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

% ***Reserved on: 25.07.2022***
Pronounced on: 27.09.2022

\+ **W.P.(C) 3362/2015 and C.M. Nos. 6020/2015, 9243/2015, 17726/2015, 16999/2017, 17859-860/2017, 19505/2018 & 7957/2021**
(LEAD MATTER)

SUGANDHI SNUFF KING PVT. LTD. & ANR. ..... Petitioners

Through: Mr. C.S. Vaidyanathan, Dr. Abhishek Manu Singhvi and Mr. Vivek Kohli, Senior Advocates alongwith Mr. Nalin Talwar, Mr. Sunil Tyagi, Mr. Manoj Gupta, Ms. Yeshi Rinchhen, Mr. Akash Yadav, Mr. Kustubh Singh and Mr. Juvas Rawal, Advocates.

versus

COMMISSIONER (FOOD SAFETY)
GOVERNMENT OF NCT OF DELHI ..... Respondent

Through: Mr. Bhagvan Swarup Shukla, CGSC with Mr. Sarvan Kumar, Advocate.
Mr. Aditya Singla and Ms. A. Sahitya Veena, Advocates for FSSAI.
Mr. Kavindra Gill, Advocate for UOI
Mr. Chetan Sharma, ASG with Mr. Rakesh Kumar and Mr. Sunil, Advocates for UOI.

This is a digitally signed Judgement.

Mr. Rahul Mehra, Senior Advocate alongwith Mr. Gautam Narayan, ASC with Mr. Chaitanya Gosain and Ms. Asmita Singh, Advocates for GNCTD.
Mr. Sameer Vashisht, ASC with Ms. Sanjana Nangia and Ms. Shreya Gupta, Advocates for GNCTD

\+ **W.P.(C) 10368/2021 and C.M. No. 31897/2021**

BG TOBACO PRODUCTS ..... Petitioner

Through: Mr. C.S. Vaidyanathan, Dr. Abhishek Manu Singhvi and Mr. Vivek Kohli, Senior Advocates alongwith Mr. Nalin Talwar, Mr. Sunil Tyagi, Mr. Manoj Gupta, Ms. Yeshi Rinchhen, Mr. Akash Yadav, Mr. Kustubh Singh and Mr. Juvas Rawal, Advocates.

versus

COMMISSIONER FOOD SAFETY
GOVT. OF NCT OF DELHI & ORS. ..... Respondents

Through: Mr. Manish Mohan and Mr.Devendra Kumar, Advocates for UOI.
Mr. Anuj Aggarwal, Mr. Sanyam Suri, Ms.Ayushi Bansal and Ms. Aishwarya Sharma, Advocates for respondent No. 1/ GNCTD.
Mr. Rahul Mehra, Senior Advocate alongwith Mr. Gautam Narayan, ASC with Mr. Chaitanya Gosain

This is a digitally signed Judgement.

and Ms. Asmita Singh, Advocates for GNCTD.

Mr. Aditya Singla and Ms. A. Sahitya Veena, Advocates for FSSAI.

\+ **W.P.(C) 4576/2020 and C.M. No. 16522/2020**

KAMNA INDUSTRIES PRIVATE LIMITED ..... Petitioner

Through: Mr. C.S. Vaidyanathan, Dr. Abhishek Manu Singhvi and Mr. Vivek Kohli, Senior Advocates alongwith Mr. Nalin Talwar, Mr. Sunil Tyagi, Mr. Manoj Gupta, Ms. Yeshi Rinchhen, Mr. Akash Yadav, Mr. Kustubh Singh and Mr. Juvas Rawal, Advocates.

versus

COMMISSIONER (FOOD SAFETY),
DEPARTMENT OF FOOD SAFETY,
GOVERNMENT OF NCT OF DELHI & ORS. .. Respondents

Through: Mr. Aditya Singla and Ms. A. Sahitya Veena, Advocates for FSSAI.

Mr. Rahul Mehra, Senior Advocate alongwith Mr. Gautam Narayan, ASC with Mr. Chaitanya Gosain and Ms. Asmita Singh, Advocates for GNCTD.

\+ **W.P.(C) 4689/2020 and C.M. No. 16882/2020**

VB TOBACCO PRIVATE LIMITED ..... Petitioner

Through: Mr. C.S. Vaidyanathan, Dr. Abhishek Manu Singhvi and Mr.

