to the relevant provisions of the COTPA and FSSA.

119. COTPA is a legislation which purports to prohibit the advertisement of cigarettes and tobacco products as well as to regulate trade and commerce in production, supply and distribution of cigarettes and other tobacco products. Section 4 prohibits smoking in a public place. Section 5 introduces a prohibition with respect to advertisement of cigarettes and other tobacco products. Section 6 places a prohibition on the sale of cigarettes and tobacco products to any person who is under 18 years of age and in an area within a radius of 100 yards of an educational institution. Section 7 prescribes that no

person shall directly or indirectly produce, supply or distribute cigarettes or any other tobacco product unless any packet thereof carries on its label the specified statutory warning as well as the pictorial warning as prescribed. Sections 8, 9 and 10 stipulate the various details with respect to a statutory and pictorial warning. COTPA also embodies statutory measures for confiscation, adjudication of offences and prescribes various punishments for violations of its provisions.

120. FSSA, on the other hand, is a legislation which is primarily concerned with food and the laying down of scientific standards for articles of food and to regulate manufacture, storage, distribution, sale and import thereof. The intent of the statute is aimed at ensuring availability of safe and wholesome food in the market for human consumption and for matters connected therewith. FSSA thus clearly comes across as a statute which seeks to comprehensively regulate food and food products. The arguments which were addressed based on an asserted and perceived conflict between COTPA and FSSA clearly appear to be misconceived for the following reasons.

121. In the considered opinion of this Court, the declaration of expediency which stands embodied in the two aforenoted statutes is merely an embodiment of the intent of Parliament to take under its control both the tobacco as well as the food industry. In our considered view, neither the subsequent promulgation of FSSA nor Section 89 thereof constitute the key to answering the questions which

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stand posited. We are also of the firm opinion that the issue of implied repeal and one, which according to the appellants, was not even urged before the learned Single Judge but has been answered, neither arose nor was germane for the purposes of considering the issues which had arisen for consideration.

122. For the purposes of examining the question of the interplay between legislations and conflicts arising therefrom, it is imperative to firstly understand the scope of the respective legislations. While COTPA does and evidently purport to regulate trade, commerce, production, supply and distribution of cigarettes and other tobacco products, in order to examine the extent of the regulatory measures that came to be adopted and the areas which they cover, one would necessarily have to bear in mind the provisions that ultimately came to be engrafted in that legislation and the extent to which they ultimately operate. As was eloquently explained by the Constitution Bench in *Ishwari Khetan***,** a mere declaration under Entry 52 is not liable to be understood as being sufficient to deprive a competent legislature from exercising its legislative powers conferred by the Constitution. As the Supreme Court explained in *Ishwari Khetan***,** the control has to be concrete and specific as opposed to being abstract. It was then pertinently observed that a State Legislature would stand denuded of the authority only to the extent of the power which Parliament may ultimately acquire.

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123. The key to answering the questions that stood raised in the writ petitions was principally the extent of control which had been ultimately acquired by the Parliament. Examined in the aforesaid light, we find that the assumption of control by Parliament under COTPA extends to the prohibitions imposed with respect to smoking in public places, advertisements in connection therewith, the sale of cigarettes and tobacco products to minors and the prohibition in respect of certain areas where those products should not be available for sale or distribution. COTPA also proceeds to prescribe the nature and the content of statutory warnings, graphic images on packets and issues relating thereto. The regulation of trade, commerce, production, supply and distribution of cigarettes and tobacco products is thus limited to the aforesaid extent only. It would thus be wholly incorrect for it to be contended that aspects unconnected with the aforesaid and pertaining to the products specified in the Schedule could not possibly be regulated by legislation promulgated by a competent and constitutionally empowered law-making body independent of COTPA.

124. We find that the learned Single Judge has understood COTPA to be a piece of legislation which covers the entire spectrum of subjects and activities relating to the tobacco industry. In our considered opinion, the learned Single Judge clearly failed to appreciate the degree and scope of the coverage of the statutory provisions engrafted therein. The *"extent of erosion"* test as was enunciated in *Ishwari Khetan* was neither considered nor were the

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provisions of COTPA subjected to that scrutiny. The extent of control which COTPA purported to exercise and the field that it sought to cover in respect of scheduled products would have to be perceived and determined upon a due consideration of the provisions ultimately embodied in that legislation.

125. What needs to be emphasized is that while COTPA does adopt measures regulating smoking of cigarettes and consumption of tobacco products in public places, in and around the vicinity of educational institutions, the nature of written and pictorial warnings to be displayed on packages, its provisions neither comprehensively control nor regulate all aspects relating to those scheduled products. The extent of the regulation, the aspects that are governed are to be ultimately discerned from the language and the scope of the individual sections of COTPA. No statute can be construed or understood as legislating upon a subject or conferring a right which is neither spoken of nor engraved therein. Tested on the aforesaid precepts, it is manifest that while scheduled products falling under COTPA are regulated and controlled by its individual provisions, it would be wholly incorrect to understand the said enactment as being an all-encompassing and comprehensive legislation pertaining thereto.

126. The fallacy of the reasoning on which the impugned judgment proceeds is also evident from the following facts. As we read paras 197 and 198 of the impugned judgment, we find that the learned Single Judge has observed that upon promulgation of COTPA,

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"....Parliament took under its control the tobacco industry thereby denuding the States to legislate qua the scheduled tobacco products.....". The learned Single Judge has clearly erred in failing to notice and appreciate the nature and the extent of the control which was taken over by COTPA. The incorrect premise on which the judgment proceeds is further evident when the learned Judge observes that "…. *once the Parliament has exercised power under Entry 52 of List I in order to take the entire tobacco industry under its control, the State Legislatures are not competent to enact laws on the said subject*." The said observation clearly appear to lose sight of the fact that the subject matter of the writ petitions was a perceived conflict between two Parliamentary statutes, namely, COTPA and FSSA as opposed to a legislation framed by a State. Secondly, the learned Judge also appears to have ignored the indubitable fact that the Impugned Notifications, albeit issued by a State authority, had in fact been promulgated in exercise of powers conferred under FSSA, a Parliamentary legislation.

127. The learned Single Judge while dealing with the question of a perceived conflict between COTPA and FSSA clearly appears to have trodden down an incorrect path while holding that FSSA constitutes a general legislation and therefore must yield to COTPA. We find that the aforesaid conclusion proceeds on the fallacious premise that the respondents sought to regulate and prohibit tobacco *per se*. As would be manifest from a reading of the Impugned Notifications what was sought to be regulated and controlled was chewing tobacco, gutka and

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pan masala and tobacco sold as a mixture or in a combination package. The question which thus principally arose was whether the aforesaid articles could be termed as food and thus regulated under FSSA. Rather than conferring attention and restricting its unerring scrutiny on the aforesaid aspect, the learned Single Judge appears to have comprehended the principal question to be whether tobacco could be labelled as food. We are of the considered view that the same was not a question which even remotely arose for consideration.

128. In any case, and this we do deem necessary to observe, that while COTPA undoubtedly is a special statute regulating and controlling certain aspects of scheduled products, it is special by virtue of the individual and specific provisions contained therein. Similarly, FSSA is special in its own right in light of the detailed provisions that it adopts and engrafts relating to food safety and other allied issues. As long as the regulatory power is exercised under the FSSA in respect of a food article, it would not be invalidated or discredited merely because it is viewed as incidentally entrenching upon a provision contained in another competing statute. In the present matters, we have not been shown any provision in the COTPA which may be viewed as covering matters falling under the FSSA or the Regulations framed thereunder.

129. What we seek to emphasize is that the issue of a general or special law would have arisen provided the Court came to be faced with a situation of an apparent or evident conflict between the

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working of two statutes dealing with the same article. However, and as is evident from the aforesaid discussion, FSSA was neither understood nor asserted to be a legislation which seeks to regulate tobacco or any other tobacco products specified in a Schedule covering issues falling under COTPA. Even if one were to consider the article of pan masala which is covered both under the COTPA as well as FSSA, the former would be liable to be construed as regulating that article only to the extent of the specific provisions contained therein. Those provisions would also have to be construed bearing in mind that pan masala is an article which is also regulated under the FSSA. We find that the aspects of that article which are covered and regulated by FSSA are not regulated by the provisions of COTPA at all. In fact, the two statutes do not even construct or erect parallel or competing regimes of regulation.

130. The principles of interpretation which would apply for the purposes of understanding the operation of general and special laws were lucidly explained by the Supreme Court in **Ajoy Kumar Banerjee vs. Union of India**[48] where the following precepts were culled out: -

> "**39.** From the text and the decisions, four tests are deducible and these are: (*i*) The legislature has the undoubted right to alter a law already promulgated through subsequent legislation, (*ii*) A special law may be altered, abrogated or repealed by a later general law by an express provisions, (*iii*) A later general law will override a prior special law if the two are so repugnant to each other that they cannot co-exist even though no express provision in that behalf is found in the general law, and (*iv*) It

[48] (1984) 3 SCC 127

> is only in the absence of a provision to the contrary and of a clear inconsistency that a special law will remain wholly unaffected by a later general law. See in this connection, *Maxwell on the Interpretation of Statutes*, Twelfth Edn., pp. 196-198."

131. The Court also deems it apposite to note the following observations as were made by the Supreme Court in *Ashoka Marketing*: -

> "**50.** One such principle of statutory interpretation which is applied is contained in the latin maxim : *leges posteriores priores conterarias abrogant* (later laws abrogate earlier contrary laws). This principle is subject to the exception embodied in the maxim : *generalia specialibus non derogant* (a general provision does not derogate from a special one.) This means that where the literal meaning of the general enactment covers a situation for which specific provision is made by another enactment contained in the earlier Act, it is presumed that the situation was intended to continue to be dealt with by the specific provision rather than the later general one (Bennion, *Statutory Interpretation* pp. 433-34).
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> **51.** The rationale of this rule is thus explained by this Court in the *J.K. Cotton Spinning & Weaving Mills Co. Ltd.* v. *State of Uttar Pradesh* [(1961) 3 SCR 185 : AIR 1961 SC 1170 : (1961) 1 LLJ 540] : (SCR p. 194)
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> > "The rule that general provisions should yield to specific provisions is not an arbitrary principle made by lawyers and judges but springs from the common understanding of men and women that when the same person gives two directions one covering a large number of matters in general and another to only some of them his intention is that these latter directions should prevail as regards these while as regards all the rest the earlier directions should have effect."
>
> **56.** We arrive at the same conclusion by applying the principle which is followed for resolving a conflict between the provisions of two special enactments made by the same legislature. We may in this context refer to some of the cases which have come before this Court where the provisions of two enactments made by the same legislature were found to be inconsistent and each enactment was claimed to be a special enactment and had a non-obstante clause giving overriding effect to its provisions.

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> **57.** In *Shri Ram Narain* v. *Simla Banking and Industrial Co. Ltd.* [1956 SCR 603 : AIR 1956 SC 614 : (1956) 26 Comp Cas 280] this Court was considering the provisions contained in the Banking Companies Act, 1949 and the Displaced Persons (Debts Adjustment) Act, 1951. Both the enactments contained provisions giving overriding effect to the provisions of the enactment over any other law. This Court has observed : (SCR pp. 613 and 615)
>
> > "Each enactment being a special Act, the ordinary principle that a special law overrides a general law does not afford any clear solution in this case."
> >
> > "It is, therefore, desirable to determine the overriding effect of one or the other of the relevant provisions in these two Acts, in a given case, on much broader considerations of the purpose and policy underlying the two Acts and the clear intendment conveyed by the language of the relevant provisions therein."

132. What emerges upon a consideration of the legal principles propounded in the aforenoted two decisions, is the imperative of understanding the scope of the respective legislations, the subjects which are sought to be regulated, the nature of the inconsistency and whether it is wholly irreconcilable. The question of conflict is not liable to be answered on a facile examination of the provisions of the respective statutes but on a more meaningful consideration of the provisions themselves, the situations that they seek to remedy and provision and the measures that are ultimately adopted. Courts would also bear in mind the objects of the two legislations and the purposes that they seek to achieve. Tested on those principles, we find ourselves unable to recognize any element of incompatibility in the operation and implementation of the two legislations in question.

133. It becomes pertinent to note that no provision of COTPA incorporates provisions similar or identical to those set out in

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Regulation 2.11.5 of the Food Products Regulations 2011. The question of conflict thus clearly did not arise at all. We are also of the considered opinion that the conclusions which have come to be recorded by the learned Judge in Para 198 of the impugned judgment are legally unsustainable bearing in mind that the writ petitions did not raise an issue of a conflict between a Parliamentary and a State legislation. It is pertinent to recall that the State food authorities were not exercising powers while issuing the impugned notifications under a State enactment. Those notifications had been issued in purported exercise of powers conferred by Section 30(2)(a) of the FSSA read with Regulation 2.3.4 of the Food Product Regulations 2011.

134. Before closing the discussion on this particular issue, we deem it expedient to advert to *Godawat* on the strength of which it was contended that COTPA is a special statute and would thus override the provisions of the FSSA. It would be pertinent to note the following passages from the decision in *Godawat*:-

> **"41.** It is submitted that a reading of Act 34 of 2003 clearly suggests that it is a special law intended to deal with tobacco and its product. The Prevention of Food Adulteration Act, 1954 is a general law dealing with adulteration of food articles and a tobacco product is incidentally referred to in the said law in the context of prevention of adulteration. In case of conflict between a special law and a general law, even if both are enacted by the same legislative authority, the special law must displace the general law to the extent of inconsistency. The operation of the maxim *generalia specialibus non derogant* has been approved and applied by this Court in such situations.
>
> xxx xxx xxx

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71. A reference of this Court's judgment in *Dineshchandra Jamnadas Gandhi* v. *State of Gujarat* [(1989) 1 SCC 420, 426 : 1989 SCC (Cri) 194] vide paras 16 and 17 makes it clear that the object and the purpose of the Prevention of Food Adulteration Act, 1954 is to eliminate the danger to human life from the sale of unwholesome articles of food. This Court held that the legislation of "Adulteration of Food Stuffs and Other Goods" (Entry 18 List III of the Seventh Schedule) is enacted to curb the widespread evil of food adulteration and is a legislative measure for social defence. This Court indicated the object of the Prevention of Food Adulteration Act, 1954, its constitutional basis and its purpose in the following observations: (SCC p. 426, paras 16 & 18)

> "*16.* The object and the purpose of the Act are to eliminate the danger to human life from the sale of unwholesome articles of food. The legislation is on the topic 'Adulteration of Food Stuffs and Other Goods' (Entry 18 List III Seventh Schedule). It is enacted to curb the widespread evil of food adulteration and is a legislative measure for social defence. It is intended to suppress a social and economic mischief — an evil which attempts to poison, for monetary gains, the very sources of sustenance of life and the well-being of the community. The evil of adulteration of food and its effects on the health of the community are assuming alarming proportions. The offence of adulteration is a socio-economic offence. In *Municipal Corpn. of Delhi* v. *Kacheroo Mal* [(1976) 1 SCC 412, 415, para 5 : 1976 SCC (Cri) 30] Sarkaria, J. said:
>
> 'The Act has been enacted to curb and remedy the widespread evil of food adulteration, and to ensure the sale of wholesome food to the people. It is well settled that wherever possible, without unreasonable stretching or straining, *the language of such a statute should be construed in a manner which would suppress the mischief, advance the remedy, promote its object, prevent its subtle evasion and foil its artful circumvention*.'
>
> ***
>
> *18.* The offences under the 'Act' are really acts prohibited by the police powers of the State in the interests of public health and well-being. The prohibition is backed by the sanction of a penalty. The offences are strict statutory offences. Intention or

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> mental state is irrelevant. In *Goodfellow* v. *Johnson* [(1965) 1 All ER 941, 944 : (1966) 1 QB 83] referring to the nature of offences under the Food and Drugs Act, 1955, it was said:
>
> > 'As is well known, Section 2 of the Food and Drugs Act, 1955, constitutes an absolute offence. If a person sells to the prejudice of the purchaser any food, and that includes drink, which is not of the nature or not of the substance or not of the quality demanded by the purchaser he shall be guilty of an offence. The forbidden act is the selling to the prejudice of the purchaser….' "
>
> (emphasis in original)
>
> These observations make it clear that the purpose of the Act, as its title suggests, is to prevent adulteration of food. Any attempt to travel beyond these parameters must necessarily be looked at askance by the court.

135. The Supreme Court recorded its conclusions on this aspect in para 77(6) which is reproduced hereinbelow: -

> **"77(6)**. The provisions of the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 are directly in conflict with the provisions of Section 7(*iv*) of the Prevention of Food Adulteration Act, 1954. The former Act is a special Act intended to deal with tobacco and tobacco products particularly, while the latter enactment is a general enactment. Thus, 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 Act 34 of 2003."

136. It would be relevant to note that *Godawat* was a decision which had come to be rendered prior to the insertion of Rule 44J in the 1955 Rules and the promulgation of Regulation 2.3.4 in the FSSA. As noted

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hereinabove, the validity of the aforesaid provisions was neither questioned nor assailed in the writ petitions. The writ petitioners also did not assert that the aforenoted two provisions were liable to be struck down on that score. The decision in *Godawat* must also be appreciated in the backdrop of COTPA constituting a latter legislation having been brought onto the statute book long after PFA. It was in this factual setting that *Godawat* came to be rendered. However, and undisputedly FSSA, on the other hand, was promulgated thereafter in 2006 and in any case post the enforcement of COTPA. The statutory regime which prevailed at the time when the judgment in *Godawat* came to be handed down has undergone a paradigm shift as is manifest from the introduction of statutory measures which specifically prohibit the addition of tobacco and nicotine to food products.

H. PURPORT OF THE IMPUGNED NOTIFICATIONS

137. We are of the firm view that the fundamental question which the writ petitions raised was itself confined to whether the Impugned Notifications could have prohibited the addition of tobacco or nicotine in a food product. Pan Masala, indubitably, is a food product which is regulated under the FSSA. The fundamental question which therefore arose was whether tobacco or nicotine for that matter could be permitted to be added to that food product.

138. The Appellants sought to support the issuance of the notifications based upon the statutory command of Regulation 2.3.4.

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The writ petitioners, however, clearly appear to have proceeded on the mistaken assumption that the impugned notifications sought to ban or prohibit tobacco. The prohibition which was sought to be enforced was of the addition of tobacco or tobacco products to a food product, namely, Pan Masala.

139. The impugned notifications essentially sought to regulate a food article. The learned Single Judge clearly appears to have misconstrued the scope and intent of those notifications as being one directly aimed at regulating tobacco. As would be manifest and evident from a reading of the various provisions of the FSSA including the impugned notifications, the respondents never evinced an intent to regulate tobacco or tobacco products. In fact, and as per the appellants themselves, FSSA does not even deal with raw tobacco or pure tobacco.

140. The conclusions of the Court recorded hereinabove are further buttressed from the following facts. As would be evident from a reading of the Impugned Notifications, the GNCTD Food Authority firstly records its conclusion that gutka, pan masala and other like products containing tobacco are injurious to health. It then proceeds to proclaim that tobacco when mixed with other ingredients and additives mentioned therein, is "food" as defined under the FSSA. It then proceeds to take cognizance of the prohibition placed by Regulation 2.3.4 of tobacco or nicotine being added to a food article. Taking into consideration the harmful effect that those substances may

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have on public health, it proceeds to ban the manufacture, storage, distribution or sale of tobacco which is either flavoured, scented or mixed with any additive. The articles to which the ban is proposed to be extended have been mentioned as gutka, pan masala, flavoured/scented tobacco, kharra and other like products by whatever name called.