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Vivek Kohli, Senior Advocates alongwith Mr. Nalin Talwar, Mr. Sunil Tyagi, Mr. Manoj Gupta, Ms. Yeshi Rinchhen, Mr. Akash Yadav, Mr. Kustubh Singh and Mr. Juvas Rawal, Advocates.

Versus

COMMISSIONER (FOOD SAFETY), GOVERNMENT OF NCT OF DELHI & ORS. .. Respondents

Through: Mr. Rahul Mehra, Senior Advocate alongwith Mr. Gautam Narayan, ASC with Mr. Chaitanya Gosain and Ms. Asmita Singh, Advocates for GNCTD

\+ **W.P.(C) 4752/2020 and C.M. No. 17149/2020**

KRISHNA TRADERS ..... Petitioner

Through: Mr. C.S. Vaidyanathan, Dr. Abhishek Manu Singhvi and Mr. Vivek Kohli, Senior Advocates alongwith Mr. Nalin Talwar, Mr. Sunil Tyagi, Mr. Manoj Gupta, Ms. Yeshi Rinchhen, Mr. Akash Yadav, Mr. Kustubh Singh and Mr. Juvas Rawal, Advocates.

versus

COMMISSIONER (FOOD SAFETY), DEPARTMENT OF FOOD SAFETY, GOVERNMENT OF NCT OF DELHI & ORS. ..... Respondents

Through: Mr. Aditya Singla and Ms. A. Sahitya Veena, Advocates for FSSAI.

Mr. Rahul Mehra, Senior Advocate alongwith Mr. Gautam Narayan,

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ASC with Mr. Chaitanya Gosain and Ms. Asmita Singh, Advocates for GNCTD.

\+ **W.P.(C) 4953/2020 and C.M. No. 17885/2020**

KAY PEE KHAINI PRIVATE LIMITED ..... Petitioner

Through: Mr. C.S. Vaidyanathan, Dr. Abhishek Manu Singhvi and Mr. Vivek Kohli, Senior Advocates alongwith Mr. Nalin Talwar, Mr. Sunil Tyagi, Mr. Manoj Gupta, Ms. Yeshi Rinchhen, Mr. Akash Yadav, Mr. Kustubh Singh and Mr. Juvas Rawal, Advocates.

versus

COMMISSIONER (FOOD SAFETY), DEPARTMENT OF FOOD SAFETY, GOVERNMENT OF NCT OF DELHI & ORS. ..... Respondents

Through: Mr. Bhagvan Swarup Shukla, CGSC with Mr. Sarvan Kumar, Advocate.

Mr. Aditya Singla and Ms. A. Sahitya Veena, Advocates for FSSAI.

Mr. Rahul Mehra, Senior Advocate alongwith Mr. Gautam Narayan, ASC with Mr. Chaitanya Gosain and Ms. Asmita Singh, Advocates for GNCTD.

\+ **W.P.(C) 5934/2020 and C.M. No. 21448/2020**

SHRI RASBAHAR FRAGRANCES LLP ..... Petitioner

This is a digitally signed Judgement.

Through: Mr. Rohit Tiwari & Mr. V.N. Jha, Advocates

versus

COMMISSIONER, FOOD SAFETY & ORS. .... Respondents

Through: Mr. Rahul Mehra, Senior Advocate alongwith Mr. Gautam Narayan, ASC with Mr. Chaitanya Gosain and Ms. Asmita Singh, Advocates for GNCTD.

\+ **W.P.(C) 5387/2019 and C.M. No. 23660/2019**

RAJAT FOOD PRODUCTS ..... Petitioner

Through: Mr. C.S. Vaidyanathan, Dr. Abhishek Manu Singhvi and Mr. Vivek Kohli, Senior Advocates alongwith Mr. Nalin Talwar, Mr. Sunil Tyagi, Mr. Manoj Gupta, Ms. Yeshi Rinchhen, Mr. Akash Yadav, Mr. Kustubh Singh and Mr. Juvas Rawal, Advocates.

versus

COMMISSIONER (FOOD SAFETY) GOVERNMENT OF NCT OF DELHI AND ORS. ..... Respondents

Through: Mr. Ripu Daman Bhardwaj, CGSC for respondent No. 2/ UOI.