141. A careful reading of the Impugned Notifications would establish that what was proposed to be banned was not raw or pure tobacco. The subject matter of the prohibitory order was tobacco when mixed with other ingredients and additives. Those articles were specified to be gutka, pan masala, flavoured/scented tobacco and other like products. It would thus be wholly incorrect to assume that the notifications sought to ban tobacco *per se*.

142. Undisputedly, food as defined under the FSSA would mean any substance which is intended to be used for human consumption. As has been noticed hereinabove, the nutritive or restitutive properties of a substance being a sin qua non for it to be termed as food is a principle which has been consistently and stoutly negatived both under the PFA as well as the FSSA. What needs to be underlined is that when tobacco is mixed or used as an ingredient or additive to a food article, it is then that it becomes subject to the regulatory regime constructed by the FSSA. It would be pertinent to recall that a food additive is defined under the FSSA to mean *"any substance which is not normally consumed as a food by itself or used as a typical*

ingredient of the food, whether or not it has nutritive value….”. It is thus apparent that an additive could be one which is neither a substance which is normally consumed as food nor one which may have a nutritive value. Similarly, Regulation 2.11.5 of the Food Products Regulations 2011 while prescribing the standards for pan masala, proscribes the addition of any substance which may be injurious to health. The aforenoted prohibition is in addition to that contained in Regulation 2.3.4 of the Prohibition Regulations 2011. The Impugned Notifications were thus clearly not an attempt to regulate tobacco or nicotine but to regulate food containing those substances. We thus find ourselves unable to countenance the conclusions to the contrary that the Learned Judge proceeded to record in para 193 of the impugned judgment.

I. THE ‘TOBACCO AS FOOD” QUESTION

143. That takes the Court to consider whether the impugned articles which form subject matter of the Impugned Notifications could be held to be food as defined under the FSSA. While on the question of food and foodstuff, it would be relevant to briefly notice some of the decisions which were commended for our consideration by the writ petitioners. It becomes pertinent to note that *S. Samuel* was dealing with an order made under the Essential Commodities Act, 1955 and which did not define foodstuff specifically. It was in the aforesaid backdrop that the Supreme Court employed the common parlance test for the purposes of ascribing the meaning to be assigned to that word.

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Similar was the position in *Gulati & Co***.** where in the context of a fiscal statute, the Supreme Court held that the word food must be interpreted bearing in mind how that expression is commonly understood.

144. In contrast to the above, we are called upon to consider a legislation, namely the FSSA, which defines food specifically. It would be apposite to note that the nutritive element test as was advocated had been rejected by the Constitution Bench of the Supreme Court as far back as in *Virkumar Gulabchand Shah* as would be evident from the following extracts from that decision: -

> **"11.** So far as "food" is concerned, it can be used in a wide as well as a narrow sense and, in my opinion, much must depend upon the context and background. Even in a popular sense, when one asks another, "Have you had your food? ", one means the composite preparations which normally go to constitute a meal—curry and rice, sweetmeats, pudding, cooked vegetables and so forth. One does not usually think separately of the different preparations which enter into their making, of the various condiments and spices and vitamins, any more than one would think of separating in his mind the purely nutritive elements of what is eaten from their non-nutritive adjuncts.
>
> **12.** So also, looked at from another point of view, the various adjuncts of what I may term food proper which enter into its preparation for human consumption in order to make it palatable and nutritive, can hardly be separated from the purely nutritive elements if the effect of their absence would be to render the particular commodity in its finished state unsavoury and indigestible to a whole class of persons whose stomachs are accustomed to a more spicily prepared product. The proof of the pudding is, as it were, in the eating, and if the effect of eating what would otherwise be palatable and digestible and therefore nutritive is to bring on indigestion to a stomach unaccustomed to such unspiced fare, the answer must, I think, be that however nutritive a product may be in one form it can scarcely be classed

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> as nutritive if the only result of eating it is to produce the opposite effect; and if the essence of the definition is the nutritive element, then the commodity in question must cease to be food, within the strict meaning of the definition, to that particular class of persons, without the addition of the spices which make it nutritive. Put more colloquially, "one man's food is another man's poison". I refer to this not for the sake of splitting hairs but to show the undesirability of such a mode of approach. The problem must, I think, be solved in a common sense way.
>
> **22.** Now I have no doubt that had the Central Government re-promulgated the Order of 1944 in 1946 after the passing of either the Ordinance or the Act of 1946, the Order would have been good. As we have seen, turmeric falls within the wider definition of "food" and "foodstuffs" given in a dictionary of international standing as well as in several English decisions. It is, I think, as much a "foodstuff", in its wider meaning, as sausage, skins and baking powder and tea. In the face of all that I would find it difficult to hold that an article like turmeric cannot fall within the wider meaning of the term "foodstuffs". Had the Order of 1944 not specified turmeric and had it merely prohibited forward contracts in "foodstuffs" I would have held, in line with the earlier tea case, that that is not a proper way of penalising a man for trading in an article which would not ordinarily be considered as a foodstuff. But in the face of the Order of 1944, which specifically includes turmeric, no one can complain that his attention was not drawn to the prohibition of trading in this particular commodity and if, in spite of that, he chooses to disregard the Order and test its validity in a court of law, he can hardly complain that he was trapped or taken unawares; whatever he may have thought he was at any rate placed on his guard. As I see it, the test here is whether the Order of 1944 would have been a good order had it been re-promulgated after the Ordinance of 1946. In my opinion, it would, and from that it follows that it is saved by the saving clauses of the Ordinance and the Act."

145. In *Pyarli K. Tejani*, the Supreme Court significantly observed that all that may be ingested by humans would be food. This was a case which was considering whether supari could be termed as food. Answering that question, the Supreme Court had observed as follows:-

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"**14.** We now proceed to consider the bold bid made by the appellant to convince the Court that supari is not an article of food and, as such, the admixture of any sweetener cannot attract the penal provisions at all. He who runs and reads the definition in Section 2(*v*) of the Act will answer back that supari is food. The lexicographic learning, pharmacopic erudition, the ancient medical literature and extracts of encyclopaedias pressed before us with great industry are worthy of a more substantial submission. Indeed, learned Counsel treated us to an extensive study to make out that supari was not a food but a drug. He explained the botany of bettlenut, drew our attention to Dr Nandkarni's Indian Materia Medica, invited us to great Susruta's reference to this aromatic stimulant, in a valiant endeavour to persuade us to hold that supari was more medicinal than edible. We are here concerned with a law regulating adulteration of food which affects the common people in their millions and their health. We are dealing with a commodity which is consumed by the ordinary man in houses, hotels, marriage parties and even routinely. In the field of legal interpretation, dictionary scholarship and precedent-based connotations cannot become a universal guide or semantic tyrant, oblivious of the social context subject of legislation and object of the law. The meaning of common words relating to common articles consumed by the common people, available commonly and contained in a statute intended to protect the community generally, must be gathered from the common sense understanding of the word. The Act defines "food" very widely as covering any article used as food and every component which enters into it, and even flavouring matter and condiments. It is commonplace knowledge that the word 'food' is a very general term and applies to all that is eaten by men for nourishment and takes in subsidiaries. Is supari eaten with relish by men for taste and nourishment? It is. And so it is food. Without tarrying further on this unusual argument we hold that supari is food within the meaning of Section 2(*v*) of the Act.

15. It was next urged before us that the dealer believed in good faith that there was no cyclamate in the substance sold induced by the warranty and honestly did not know that saccharin was contraband, the Rules in this behalf having been changed frequently and recently. It is trite law that in food offences strict liability is the rule not merely under the Indian Act but all the world over. The principle has been explained in *American Jurisprudence* 2d. Vol. 35, p. 864) thus:

"Intent as element of offence:

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> The distribution of impure or adulterated food for consumption is an act perilous to human life and health, hence, a dangerous act, and cannot be made innocent and harmless by the want of knowledge or by the good faith of the seller: it is the act itself, not the intent, that determines the guilt, and the actual harm to the public is the same in one case as in the other. Thus, the seller of food is under the duty of ascertaining at his peril whether the article of food conforms to the standard fixed by statute or ordinance, unless such statutes or ordinances, expressly or by implication, make intent an element of the offence."
>
> Nothing more than the *actus reus* is needed where regulation of private activity in vulnerable areas like public health is intended. In the words of Lord Wright in *McLeod v. Buchanan* "intention to commit a breach of statute need not be shown. The breach in fact is enough." Social defence reasonably overpowers individual freedom to injure, in special situations of strict liability. Section 7 casts an absolute obligation regardless of scienter, bad faith and mens rea. If you have sold any article of food contrary to any of the sub-sections of Section 7, you are guilty. There is no more argument about it. The law denies the right of a dealer to rob the health of a supari consumer. We may merely refer to a similar plea overruled in the case *Andhra Pradesh Grain & Seed Merchants' Association v. Union of India [(1971)1 SCR 166 : 1970) 2 SCC 71]*."