Mr. Aditya Singla and Ms. A. Sahitya Veena, Advocates for FSSAI.

Mr. Rahul Mehra, Senior Advocate alongwith Mr. Gautam Narayan, ASC with Mr. Chaitanya Gosain

This is a digitally signed Judgement.

and Ms. Asmita Singh, Advocates for GNCTD.
Mr. Tushar Sannu, Advocate for Ms. Ritika Priya, Advocate for GNCTD

\+ **W.P.(C) 5489/2019 and C.M. No. 24083/2019**

VISHNU TOBACCO MANUFACTURING ..... Petitioner
Through: Mr. C.S. Vaidyanathan, Dr. Abhishek Manu Singhvi and Mr. Vivek Kohli, Senior Advocates alongwith Mr. Nalin Talwar, Mr. Sunil Tyagi, Mr. Manoj Gupta, Ms. Yeshi Rinchhen, Mr. Akash Yadav, Mr. Kustubh Singh and Mr. Juvas Rawal, Advocates.

versus

COMMISSIONER (FOOD SAFETY)
GOVERNMENT OF NCT OF DELHI & ORS. .. Respondents
Through: Mr. Aditya Singla and Ms. A. Sahitya Veena, Advocates for FSSAI.
Mr. Rahul Mehra, Senior Advocate alongwith Mr. Gautam Narayan, ASC with Mr. Chaitanya Gosain and Ms. Asmita Singh, Advocates for GNCTD.
Mr. Anuj Aggarwal, Mr.Sanyam Suri, Ms.Ayushi Bansal and Ms. Aishwarya Sharma, Advocates for respondent No. 1/ GNCTD.
Ms. Manisha Agarwal Narain, CGSC with Mr. Aditya Singh

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Deshwal and Ms. Rakshita Goyal, Advocates for UOI

\+ **W.P.(C) 5881/2019 and C.M. No. 25550/2019**

K. Y. TOBACCO WORKS PRIVATE LIMITED ... Petitioner

Through: Mr. C.S. Vaidyanathan, Dr. Abhishek Manu Singhvi and Mr. Vivek Kohli, Senior Advocates alongwith Mr. Nalin Talwar, Mr. Sunil Tyagi, Mr. Manoj Gupta, Ms. Yeshi Rinchhen, Mr. Akash Yadav, Mr. Kustubh Singh and Mr. Juvas Rawal, Advocates.

versus

COMMISSIONER (FOOD SAFETY)
DEPARTMENT OF FOOD SAFETY
GOVERNMENT OF NCT OF DELHI & ORS. ..Respondents

Through: Mr. Bhagvan Swarup Shukla, CGSC with Mr. Sarvan Kumar, Advocate.
Mr. Aditya Singla and Ms. A. Sahitya Veena, Advocates for FSSAI.
Ms. Monika Arora, Advocates for UOI.
Mr. Rahul Mehra, Senior Advocate alongwith Mr. Gautam Narayan, ASC with Mr. Chaitanya Gosain and Ms. Asmita Singh, Advocates for GNCTD.

\+ **W.P.(C) 5883/2019 & C.M. Nos. 25554/2019, 15861-862/2020 & 29410/2021**

SHAMBHU KHAINI PRIVATE LIMITED ..... Petitioner

This is a digitally signed Judgement.

Through: Mr. C.S. Vaidyanathan, Dr. Abhishek Manu Singhvi and Mr. Vivek Kohli, Senior Advocates alongwith Mr. Nalin Talwar, Mr. Sunil Tyagi, Mr. Manoj Gupta, Ms. Yeshi Rinchhen, Mr. Akash Yadav, Mr. Kustubh Singh and Mr. Juvas Rawal, Advocates.

versus

COMMISSIONER (FOOD SAFETY),
GOVERNMENT OF NCT OF DELHI & ORS. . Respondents

Through: Mr. Aditya Singla and Ms. A. Sahitya Veena, Advocates for FSSAI.
Mr. Tushar Sannu and Ms. Ritika Priya, Advocates for GNCTD.
Mr. Bhagvan Swarup Shukla, Mr. Kamal deep and Mr.Sarvan Kumar, Advocates for UOI.
Mr. Rahul Mehra, Senior Advocate alongwith Mr. Gautam Narayan, ASC with Mr. Chaitanya Gosain and Ms. Asmita Singh, Advocates for GNCTD.

\+ **W.P.(C) 6006/2019 and C.M. No. 25942/2019**

M/S S. N. AGRIFOODS PRIVATE LIMITED ..... Petitioner

Through: Mr. C.S. Vaidyanathan, Dr. Abhishek Manu Singhvi and Mr. Vivek Kohli, Senior Advocates alongwith Mr. Nalin Talwar, Mr. Sunil Tyagi, Mr. Manoj Gupta, Ms. Yeshi Rinchhen, Mr. Akash Yadav,

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Mr. Kustubh Singh and Mr. Juvas Rawal, Advocates.

versus

COMMISSIONER (FOOD SAFETY)
GOVERNMENT OF NCT OF DELHI AND ORS. ….Respondents

Through: Mr. Vivek Goyal, Advocate for UOI.
Mr. Aditya Singla and Ms. A. Sahitya Veena, Advocates for FSSAI.
Mr. Rahul Mehra, Senior Advocate alongwith Mr. Gautam Narayan, ASC with Mr. Chaitanya Gosain and Ms. Asmita Singh, Advocates for GNCTD.

\+ **W.P.(C) 6010/2019 and C.M. No. 25960/2019**

HARSH INFINITY FLAVOUR PRIVATE LIMITED..... Petitioner

Through: Mr. C.S. Vaidyanathan, Dr. Abhishek Manu Singhvi and Mr. Vivek Kohli, Senior Advocates alongwith Mr. Nalin Talwar, Mr. Sunil Tyagi, Mr. Manoj Gupta, Ms. Yeshi Rinchhen, Mr. Akash Yadav, Mr. Kustubh Singh and Mr. Juvas Rawal, Advocates.

versus

COMMISSIONER (FOOD SAFETY)
GOVERNMENT OF NCT OF DELHI AND ORS. .... Respondents

Through: Mr. Aditya Singla and Ms. A. Sahitya Veena, Advocates for FSSAI.
Mr. Rahul Mehra, Senior Advocate alongwith Mr. Gautam Narayan,

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ASC with Mr. Chaitanya Gosain and Ms. Asmita Singh, Advocates for GNCTD**.**

\+ **W.P.(C) 6018/2019 and C.M. Nos. 26034/2019 & 29618/2021**

JAISWAL PRODUCTS ..... Petitioner

Through: Mr. C.S. Vaidyanathan, Dr. Abhishek Manu Singhvi and Mr. Vivek Kohli, Senior Advocates alongwith Mr. Nalin Talwar, Mr. Sunil Tyagi, Mr. Manoj Gupta, Ms. Yeshi Rinchhen, Mr. Akash Yadav, Mr. Kustubh Singh and Mr. Juvas Rawal, Advocates.

versus

COMMISSIONER (FOOD SAFETY)
GOVERNMENT OF NCT OF DELHI AND ORS. .....Respondents

Through: Mr. Aditya Singla and Ms. A. Sahitya Veena, Advocates for FSSAI.

Ms. Monika Arora, Advocates for UOI

Mr. Rahul Mehra, Senior Advocate alongwith Mr. Gautam Narayan, ASC with Mr. Chaitanya Gosain and Ms. Asmita Singh, Advocates for GNCTD**.**

\+ **W.P.(C) 6019/2019 and C.M. Nos. 26036/2019, 15866-867/2020 & 29409/2021**

MURARI LAL HARISH CHANDRA
JAISWAL PVT. LTD. ..... Petitioner

Through: Mr. C.S. Vaidyanathan, Dr. Abhishek Manu Singhvi and Mr.

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Vivek Kohli, Senior Advocates alongwith Mr. Nalin Talwar, Mr. Sunil Tyagi, Mr. Manoj Gupta, Ms. Yeshi Rinchhen, Mr. Akash Yadav, Mr. Kustubh Singh and Mr. Juvas Rawal, Advocates.

versus

COMMISSIONER (FOOD SAFETY)
GOVERNMENT OF NCT OF DELHI AND ORS. .....Respondents

Through: Mr. Aditya Singla and Ms. A. Sahitya Veena, Advocates for FSSAI.
Ms. Monika Arora, Advocates for UOI
Mr. Rahul Mehra, Senior Advocate alongwith Mr. Gautam Narayan, ASC with Mr. Chaitanya Gosain and Ms. Asmita Singh, Advocates for GNCTD.