146. The Supreme Court in *R. Krishnamurthy* took the principle even further to hold that as long as an article is *"generally or commonly used for human consumption"*, that would be sufficient to hold it to be food for the purposes of the PFA. This is evident from the following passages of that decision: -

> **"7.** According to the definition of "food" which we have extracted above, for the purposes of the Act, any article used as food or drink for human consumption and any article which ordinarily enters into or is used in the composition or preparation of human food is "food". It is not necessary that it is intended for human

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> consumption or for preparation of human food. It is also irrelevant that it is described or exhibited as intended for some other use. It is enough if the article is generally or commonly used for human consumption or in the preparation of human food. It is notorious that there are, unfortunately, in our vast country, large segments of population, who, living as they do, far beneath ordinary subsistence level, are ready to consume that which may otherwise be thought as not fit for human consumption. In order to keep body and soul together, they are often tempted to buy and use as food, articles which are adulterated and even unfit for human consumption but which are sold at inviting prices, under the pretence or without pretence that they are intended to be used for purposes other than human consumption. It is to prevent the exploitation and self-destruction of these poor, ignorant and illiterate persons that the definition of "food" is couched in such terms as not to take into account whether an article is intended for human consumption or not. In order to be "food" for the purposes of the Act, an article need not be "fit" for human consumption; it need not be described or exhibited as intended for human consumption; it may even be otherwise described or exhibited; it need not even be necessarily intended for human consumption; it is enough if it is generally or commonly used for human consumption or in the preparation of human food. Where an article is generally or commonly not used for human consumption or in the preparation of human food but for some other purpose, notwithstanding that it may be capable of being used, on rare occasions, for human consumption or in the preparation of human food, it may be said, depending on the facts and circumstances of the case, that it is not "food". In such a case the question whether it is intended for human consumption or in the preparation of human food may become material. But where the article is one which is generally or commonly used for human consumption or in the preparation of human food, there can be no question but that the article is "food". Gingelly oil, mixed or not with groundnut oil or some other oil, whether described or exhibited as an article of food for human consumption or as an article for external use only is "food" within the meaning of the definition contained in Section 2(*v*) of the Act."

147. In any case, the death knell to the nutritional or restitutive tests as being relevant for the purposes of ascertaining the meaning to be ascribed to food and whether pan masala or gutka would be food is *Godawat* itself which had clearly held that they would fall within the

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ambit of that expression. This Court also bears in mind the plethora of authorities starting from *Khedan Lal, Manohar Lal, Dhariwal Industries, J. Anbazhagan and Sri Kamdhenu Traders* which have held that chewing tobacco, pan masala and gutka are food. The Court finds no justification to differ from the views expressed therein.

148. While arriving at this conclusion, the Court also bears in mind the definition of food under the FSSA. It would be pertinent to recall that Section 3(1)(j) not only embodies an inclusive element it also specifically excludes certain articles. We also bear in mind the admitted position that while the PFA defined food to mean "any article used as food or drink for human consumption", the FSSAI clearly attempts to confer an expansive meaning upon that expression by providing that any substance meant for human consumption would stand included. We thus find no justification to hold that pan masala, gutka or any other form of chewing tobacco which is meant for human consumption would stand excluded from the ambit of Section 3(1)(j). We are further fortified in the view that we take noting that neither pan masala, nor chewing tobacco or gutka stand excluded from Section 3(1)(j) of the FSSA. This too clearly appears to be evidence of the intent of the enactment to include not only those articles but also all others.

149. While dealing with this aspect, the learned Single Judge in para 217 of the impugned judgment proceeds to base his decision on the fact that no scientific standards had been fixed under the FSSA for

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tobacco. In view thereof, the learned Judge concluded that tobacco could not be considered as food. We find ourselves unable to adopt this line of reasoning since it clearly fails to consider that what the appellants sought to regulate and prohibit was not tobacco itself but its introduction and addition in a food article. It becomes pertinent to highlight that FSSA does not even attempt to lay down standards for tobacco. It is concerned solely with substances which are meant for human consumption. Tobacco or nicotine are noticed in that legislation only to the extent of being identified as substances which cannot be added to an article of food. It is our respectful view that the learned Judge clearly erred in this regard and completely misconstrued the principal question which arose for consideration.

150. We similarly find that the learned Judge has clearly erred in proceeding on the premise that the Appellants sought to prohibit tobacco in terms of Regulation 2.3.4. That does not appear to have been their case at all. The Appellants had consistently taken the position that what Regulation 2.3.4 proscribes is the addition of tobacco or nicotine to food.

151. Significantly, while holding so the learned Judge observes in para 219 of the judgment that there is no conflict between Regulation 2.3.4 and COTPA. We note that this was exactly the argument of the Appellants before us. The judgment thus clearly appears to suffer from inherent and apparent inconsistencies.

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J. POWER TO PROHIBIT UNDER FSSA

152. Proceeding to deal with the issues which arise out of Section 30(2)(a) of the FSSA and Regulation 2.3.4, the learned Judge has proceeded to hold that the power to establish standards for food under the FSSA would not include within its purview the power to prohibit the manufacture, sale, storage and distribution of goods more so when those which are sought to be prohibited pertain to scheduled tobacco products. The learned Judge has sought to draw sustenance for the aforesaid findings from the decision rendered by the Supreme Court in *Himat Lal K. Shah*. While ruling on this issue, it has been additionally observed by the learned Judge that on a consideration of the entire scheme of the FSSA, it is apparent that the power to frame Regulations would not include the power to prohibit manufacture, distribution, storage and sale of a product.

153. We are constrained to observe that the aforesaid findings have come to be returned with the learned Judge significantly ignoring the admitted position that no challenge to Regulation 2.3.4 stood raised. The reliance which was sought to be placed on the observations as appearing in *Himat Lal K. Shah* was also clearly misplaced since the said decision observes that the power to regulate would not "*normally*" include the power to prohibit. *Himat Lal K. Shah* thus could not have been viewed as an authority laying down an absolute proposition that the power to regulate would not include the power to prohibit.

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154. More fundamentally, we note that the power to prohibit stands specifically conferred upon the food safety authorities by virtue of Section 30(2)(a) of the FSSA. The learned Judge thus clearly appears to have overlooked the fact that the principal enactment itself had conferred a power to prohibit and therefore the said power need not have been additionally spelt out in the Regulations which came to be framed under the FSSA.

155. In any case, Regulation 2.3.4 on its plain language prohibits the use of tobacco or nicotine in a food product. That prohibition is neither temporary nor one which is stipulated to operate for a particular period of time. The statutory prohibition is permanent and would thus apply to all food articles during the entire period that FSSA and Regulation 2.3.4 operates. The question therefore of the power being temporary or *pro tem* did not arise. As long as Regulation 2.3.4 remained on the statute book, it was incumbent upon the appellant to implement and enforce that provision and the statutory injunct which stood engrafted therein.

156. Insofar as the findings returned by the learned Judge with respect to Regulation 2.3.4 not prohibiting the use of tobacco or nicotine, this Court in the preceding parts of this decision has already found that the said observations have clearly been rendered upon the learned Judge having lost sight of the principal question which arose, namely, whether tobacco and nicotine could be permitted to be used as additives in a food article.

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157. On an overall consideration of the aforesaid discussion, we find that both Section 30(2)(a) as well as Regulation 2.3.4 embody a power to prohibit a particular food article as well as regulate the nature of additives which may be permitted to be added in food articles. We also find that neither Section 30(2)(a) nor the validity of Regulation 2.3.4 had been questioned by the writ petitioners. Since the restraint embodied in Regulation 2.3.4 was permanent in character, the prohibitory orders could not have been held to be bound by prescriptions of time.

158. In light of our conclusions recorded hereinabove, we find ourselves unable to accept the view taken by the Madras High Court in *Designated Officer* and which had in any case followed the judgment rendered by the learned Judge which forms subject matter of the present appeals.

159. For the completeness of the record, we also deem this to be an appropriate stage to consider a recent decision rendered by the Andhra Pradesh High Court in **Dwarapudi Sivarama Reddy Vs. State of Union of India & Ors.**[49] which too has quashed similar notifications issued by the Food Safety authorities of that State. Although the aforesaid judgment was placed for our consideration after the present appeals had been closed for judgment, we do not deem it appropriate to deny the writ petitioners of the opportunity to place reliance upon the said decision on this ground. In any case, the said decision would

[49] WP(C) 30185/2021 dated 24.03.2023

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only aid us in enunciating the correct legal position. *Dwarapudi Sivarama Reddy* proceeds on the premise that the entire controversy stands conclusively settled in light of *Godawat*. While proceeding to deal with the impact of the special provisions made in the FSSA and the Regulations framed thereunder, the said High Court held as under:

> "**29.** The respondents have tried to convince this Court by referring to the FSSA Regulations, 2011 and the FPSFA Regulations, 2011, by submitting that food products should not contain any substance which may be injurious to health and Tobacco and Nicotine shall not be used as ingredients in any food products generally taken as such or in conjunction with pan. Clause 2.11.5 of the FPSFA Regulations, 2011 provides that Pan Masala may contain betelnut, lime, coconut, catechu, saffron, cardamom, dry fruits, mulethi, sabnermusa, other aromatic herbs and spices, sugar, glycerine, glucose, permitted natural colours, menthol and non prohibited flavours; it should be free from added coaltar colouring matter and any other ingredient injurious to health. However, it is not legally permissible to accept the submission of the respondents for the reason that even if Pan Masala is taken to be "food" under the FPSFA Regulations, 2011 though not defined as such under Section 3(j) of the FSSA, 2006, the same would remain "food" till it does not contain Tobacco and Nicotine and the moment Tobacco and Tobacco products are mixed with pan masala, the same would become "food", which would be covered by COTPA, 2003, as defined under the schedule of the COTPA, 2003. Therefore, the moment Pan Masala or Gutka is included in the schedule of the COTPA, 2003, the law laid down in Godawat Pan Masala Products I.P. Ltd. (supra) would operate the field and the provisions of the FSSA Regulations, 2011, framed under the FSSA, 2006, would be in direct conflict with the provisions of the COTPA, 2003.
>
> **30.** It is significant to mention that the Hon'ble Supreme Court in Godawat Pan Masala Products I.P. Ltd. (supra) has already held that COTPA, 2003 is a special Act intended to deal with Tobacco and Tobacco products, while Prevention of Food Adulteration Act, 1954, is a general Act. In the same analogy, the FSSA, 2006 being a general Act, would yield to the provisions of the COTPA, 2003, which is a special Act. It is settled law that when a general Act is specifically passed, it is logical to presume that Parliament has not repealed or modified the former special Act, unless anything to the

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> contrary appears from the subsequent general Act. For this proposition, we may profitably refer to the judgment of the Hon'ble Supreme Court in U.P. State Electricity Board v. Hari Shanker Jain and others – (1978) 4 SCC 16."