\+ **W.P.(C) 5499/2019 and C.M. No. 24144/2019**

RAS BAHAR FRAGRANCES LLP ..... Petitioner

Through: Mr. C.S. Vaidyanathan, Dr. Abhishek Manu Singhvi and Mr. Vivek Kohli, Senior Advocates alongwith Mr. Nalin Talwar, Mr. Sunil Tyagi, Mr. Manoj Gupta, Ms. Yeshi Rinchhen, Mr. Akash Yadav, Mr. Kustubh Singh and Mr. Juvas Rawal, Advocates.

versus

COMMISSIONER (FOOD SAFETY)
DEPARTMENT OF FOOD SAFETY AND ORS. .....Respondents

This is a digitally signed Judgement.

Through: Mr. Ajay Digpaul, CGSC with Mr.Kamal Digpaul and Ms. Sawati Kwatra, Advocates for respondent No. 2/ UOI.
Mr. Aditya Singla and Ms. A. Sahitya Veena, Advocates for FSSAI.
Mr. Rahul Mehra, Senior Advocate alongwith Mr. Gautam Narayan, ASC with Mr. Chaitanya Gosain and Ms. Asmita Singh, Advocates for GNCTD.

\+ **W.P.(C) 6279/2019 and C.M. No. 26865/2019**

SOM GLOBAL ZARDA PRIVATE LIMITED ..... Petitioner

Through: Mr. C.S. Vaidyanathan, Dr. Abhishek Manu Singhvi and Mr. Vivek Kohli, Senior Advocates alongwith Mr. Nalin Talwar, Mr. Sunil Tyagi, Mr. Manoj Gupta, Ms. Yeshi Rinchhen, Mr. Akash Yadav, Mr. Kustubh Singh and Mr. Juvas Rawal, Advocates.

versus

COMMISSIONER (FOOD SAFETY)
GOVERNMENT OF NCT OF DELHI AND ORS. .....Respondents

Through: Mr. Aditya Singla and Ms. A. Sahitya Veena, Advocates for FSSAI.
Ms. Monika Arora, Advocates for UOI
Mr. Rahul Mehra, Senior Advocate alongwith Mr. Gautam Narayan, ASC with Mr. Chaitanya Gosain

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and Ms. Asmita Singh, Advocates for GNCTD.

\+ **W.P.(C) 7358/2019 and C.M. No. 30674/2019**

AFT TOBACCO PRIVATE LIMITED, THROUGH
MR. PRADYUMN KUMAR JAIN, DIRECTOR ..... Petitioner

Through: Mr. C.S. Vaidyanathan, Dr. Abhishek Manu Singhvi and Mr. Vivek Kohli, Senior Advocates alongwith Mr. Nalin Talwar, Mr. Sunil Tyagi, Mr. Manoj Gupta, Ms. Yeshi Rinchhen, Mr. Akash Yadav, Mr. Kustubh Singh and Mr. Juvas Rawal, Advocates.

versus

COMMISSIONER (FOOD SAFETY)
GOVERNMENT OF NCT OF DELHI AND ORS. .....Respondents

Through: Mr. Aditya Singla and Ms. A. Sahitya Veena, Advocates for FSSAI.
Mr. Sameer Vashisht, Ms. Sanjana Nangia and Ms. Shreya Gupta, Advocates for GNCTD.
Mr. T.P. Singh, Advocate.
Mr. R.V. Sinha, Advocate for respondent No. 2.
Mr. Rahul Mehra, Senior Advocate alongwith Mr. Gautam Narayan, ASC with Mr. Chaitanya Gosain and Ms. Asmita Singh, Advocates for GNCTD.

\+ **W.P.(C) 7359/2019 and C.M. Nos. 30676/2019 & 25023/2020**

APEX FLAVOURS, THROUGH

This is a digitally signed Judgement.

MR. ANIL KUMAR SIKKA, PROPRIETOR ..... Petitioner

Through: Mr. C.S. Vaidyanathan, Dr. Abhishek Manu Singhvi and Mr. Vivek Kohli, Senior Advocates alongwith Mr. Nalin Talwar, Mr. Sunil Tyagi, Mr. Manoj Gupta, Ms. Yeshi Rinchhen, Mr. Akash Yadav, Mr. Kustubh Singh and Mr. Juvas Rawal, Advocates.

versus

COMMISSIONER (FOOD SAFETY)
GOVERNMENT OF NCT OF DELHI AND ORS. .....Respondents

Through: Mr. R.V. Sinha, Advocate for respondent No. 2.
Mr. Rahul Mehra, Senior Advocate alongwith Mr. Gautam Narayan, ASC with Mr. Chaitanya Gosain and Ms. Asmita Singh, Advocates for GNCTD.

\+ **W.P.(C) 7883/2019 and C.M. Nos. 32724/2019 & 29411/2021**

TRIMURTI FRAGRANCES AND
FLAVOURS PRIVATE LIMITED ..... Petitioner

Through: Mr. C.S. Vaidyanathan, Dr. Abhishek Manu Singhvi and Mr. Vivek Kohli, Senior Advocates alongwith Mr. Nalin Talwar, Mr. Sunil Tyagi, Mr. Manoj Gupta, Ms. Yeshi Rinchhen, Mr. Akash Yadav, Mr. Kustubh Singh and Mr. Juvas Rawal, Advocates.

versus

COMMISSIONER (FOOD SAFETY)
GOVRNMENT OF NCT OF DELHI & ORS. .....Respondents

This is a digitally signed Judgement.

Through: Mr. Chetan Sharma, ASG with Mr. T.P. Singh, Advocate for respondent No. 2/ UOI.
Mr. Aditya Singla and Ms. A. Sahitya Veena, Advocates for FSSAI.
Mr. Rahul Mehra, Senior Advocate alongwith Mr. Gautam Narayan, ASC with Mr. Chaitanya Gosain and Ms. Asmita Singh, Advocates for GNCTD.

\+ **W.P.(C) 4936/2018 and C.M. Nos. 19058-059/2018**

SHAMBHU KHAINI PRIVATE LIMITED ..... Petitioner

Through: Mr. C.S. Vaidyanathan, Dr. Abhishek Manu Singhvi and Mr. Vivek Kohli, Senior Advocates alongwith Mr. Nalin Talwar, Mr. Sunil Tyagi, Mr. Manoj Gupta, Ms. Yeshi Rinchhen, Mr. Akash Yadav, Mr. Kustubh Singh and Mr. Juvas Rawal, Advocates.

versus

COMMISSIONER (FOOD SAFETY) & ORS .....Respondents

Through: Mr. Ripu Daman Bhardwaj, CGSC for respondent No. 2/ UOI.
Mr. Rahul Mehra, Senior Advocate alongwith Mr. Gautam Narayan, ASC with Mr. Chaitanya Gosain and Ms. Asmita Singh, Advocates for GNCTD.

\+ **W.P.(C) 4937/2018 and C.M. Nos. 19060-061/2018**

S N AGRIFOODS PRIVATE LIMITED ..... Petitioner

This is a digitally signed Judgement.

Through: Mr. C.S. Vaidyanathan, Dr. Abhishek Manu Singhvi and Mr. Vivek Kohli, Senior Advocates alongwith Mr. Nalin Talwar, Mr. Sunil Tyagi, Mr. Manoj Gupta, Ms. Yeshi Rinchhen, Mr. Akash Yadav, Mr. Kustubh Singh and Mr. Juvas Rawal, Advocates.

versus

COMMISSIONER (FOOD SAFETY) & ORS .....Respondents

Through: Mr. Ripu Daman Bhardwaj, CGSC for respondent No. 2/ UOI.
Mr. Rahul Mehra, Senior Advocate alongwith Mr. Gautam Narayan, ASC with Mr. Chaitanya Gosain and Ms. Asmita Singh, Advocates for GNCTD.