160. We however find ourselves unable to approve or adopt the view expressed in *Dwarapudi Sivarama Reddy* since it clearly fails to appreciate the backdrop in which *Godawat* had come to be rendered and which aspects have been duly underlined by us in the preceding parts of this decision. Significantly, in para 34 of that decision, the said High Court seeks to sustain its conclusion that pan masala and gutka cannot be construed as food on *Godawat*. The said observation cannot possibly be accepted to be the correct position in law since, and as was noticed hereinabove, *Godawat* had categorically held pan masala to be food. The said decision in any case follows the judgment which is impugned before us in these appeals. We for all the aforesaid reasons thus find ourselves unable to agree with the decision in *Dwarapudi Sivarama Reddy*.

K. CEASELESS INVOKATION OF S. 30(2)(a)

161. That takes us then to consider the challenge to the successive notifications which came to be issued by the appellant/GNCTD in purported exercise of powers conferred by Section 30(2)(a). As is apparent from a reading of that provision, the power to prohibit as vested in the Commissioner of Food Safety is stipulated to not exceed a period of one year. The prohibition itself is further conditioned upon the Commissioner of Food Safety being satisfied that such a

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prohibition is liable to be imposed in the interest of public health. It is in the aforesaid backdrop that the writ petitioners had contended that the power to prohibit was clearly temporary in character and did not warrant the repetitive issuance of prohibitory orders.

162. In our considered opinion, the aforesaid submission would have held good provided the power to prohibit stood conferred and governed by Section 30(2)(a) alone. However, and as was noticed in the preceding paragraphs of this decision, Regulation 2.3.4 proscribes the use of tobacco and nicotine as ingredients in any food product. That prohibition is clearly neither provisional nor impermanent. Thus, as long as the Commissioner of Food Safety finds that food articles containing tobacco or nicotine are being manufactured, distributed or sold, it would be fully justified in issuing a prohibitory order.

163. That prohibition would clearly be sustainable on a conjoint reading of Section 30(2)(a) read with Regulation 2.3.4. The prohibition this Court finds is principally aimed at giving effect to the statutory injunct contained in Regulation 2.3.4. As noticed hereinbefore, as long as that Regulation remains on the statute book, there would be a ban which would operate on gutka, pan masala with tobacco or other like commodity.

164. We further note that the scheme of Section 30(2)(a) read with Regulation 2.3.4 clearly stands on a pedestal distinct and different from other statutory provisions which empower authorities to prohibit or ban for a temporary period of time. For instance, Section 144 as

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contained in the **Code of Criminal Procedure Act, 1973**[50] stands out as a primary example of the power to prohibit being operative for a particular period of time. In terms of Section 144(4), an order passed under the aforesaid section is to normally remain in force for no more than two months. The Proviso to Section 144(4), however, empowers the State Government to extend the validity of such a notification for a further period not exceeding six months.

165. We are also aware of the judgments of the Supreme Court in **Acharya Jagdishwaranand Avadhuta vs. Commr. of Police**[51] where while dealing with the validity of successive orders made under Section 144, their Lordships had held as follows: -

> "**16.** It is the petitioner's definite case that the prohibitory orders under Section 144 of the Code are being repeated at regular intervals from August 1979. Copies of several prohibitory orders made from time to time have been produced before us and it is not the case of the respondents that such repetitive prohibitory orders have not been made. The order under Section 144 of the Code made in March 1982 has also been challenged on the ground that the material facts of the case have not been stated. Section 144 of the Code, as far as relevant, provides: "(1) In cases where in the opinion of a District Magistrate, a Sub-Divisional Magistrate, or any other Executive Magistrate specially empowered by the State Government in this behalf, there is sufficient ground for proceeding under this section and immediate prevention or speedy remedy is desirable, such Magistrate may, by a written order stating the material facts of the case and served in the manner provided by Section 134, direct…." It has been the contention of Mr Tarkunde that the right to make the order is conditioned upon it being a written one and the material facts of the case being stated. Some High Courts have taken the view that this is a positive requirement and the validity of the order depends upon compliance

[50] CrPC
[51] (1983) 4 SCC 522

of this provision. In our opinion it is not necessary to go into this question as counsel for the respondents conceded that this is one of the requirements of the provision and if the power has to be exercised it should be exercised in the manner provided on pain of invalidating for non-compliance. There is currently in force a prohibitory order in the same terms and hence the question cannot be said to be academic. The other aspect viz. the propriety of repetitive prohibitory orders is, however, to our mind a serious matter and since long arguments have been advanced, we propose to deal with it. In this case as a fact from October 1979 till 1982 at the interval of almost two months orders under Section 144(1) of the Code have been made from time to time. It is not disputed before us that the power conferred under this section is intended for immediate prevention of breach of peace or speedy remedy. An order made under this section is to remain valid for two months from the date of its making as provided in sub-section (4) of Section 144. The proviso to sub-section (4) authorises the State Government in case it considers it necessary so to do for preventing danger to human life, health or safety, or for preventing a riot or any affray, to direct by notification that an order made by a Magistrate may remain in force for a further period not exceeding six months from the date on which the order made by the Magistrate would have, but for such order, expired. The effect of the proviso, therefore, is that the State Government would be entitled to give the prohibitory order an additional term of life but that would be limited to six months beyond the two months' period in terms of sub-section (4) of Section 144 of the Code. Several decisions of different High Courts have rightly taken the view that it is not legitimate to go on making successive orders after earlier orders have lapsed by efflux of time. A Full Bench consisting of the entire Court of 12 Judges in *Gopi Mohun Mullick* v. *Taramoni Chowdhrani* [ILR 5 Cal 7 : 4 CLR 309 : 2 Shome LR 217 (FB)] examining the provisions of Section 518 of the Code of 1861 (corresponding to present Section 144) took the view that such an action was beyond the Magistrate's powers. Making of successive orders was disapproved by the Division Bench of the Calcutta High Court in *Bishessur Chuckerbutty* v. *Emperor* [AIR 1916 Cal 472 : 20 CWN 758 : 1916 (17) Cri LJ 200] . Similar view was taken in *Swaminatha Mudaliar* v. *Gopalakrishna Naidu* [AIR 1916 Mad 1106 : 1915 (16) Cri LJ 592] , *Taturam Sahu* v. *State of Orissa* [AIR 1953 Ori 96] , *Ram Das Gaur* v. *City Magistrate, Varanasi* [AIR 1960 All 397 : 1960 Cri LJ 865] , and *Ram Narain Sah* v. *Parmeshar Prasad Sah* [AIR 1942 Pat 414 : 1942 (43) Cri LJ 722] . We have no doubt that the ratio of these decisions

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represents a correct statement of the legal position. The proviso to sub-section (4) of Section 144 which gives the State Government jurisdiction to extend the prohibitory order for a maximum period of six months beyond the life of the order made by the Magistrate is clearly indicative of the position that Parliament never intended the life of an order under Section 144 of the Code to remain in force beyond two months when made by a Magistrate. The scheme of that section does not contemplate repetitive orders and in case the situation so warrants steps have to be taken under other provisions of the law such as Section 107 or Section 145 of the Code when individual disputes are raised and to meet a situation such as here, there are provisions to be found in the Police Act. If repetitive orders are made it would clearly amount to abuse of the power conferred by Section 144 of the Code. It is relevant to advert to the decision of this Court in *Babulal Parate* v. *State of Maharashtra* [AIR 1961 SC 884 : (1961) 3 SCR 423, 437 : 1961 (2) Cri LJ 16] where the vires of Section 144 of the Code was challenged. Upholding the provision, this Court observed:

> "Public order has to be maintained in advance in order to ensure it and, therefore, it is competent to a legislature to pass a law permitting an appropriate authority to take anticipatory action or place anticipatory restrictions upon particular kinds of acts in an emergency for the purpose of maintaining public order...."

It was again emphasized:

> "But it is difficult to say that an anticipatory action taken by such an authority in an emergency where danger to public order is genuinely apprehended is anything other than an action done in the discharge of the duty to maintain order...."

This Court had, therefore, appropriately stressed upon the feature that the provision of Section 144 of the Code was intended to meet an emergency. This postulates a situation temporary in character and, therefore, the duration of an order under Section 144 of the Code could never have been intended to be semi-permanent in character.

17. Similar view was expressed by this Court in *Gulam Abbas* v. *State of U.P.* [(1982) 1 SCC 71 : 1982 SCC (Cri) 82 : AIR 1981 SC 2198 : (1982) 1 SCR 1077 : (1981) 2 Cri LJ 1835,

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> 1862] where it was said that (SCC p. 109, para 27) "the entire basis of action under Section 144 is provided by the urgency of the situation and the power thereunder is intended to be availed of for preventing disorders, obstructions and annoyances with a view to secure the public weal by maintaining public peace and tranquillity …". Certain observations in *Gulam Abbas* [(1982) 1 SCC 71 : 1982 SCC (Cri) 82 : AIR 1981 SC 2198 : (1982) 1 SCR 1077 : (1981) 2 Cri LJ 1835, 1862] *decision* regarding the nature of the order under Section 144 of the Code — judicial or executive — to the extent they run counter to the decision of the Constitution Bench in *Babulal Parate case* [AIR 1961 SC 884 : (1961) 3 SCR 423, 437 : 1961 (2) Cri LJ 16] may require reconsideration but we agree that the nature of the order under Section 144 of the Code is intended to meet emergent situation. Thus the clear and definite view of his Court is that an order under Section 144 of the Code is not intended to be either permanent or semi-permanent in character. The consensus of judicial opinion in the High Courts of the country is thus in accord with the view expressed by this Court. It is not necessary on that ground to quash the impugned order of March 1982 as by efflux of time it has already ceased to be effective.
>
> **18.** It is appropriate to take note of the fact that the impugned order under Section 144 of the Code did not ban processions or gatherings at public places even by Ananda Margis. The prohibition was with reference to the carrying of daggers, trishuls and skulls. Even performance of Tandava dance in public places, which we have held is not an essential part of religious rites to be observed by Ananda Margis, without these, has not been prohibited."