\+ **W.P.(C) 13204/2018 and C.M. No. 51263/2018**

SOM GLOBAL ZARDA PRIVATE LIMITED ..... Petitioner

Through: Mr. C.S. Vaidyanathan, Dr. Abhishek Manu Singhvi and Mr. Vivek Kohli, Senior Advocates alongwith Mr. Nalin Talwar, Mr. Sunil Tyagi, Mr. Manoj Gupta, Ms. Yeshi Rinchhen, Mr. Akash Yadav, Mr. Kustubh Singh and Mr. Juvas Rawal, Advocates.

versus

COMMISSIONER FOOD SAFETY GOVT OF NCT OF DELHI AND ORS .....Respondents

Through: Mr. Kirtiman Singh, CGSC with Ms.Kunjala Bhardwaj, Advocates for UOI.

This is a digitally signed Judgement.

Mr. Arnav Kumar, CGSC with Mr. Harshil Manchanda, Gurudas Khurana and Mr. Suprateek Neogi, Advocates for UOI

Mr. Aditya Singla and Ms. A. Sahitya Veena, Advocates for FSSAI.

Mr. Rahul Mehra, Senior Advocate alongwith Mr. Gautam Narayan, ASC with Mr. Chaitanya Gosain and Ms. Asmita Singh, Advocates for GNCTD.

\+ **W.P.(C) 1142/2017 and C.M. No. 5175/2017**

M/S AGGARWAL TRADERS AND ANR ..... Petitioners

Through: Ms. Nikita Sharma, Advocate

versus

COMMISSIONER (FOOD SAFETY), DEPARTMENT OF FOOD SAFETY ..... Respondent

Through: Mr. Rahul Mehra, Senior Advocate alongwith Mr. Gautam Narayan, ASC with Mr. Chaitanya Gosain and Ms. Asmita Singh, Advocates for GNCTD.

\+ **W.P.(C) 4036/2017 and C.M. No. 17756/2017**

A.K. TRADING CO. ..... Petitioner

Through: Mr. C.S. Vaidyanathan, Dr. Abhishek Manu Singhvi and Mr. Vivek Kohli, Senior Advocates alongwith Mr. Nalin Talwar, Mr. Sunil Tyagi, Mr. Manoj Gupta, Ms. Yeshi Rinchhen, Mr. Akash Yadav,

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Mr. Kustubh Singh and Mr. Juvas Rawal, Advocates.

versus

COMMISSIONER (FOOD SAFETY),
DEPARTMENT OF FOOD SAFETY,
GOVT. OF NCT OF DELHI & ORS .....Respondents

Through: Ms. Bharathi Raju, Advocate for UOI.
Mr. Rahul Mehra, Senior Advocate alongwith Mr. Gautam Narayan, ASC with Mr. Chaitanya Gosain and Ms. Asmita Singh, Advocates for GNCTD.

\+ **W.P.(C) 4037/2017 and C.M. No. 17758/2017**

M/S SHIVAM BETELNUT PRIVATE LIMITED ..... Petitioner

Through: Mr. C.S. Vaidyanathan, Dr. Abhishek Manu Singhvi and Mr. Vivek Kohli, Senior Advocates alongwith Mr. Nalin Talwar, Mr. Sunil Tyagi, Mr. Manoj Gupta, Ms. Yeshi Rinchhen, Mr. Akash Yadav, Mr. Kustubh Singh and Mr. Juvas Rawal, Advocates.

versus

COMMISSIONER (FOOD SAFETY),
DEPARTMENT OF NCT OF DELHI & ORS .....Respondents

Through: Mr. Rahul Mehra, Senior Advocate alongwith Mr. Gautam Narayan, ASC with Mr. Chaitanya Gosain and Ms. Asmita Singh, Advocates for GNCTD.

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+ **W.P.(C) 4362/2017 and C.M. No. 19044/2017**

SSAF ENTERPRISES ..... Petitioner

Through: Mr. C.S. Vaidyanathan, Dr. Abhishek Manu Singhvi and Mr. Vivek Kohli, Senior Advocates alongwith Mr. Nalin Talwar, Mr. Sunil Tyagi, Mr. Manoj Gupta, Ms. Yeshi Rinchhen, Mr. Akash Yadav, Mr. Kustubh Singh and Mr. Juvas Rawal, Advocates.

versus

COMMISSIONER (FOOD SAFETY), GOVT. OF NCT OF DELHI & ORS .....Respondents

Through: Mr. Rahul Mehra, Senior Advocate alongwith Mr. Gautam Narayan, ASC with Mr. Chaitanya Gosain and Ms. Asmita Singh, Advocates for GNCTD.