166. A similar view was taken by a Division Bench of our Court in **Bano Bee vs. UOI and Anr.**[52] where the following observations came to be made: -

> "**3.** This Court on 2nd August, 2010 had passed the following order:—

[52] 2011 SCC OnLine Del 5692

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1. In this public interest litigation, the petitioner invoking the jurisdiction of this Court under Article 226 of the Constitution of India has called in question the legal substantiality and tenability of the order dated 6th July, 2010 passed by the Deputy Commissioner of Police whereby he has, in exercise of powers conferred on him under Section 144 of the Criminal Procedure Code, 1973 (for short 'the Code') read with Notification No. 11036/1/08-UTL dated 31.10.2008 issued by the Government of India, Ministry of Home Affairs, New Delhi passed an order prohibiting certain activities.

2. It is urged in the petition that the Delhi Police has been issuing such prohibitory orders from time to time as a result of which the fundamental right to assemble peacefully under Article 19(1)(b) of the Constitution which includes holding peaceful dharna, demonstration, etc. has been destroyed. It is contended that the impugned order does not indicate any criteria for granting or refusing permission. It is completely left to the discretion of Delhi Police as a consequence of which the permission to hold dharna, public meetings in the entire prohibited area which is the centre of power and best suited for political dharna is denied.

3. It is averred that the petitioner is one of the members of 'Bhopal Gas Pidit Mahila Stationary Karamchari Sangh' who had come along with other activists to Delhi to raise a protest because of the failure of the Government of India to set up an empowered commission to look into the problems of the victims of toxic gases leak from the plant of Union Carbide in 1984, but the same has become unfruitful because of the order passed by the Deputy Commissioner of Police. Reference has been made to Section 144 to show that in total violation of the said provision, the Delhi Police have been issuing orders under Section 144, Cr.PC in a routine manner without there being any emergent situation. It is the case of the petitioner that the said orders create unreasonable restriction which affects the fundamental right of the petitioner. It is urged that the prohibitory orders are in total violation of Article 19(1)(a) and (b) and the same have been issued without any basis and thereby tantamounts to abuse of the process of the mandate contained in Section 144 of Cr.PC.

4. We have heard Mr. Prashant Bhushan, learned counsel for the petitioner and Ms. Jasbir Kaur, learned counsel for respondent No. 1 and Mr. N. Waziri learned counsel for

respondent No. 2 on the question of admission. It is submitted by Mr. Bhushan that the orders have been passed one after the other in a routine manner without the authority addressing to the emergent nature and taking recourse to power conferred on it under Section 144 Cr.PC which is impermissible. It is propounded by him that the prohibitions that have been stipulated in the order are violative of fundamental rights and the right to protest is totally extinguished. To buttress the submission, he has placed reliance on the decision in *Himmat Lal K. Shah* v. *Commissioner of Police, Ahmedabad*, (1973) 1 SCC 227.

5. Ordinarily we would have dealt with the law laid down in *Himmat Lal K. Shah Case* (supra) and another decision rendered in *Babulal Parate* v. *The State of Maharashtra*, AIR 1961 SC 884 by the Constitution Bench, but we have come across a decision in *Acharya Jagdishwaranand Avadhuta* v. *Commissioner of Police, Calcutta*, (1983) 4 SCC 522 : AIR 1984 SC 51, wherein it has been held as follows:

> "The other aspect, viz., the propriety of repetitive prohibitory orders is, however, to our mind a serious matter and since long arguments have been advanced, we propose to deal with it. In this case as a fact from October 1979 till 1982 at the interval of almost two months orders under Section 144(1) of the Code have been made from time to time. It is not disputed before us that the power conferred under this section is intended for immediate prevention of breach of peace or speedy remedy. An order made under this section is to remain valid for two months from the date of its making as provided in sub-section (4) of Section 144. The proviso to sub-section (4) authorises the State Government in case it considers it necessary so to do for preventing danger to human life, health or safety, or for preventing a riot or any affray, to direct by notification that an order made by a Magistrate may remain in force for a further period not exceeding six months from the date on which the order made by the Magistrate would have, but for such order, expired. The effect of the proviso, therefore, is that the State Government would be entitled to give the prohibitory order an additional term of life but that would be limited to six months beyond the two months? period in terms of sub-section (4) of Section 144 of the Code. Several decisions of different High Courts have rightly taken the view that it is not legitimate to go on

making successive orders after earlier orders have lapsed by efflux of time. A Full Bench consisting of the entire Court of 12 Judges in *Gopi Mohun Mullick* v. *Taramoni Chowdhrani* examining the provisions of Section 518 of the Code of 1861 (corresponding to present Section 144) took the view that such an action was beyond the Magistrate's powers. Making of successive orders was disapproved by the Division Bench of the Calcutta High Court in *Bishessur Chuckerbutty* v. *Emperor*. Similar view was taken in *Swaminatha Mudaliar* v. *Gopalakrishna Naidu*, *Taturam Sahu* v. *State of Orissa*, *Ram Das Gaur* v. *City Magistrate, Varanasi*, and *Ram Narain Sah* v. *Parmeshar Prasad Sah*. We have no doubt that the ratio of these decisions represents a correct statement of the legal position. The proviso to sub-section (4) of Section 144 which gives the State Government jurisdiction to extend the prohibitory order for a maximum period of six months beyond the life of the order made by the Magistrate is clearly indicative of the position that Parliament never intended the life of an order under Section 144 of the Code to remain in force beyond two months when made by a Magistrate. The scheme of that section does not contemplate repetitive orders and in case the situation so warrants steps have to be taken under other provisions of the law such as Section 107 or Section 145 of the Code when individual disputes are raised and to meet a situation such as here, there are provisions to be found in the Police Act. If repetitive orders are made it would clearly amount to abuse of the power conferred by Section 144 of the Code. It is relevant to advert to the decision of this Court in *Babulal Parate* v. *State of Maharashtra* where the vires of Section 144 of the Code was challenged. Upholding the provision, this Court observed:

"Public order has to be maintained in advance in order to ensure it and, therefore, it is competent to a legislature to pass a law permitting an appropriate authority to take anticipatory action or place anticipatory restrictions upon particular kinds of acts in an emergency for the purpose of maintaining public order…."

It was again emphasized (at p.891 of AIR):

"But it is difficult to say that an anticipatory action taken by such an authority in an emergency where danger to

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> public order is genuinely apprehended is anything other than an action done in the discharge of the duty to maintain order…."
>
> This Court had, therefore, appropriately stressed upon the feature that the provision of Section 144 of the Code was intended to meet an emergency. This postulates a situation temporary in character and, therefore, the duration of an order under Section 144 of the Code could never have been intended to be semi-permanent in character.?
>
> 6. In view of the aforesaid enunciation of law and keeping in view the nature of assertions made in the writ petition, we are inclined to issue notice on the question of admission and disposal.
>
> 7. Issue notice.
>
> 8. As Ms. Jasbir and Mr. Waziri have entered appearance, no requisites need be filed. Counter affidavits be filed within two weeks. Rejoinder, if any, be filed within a week thereafter.
>
> 9. Matter be listed on 25th August, 2010."

4. Thereafter, a counter affidavit has been filed and the matter was debated on certain occasions. Today an affidavit has been filed by the second respondent. In paragraph 1 of the affidavit, it has been stated as follows:—

> "1. That continuous Prohibition under Section 144 Cr.P.C. 1973 (2 of 1974) under the jurisdiction of New Delhi District declaring certain areas as 'Prohibited area' for holding any public meeting, dharna, peaceful protest etc. has been discontinued. The said provision of law would be invoked as and when warranted because of an emergent situation."

5. In view of the aforesaid, we are of the considered opinion that nothing remains to be adjudicated in the writ petition. However, we observe that the respondent No. 2 shall always be guided by the law of the land while taking recourse to Section 144 of the Code of Criminal Procedure."

167. Both *Bano Bee* as well as *Acharya Jagdishwaranand Avadhuta* have deprecated a repetitive exercise of powers under Section 144 and

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the promulgation of successive orders. However, the underlying theme of Section 30(2)(a) and Regulation 2.3.4 is clearly distinguishable from the scheme which informs Section 144 of the CrPC. Section 144 is liable to be invoked in an emergent situation and when immediate prevention is to be ordered. It is in the aforesaid backdrop that courts have taken the view that an order once made under Section 144 cannot be revived and renewed for time immemorial.

168. Contrary to the above, the powers conferred under Section 30(2)(a) read with Regulation 2.3.4 are not emergency provisions per se. Consequently, as long as the interest of public health requires a prohibition being imposed with respect to the addition of tobacco or nicotine in food articles, the appellant would clearly be justified in continuing those orders till the situation is remedied or where it is ultimately established on empirical terms that such additives would not constitute any harm to public health.

169. From the submissions which were addressed on behalf of the appellants the Court notes that the ban as enshrined in the impugned notifications was also sought to be sustained in light of the various orders passed by the Supreme Court in *Ankur Gutka* and *Central Arecanut*. As was noted in the preceding parts of this decision, we find that in *Ankur Gutka*, the Supreme Court in its order of 03 April 2013 had taken note of the contention of the Solicitor General of various States and Union Territories having imposed a complete ban on the sale of gutka and pan masala with tobacco and/or nicotine. The

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Solicitor General had also apprised the Supreme Court of the malicious tactics adopted by some of the manufacturers, of selling gutka and pan masala in two separate pouches.

170. Taking note of the aforesaid as well as the communication issued by the Union Government addressed to all State Governments on 27 August 2012, the Supreme Court issued notice to all State Governments and Union Territories which had so far not issued notifications banning the sale of gutka and pan masala with tobacco in terms of the FSSA to apprise the Court why they had failed to take action pursuant to the letter issued by the Union Government and noticed hereinabove. It was the aforesaid order which appears to have prompted the issuance of the first of the prohibitory orders in 2015.

171. The prohibition with respect to sale of gutka and pan masala with tobacco was again noticed by the Supreme Court in *Central Arecanut* and more particularly the order of 23 September 2016 passed therein where the aforenoted order passed in *Ankur Gutka* was noticed yet again. The Supreme Court also took note of Regulation 2.3.4 and consequently, the obligation placed upon all to enforce the said Regulation. It, accordingly, directed all concerned statutory authorities to comply with Regulation 2.3.4. It also called upon all State Governments and Union Territories to file affidavits with respect to "*total compliance of the ban imposed on manufacturing and sale of gutka and pan masala with tobacco and/or nicotine*".

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172. While the learned Single Judge has duly noticed those orders in Para 34 of the impugned judgment, he proceeded to hold that the case set up in the writ petition is distinguishable since it relates to chewing tobacco and not gutka and pan masala with tobacco and/or nicotine.

173. We find ourselves unable to appreciate how the orders passed in *Ankur Gutka* and *Central Arecanut* could have by any stretch of imagination been held to be distinguishable. The Impugned Notifications clearly related to gutka and pan masala with tobacco or nicotine. The peremptory direction issued by the Supreme Court in the aforenoted two matters was an ambiguous command to all State Governments and Union Territories to enforce the prohibition in respect thereof and to ensure compliance with the diktat of Regulation 2.3.4. There was thus no justification for the learned Judge holding that they would not apply.

L. THE ARTICLE 14 ARGUMENT

174. One of the arguments which was addressed was a purported violation of the equality principles as enshrined in Article 14 and the prohibition being restricted to "smokeless tobacco". We find that copious material has been placed on the record in the shape of scientific studies which had clearly indicated the nature and extent of the issues that arise from the use of smokeless tobacco. The appellants have also taken the Court through the detailed report which had been submitted by NIHFW pursuant to the directions issued by the Supreme Court on 07 December 2010 in *Ankur Gutka*. As would be

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evident from the conclusions which came to be recorded by the Expert Committee, it was found that 163.7 million people in the country are users of only smokeless tobacco. Compared to the above, the number of persons smoking was pegged at 68.9 million. The Quit Ratio for users of smokeless tobacco was placed at 5%. That report had also taken note of the exponential increase in the total number of users of smokeless tobacco over the years. As the GATS Report 2016-2017 would establish, the total number of adult smokeless tobacco users was found to be 199.4 million and thus almost double that of current tobacco smokers which was placed in the earlier survey at 99.5 million. It becomes pertinent to note that in GATS 1 [2009-2010], the number of smokeless tobacco users was found to be 163.7 million. By the time the GATS 2 [2016-17] Report came to be published, these users had increased to 199.4 million thus evidencing the exponential increase in the number of users of smokeless tobacco.

175. It becomes necessary to observe that the writ petitioners did not dispute that both cigarettes as well as smokeless tobacco have a direct and pernicious impact on public health. The submission essentially proceeded on the premise that there existed no rationale to create an artificial distinction between “smoking” and “smokeless” tobacco. We find ourselves unable to appreciate the aforesaid submission since once it was found and conceded that both categories of tobacco constituted substances which had a direct impact on public health, the impugned notifications clearly did not warrant being quashed. We bear in mind the well settled principle that a prerogative writ would

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not issue to perpetuate an illegality or cause serious prejudice to larger public interest. The acceptance of the submission addressed in this regard would amount to the Court sanctioning the distribution and sale of smokeless tobacco in addition to smoking tobacco. Article 14 cannot possibly be invoked on the ground that since a particular genre of tobacco has not been banned, there should be no prohibition in respect of an equally harmful article. In any case, Article 14 does not contemplate of a negative equality. It is, as has been repeatedly held, a positive constitutional right. The guarantee and protection conferred by that Article cannot be invoked to assert a right to manufacture, sell or distribute a harmful substance merely because the appellant has failed to take identical steps in respect of an equally injurious article. We thus find ourselves unable to either appreciate or countenance the submissions addressed on this score.

M. POLICY AND JUDICIAL REVIEW

176. More fundamentally we find that the appellant appears to have adopted the impugned measures bearing in mind the larger number of users of smokeless tobacco as was evidenced from the scientific reports coupled with the fact that it stood statutorily armed to impose a prohibition. These were essentially policy imperatives which the appellants appear to have borne in mind while issuing the impugned notifications. It becomes pertinent to note that the power of judicial review which stands conferred upon this Court does not extend to interfering with a policy decision unless it be shown to be wholly

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erroneous, capricious or manifestly arbitrary. Courts would refrain from interfering with such policy decisions merely on the ground that a more prudent or wiser alternative were available. We would clearly be crossing the well recognised rubicon if we were to impute our own views and perceptions of what would have been a more efficacious measure. Ultimately the balancing of imperatives, evaluation of competing factors, exigencies of the time are all factors which must be left for the executive to weigh while formulating an appropriate policy. Courts are ultimately concerned not with the efficacy of the policy but its legality.

177. Though the principles which must be borne in mind with respect to the extent of judicial review in relation to policy decisions is well settled, the Court deems it apposite to notice the following decisions. In **Directorate of Film Festivals vs. Gaurav Ashwin Jain**[53], while holding that the Courts cannot be called upon to examine the correctness of a policy, the Supreme Court held as follows: -

> "**16.** The scope of judicial review of governmental policy is now well defined. Courts do not and cannot act as Appellate Authorities examining the correctness, suitability and appropriateness of a policy, nor are courts advisors to the executive on matters of policy which the executive is entitled to formulate. The scope of judicial review when examining a policy of the Government is to check whether it violates the fundamental rights of the citizens or is opposed to the provisions of the Constitution, or opposed to any statutory provision or manifestly arbitrary. Courts cannot interfere with policy either on the ground that it is erroneous or on the ground that a better, fairer or wiser alternative is available. Legality

[53] (2007) 4 SCC 737

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> of the policy, and not the wisdom or soundness of the policy, is the subject of judicial review (vide *Asif Hameed* v. *State of J&K* [1989 Supp (2) SCC 364] , *Sitaram Sugar Co. Ltd.* v. *Union of India* [(1990) 3 SCC 223] , *Khoday Distilleries Ltd.* v. *State of Karnataka* [(1996) 10 SCC 304] , *BALCO Employees' Union* v. *Union of India* [(2002) 2 SCC 333] , *State of Orissa* v. *Gopinath Dash* [(2005) 13 SCC 495 : 2006 SCC (L&S) 1225] and *Akhil Bharat Goseva Sangh (3)* v. *State of A.P.* [(2006) 4 SCC 162])"'

178. In **Krishnan Kakkanth v. Govt. of Kerala**[54], the Supreme Court observed that it is only proper to test a public policy on the limited question of illegality and unconstitutionality: -

> "36. To ascertain unreasonableness and arbitrariness in the context of Article 14 of the Constitution, it is not necessary to enter upon any exercise for finding out the wisdom in the policy decision of the State Government. It is immaterial whether a better or more comprehensive policy decision could have been taken. It is equally immaterial if it can be demonstrated that the policy decision is unwise and is likely to defeat the purpose for which such decision has been taken. Unless the policy decision is demonstrably capricious or arbitrary and not informed by any reason whatsoever or it suffers from the vice of discrimination or infringes any statute or provisions of the Constitution, the policy decision cannot be struck down. It should be borne in mind that except for the limited purpose of testing a public policy in the context of illegality and unconstitutionality, courts should avoid "embarking on uncharted ocean of public policy."

179. In **Shri Sitaram Sugar Co. Ltd. v. Union of India**[55], the Supreme Court while dealing with the extent of interference with a policy measure observed as follows: -

[54] (1997) 9 SCC 495
[55] (1990) 3 SCC 223

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"**57.** Judicial review is not concerned with matters of economic policy. The court does not substitute its judgment for that of the legislature or its agents as to matters within the province of either. The court does not supplant the "feel of the expert" by its own views. When the legislature acts within the sphere of its authority and delegates power to an agent, it may empower the agent to make findings of fact which are conclusive provided such findings satisfy the test of reasonableness. In all such cases, judicial inquiry is confined to the question whether the findings of fact are reasonably based on evidence and whether such findings are consistent with the laws of the land. As stated by Jagannatha Shetty, J. in *Gupta Sugar Works* [1987 Supp SCC 476, 481] : (SCC p. 479, para 4)

> "... the court does not act like a chartered accountant nor acts like an income tax officer. The court is not concerned with any individual case or any particular problem. The court only examines whether the price determined was with due regard to considerations provided by the statute. And whether extraneous matters have been excluded from determination."

"**59.** It is a matter of policy and planning for the Central Government to decide whether it would be, on adoption of a system of partial control, in the best economic interest of the sugar industry and the general public that the sugar factories are grouped together with reference to geographical-cum-agro-economic factors for the purpose of determining the price of levy sugar. Sufficient power has been delegated to the Central Government to formulate and implement its policy decision by means of statutory instruments and executive orders. Whether the policy should be altered to divide the sugar industry into groups of units with similar cost characteristics with particular reference to recovery, duration, size and age of the units and capital cost per tonne of output, without regard to their location, as recommended by the BICP, is again a matter for the Central Government to decide. What is best for the sugar industry and in what manner the policy should be formulated and implemented, bearing in mind the fundamental object of the statute, viz., supply and equitable distribution of essential commodity at fair prices in the best interest of the general public, is a matter for decision exclusively within the province of the Central Government. Such matters do not ordinarily attract the power of judicial review."

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180. In **State of Orissa v. Gopinath Dash**[56] and in which the Court was yet again called upon to enunciate the parameters of judicial review, the Supreme Court held as under: -

> "**6.** The correctness of the reasons which prompted the Government in decision-making taking one course of action instead of another is not a matter of concern in judicial review and the Court is not the appropriate forum for such investigation.
>
> **7.** The policy decision must be left to the Government as it alone can adopt which policy should be adopted after considering all the points from different angles. In the matter of policy decisions or exercise of discretion by the Government so long as the infringement of fundamental right is not shown the courts will have no occasion to interfere and the Court will not and should not substitute its own judgment for the judgment of the executive in such matters. In assessing the propriety of a decision of the Government the Court cannot interfere even if a second view is possible from that of the Government.
>
> "**8.** The Court should constantly remind itself of what the Supreme Court of the United States said in *Metropolis Theater Co.* v. *City of Chicago* [57 L Ed 730 : 228 US 61 (1912)] :
>
> > "The problems of government are practical ones and may justify, if they do not require, rough accommodations, illogical it may be, and unscientific. But even such criticism should not be hastily expressed. What is the best is not always discernible, the wisdom of any choice may be disputed or condemned. Mere errors of government are not subject to our judicial review."

181. In a more recent decision rendered in **Jacob Puliyel vs. Union of India and Others**[57] the Supreme Court reiterated the well-established parameters of judicial review in regard to a policy decision in the following terms: -

> "**20.** The Minister for Workplace Relations and Safety passed COVID-19 Public Health Response (Specified Work Vaccinations)

[56] (2005) 13 SCC 495
[57] 2022 SCC OnLine SC 533

Order 2021, by which it was determined that work carried out by certain police and defence force personnel could only be undertaken by workers who have been vaccinated. Three police and defence force workers who did not wish to be vaccinated sought judicial review of the said order before the High Court of New Zealand (hereinafter, the "**NZ High Court**"). While adjudicating the dispute, the NZ High Court in *Ryan Yardley* (supra) expressed its opinion that the choices made by governments on their response to COVID-19 involve wide policy questions, including decisions on the use of border closures, lockdowns, isolation requirements, vaccine mandates and many other measures, which are decisions for the elected representatives to make. The NZ High Court made it clear that the Court addresses narrower legal questions and the Court's function is not to address the wider policy questions. While referring to the evidence of experts, the NZ High Court stressed on the institutional limitations on the Court's ability to reach definitive conclusions but clarified that the Court must exercise its constitutional responsibility to ensure that decisions are made lawfully. While relying upon a judgment of the Court of Appeal of New Zealand in *Ministry of Health* v. *Atkinson*15, the NZ High Court held that the Crown has the burden to demonstrate that a limitation of a fundamental right is demonstrably justified. We have come to know that in the time since the judgment in this matter was reserved, the decision of the NZ High Court in *Ryan Yardley* (supra) has been appealed by the Government of New Zealand before the New Zealand Court of Appeal.

21. We shall now proceed to analyse the precedents of this Court on the ambit of judicial review of public policies relating to health. It is well settled that the Courts, in exercise of their power of judicial review, do not ordinarily interfere with the policy decisions of the executive unless the policy can be faulted on grounds of mala fide, unreasonableness, arbitrariness or unfairness etc. Indeed, arbitrariness, irrationality, perversity and mala fide will render the policy unconstitutional. It is neither within the domain of the courts nor the scope of judicial review to embark upon an enquiry as to whether a particular public policy is wise or whether better public policy can be evolved. Nor are the courts inclined to strike down a policy at the behest of a petitioner merely because it has been urged that a different policy would have been fairer or wiser or more scientific or more logical. Courts do not and cannot act as appellate authorities examining the correctness, suitability and appropriateness of a policy, nor are courts advisors to the executive

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on matters of policy which the executive is entitled to formulate. The scope of judicial review when examining a policy of the Government is to check whether it violates the fundamental rights of the citizens or is opposed to the provisions of the Constitution, or opposed to any statutory provision or manifestly arbitrary18.

22. This Court in a series of decisions has reiterated that courts should not rush in where even scientists and medical experts are careful to tread. The rule of prudence is that courts will be reluctant to interfere with policy decisions taken by the Government, in matters of public health, after collecting and analysing inputs from surveys and research. Nor will courts attempt to substitute their own views as to what is wise, safe, prudent or proper, in relation to technical issues relating to public health in preference to those formulated by persons said to possess technical expertise and rich experience. Where expertise of a complex nature is expected of the State in framing rules, the exercise of that power not demonstrated as arbitrary must be presumed to be valid as a reasonable restriction on the fundamental right of the citizen and judicial review must halt at the frontiers. The Court cannot re-weigh and substitute its notion of expedient solution. Within the wide judge-proof areas of policy and judgment open to the government, if they make mistakes, correction is not in court but elsewhere. That is the comity of constitutional jurisdictions in our jurisprudence. We cannot evolve a judicial policy on medical issues. All judicial thought, Indian and Anglo-American, on the judicial review power where rules under challenge relate to a specialised field and involve sensitive facets of public welfare, has warned courts of easy assumption of unreasonableness of subordinate legislation on the strength of half-baked studies of judicial generalists aided by the adhoc learning of counsel. However, the Court certainly is the constitutional invigilator and must act to defend the citizen in the assertion of his fundamental rights against executive tyranny draped in disciplinary power.

23. There is no doubt that this Court has held in more than one judgment that where the decision of the authority is in regard to a policy matter, this Court will not ordinarily interfere since decisions on policy matters are taken based on expert knowledge of the persons concerned and courts are normally not equipped to question the correctness of a policy decision. However, this does not mean that courts have to abdicate their right to scrutinise whether the policy in question is formulated keeping in mind all the relevant facts and the said policy can be held to be beyond the pale of discrimination or unreasonableness, bearing in mind the

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> material on record. In *Delhi Development Authority* (supra), this Court held that an executive order termed as a policy decision is not beyond the pale of judicial review. Whereas the superior courts may not interfere with the nitty-gritty of the policy, or substitute one by the other but it will not be correct to contend that the court shall lay its judicial hands off, when a plea is raised that the impugned decision is a policy decision. Interference therewith on the part of the superior court would not be without jurisdiction as it is subject to judicial review. It was further held therein that the policy decision is subject to judicial review on the following grounds:
>
> a) if it is unconstitutional;
>
> b) if it is dehors the provisions of the Act and the regulations;
>
> c) if the delegatee has acted beyond its power of delegation;
>
> d) if the executive policy is contrary to the statutory or a larger policy."

182. Viewed in light of the aforesaid principles, we are of the firm opinion that there existed no justification for the Impugned Notifications being quashed on grounds which have found acceptance with the learned Judge. In any case, Article 14 clearly did not warrant the Impugned Notifications being set aside.

N. PERIPHERAL ISSUES

183. While parting, two additional issues which were canvassed for our consideration may also be noticed for the sake of completeness of the record.

184. The learned Judge has while allowing the writ petitions also alluded to the principles of implied repeal. However, and as this Court had noted while recording the submissions which were addressed in these appeals, the appellants had never contended before the writ court

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that COTPA stood impliedly repealed upon promulgation of FSSA. There was thus no necessity of the said observations being rendered. In any case, in light of the conclusions recorded hereinabove, we find no ground to interfere with the ultimate conclusion recorded by the learned Judge in this respect.

185. Mr. Kirtiman Singh, learned CGSC had additionally sought to contend that trade and commerce in tobacco is liable to be viewed as *res extra commercium*. Mr. Singh had in this connection referred to certain observations as entered in *Nava Bans Sar Vyapar Association* as well as *Health for Millions Trust* and *Unicorn Industries*. However, we find ourselves unable to enter such a declaration bearing in mind the categorical observations as were made by the Supreme Court in *Godawat*. The relevant passages of *Godawat* in this respect are extracted hereinbelow: -

> **"53.** Is the consumption of pan masala or *gutka* (containing tobacco), or for that matter tobacco itself, considered so inherently or viciously dangerous to health, and, if so, is there any legislative policy to totally ban its use in the country? In the face of Act 34 of 2003, the answer must be in the negative. It is difficult to accept the contention that the substance banned by the impugned notification is treated as *res extra commercium*. In the first place, the gamut of legislation enacted in this country which deals with tobacco does not suggest that Parliament has ever treated it as an article *res extra commercium*, nor has Parliament attempted to ban its use absolutely. The Industries (Development and Regulation) Act, 1951 merely imposed licensing regulation on tobacco products under Item 38(1) of the First Schedule. The Central Sales Tax Act, 1956 in Section 14(*ix*) prescribes the rates for Central sales tax. The Additional Duties of Excise (Goods of Special Importance) Act, 1957 prescribes the additional duty leviable on tobacco products. The Tobacco Board Act, 1975 established a Tobacco Board for development of tobacco

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> industries in the country. Even the latest Act i.e. the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003, does not ban the sale of tobacco products listed in the Schedule except to minors. Further, we find that in the Tariff Schedule of the Central Sales Tax Act there are several entries which deal with tobacco and also pan masala. In the face of these legislative measures seeking to levy restrictions and control the manufacture and sale of tobacco and its allied products as well as pan masala, it is not possible to accept that the article itself has been treated as *res extra commercium*. The legislative policy, if any, seems to be to the contrary. In any event, whether an article is to be prohibited as *res extra commercium* is a matter of legislative policy and must arise out of an Act of legislature and not by a mere notification issued by an executive authority."

O. OPERATIVE DIRECTIONS

186. Accordingly, and for all the aforesaid reasons, we find ourselves unable to sustain the impugned judgment rendered by the learned Judge. These appeals shall consequently stand allowed. The impugned judgment and order dated 23 September 2022 shall stand set aside.

187. For reasons aforenoted, we find no merit in the challenge raised in W.P.(C) No. 3362/2015. It shall, in consequence, stand dismissed.

SATISH CHANDRA SHARMA, C.J.

YASHWANT VARMA, J.

APRIL 10, 2023
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