+ **W.P.(C) 4365/2017 and C.M. No. 19049/2017**

S.R. TRADING CO. ..... Petitioner

Through: Mr. C.S. Vaidyanathan, Dr. Abhishek Manu Singhvi and Mr. Vivek Kohli, Senior Advocates alongwith Mr. Nalin Talwar, Mr. Sunil Tyagi, Mr. Manoj Gupta, Ms. Yeshi Rinchhen, Mr. Akash Yadav, Mr. Kustubh Singh and Mr. Juvas Rawal, Advocates.

versus

COMMISSIONER (FOOD SAFETY), GOVT. OF NCT OF DELHI & ORS .....Respondents

Through: Mr. Rahul Mehra, Senior Advocate alongwith Mr.

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Gautam Narayan, ASC with Mr. Chaitanya Gosain and Ms. Asmita Singh, Advocates for GNCTD.

\+ **W.P.(C) 3241/2016 and C.M. Nos. 13819-820/2016**

S.K. TOBACCO INDUSTRIES ..... Petitioner

Through: Mr. Pavan Narang Mr. Shiven Khurana and Ms. Aishwarya, Advocates.

versus

COMMISSIONER (FOOD SAFETY),
GOVT. OF NCT, DELHI .....Respondent

Through: Mr. Chetan Sharma, ASG with Mr. Rakesh Kumar and Mr. Sunil, Advocates for UOI.

Mr. Sameer Vashisht, Ms. Sanjana Nangia and Ms. Shreya Gupta, Advocates for GNCTD.

Mr. Rahul Mehra, Senior Advocate alongwith Mr. Gautam Narayan, ASC with Mr. Chaitanya Gosain and Ms. Asmita Singh, Advocates for GNCTD.

\+ **W.P.(C) 3415/2016 and C.M. Nos. 14606/2016 & 26854/2017**

GANDHI TOBACCO PRODUCTS ..... Petitioner

Through: Mr. Pavan Narang Mr. Shiven Khurana and Ms. Aishwarya, Advocates

versus

COMMISSIONER (FOOD SAFETY)
GOVERNMENT OF NCT, DELHI ..... Respondent

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Through: Mr. Chetan Sharma, ASG with Mr. Rakesh Kumar and Mr. Sunil, Advocates for UOI.
Mr. Rahul Mehra, Senior Advocate alongwith Mr. Gautam Narayan, ASC with Mr. Chaitanya Gosain and Ms. Asmita Singh, Advocates for GNCTD.

\+ **W.P.(C) 3778/2016 and C.M. Nos. 16090-091/2016**

GOLDEN TOBACCO MANUFACTURING CO PRIVATE LTD ..... Petitioner

Through: Mr. C.S. Vaidyanathan, Dr. Abhishek Manu Singhvi and Mr. Vivek Kohli, Senior Advocates alongwith Mr. Nalin Talwar, Mr. Sunil Tyagi, Mr. Manoj Gupta, Ms. Yeshi Rinchhen, Mr. Akash Yadav, Mr. Kustubh Singh and Mr. Juvas Rawal, Advocates.

versus

COMMISSIONER (FOOD SAFETY) GOVERNMENT OF NCT OF DELHI ..... Respondent

Through: Mr. Chetan Sharma, ASG with Mr. Rakesh Kumar and Mr. Sunil, Advocates for UOI.
Mr. Anil Soni, CGSC and Mr. Devesh Dubey, Advocate for UOI
Mr. Aditya Singla and Ms. A. Sahitya Veena, Advocates for FSSAI.
Mr. Anil Soni, CGSC.
Mr. Rahul Mehra, Senior Advocate alongwith Mr. Gautam Narayan,

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ASC with Mr. Chaitanya Gosain and Ms. Asmita Singh, Advocates for GNCTD.

\+ **W.P.(C) 3780/2016 and C.M. Nos. 16094-095/2016**

JAISWAL PRODUCTS ..... Petitioner

Through: Mr. C.S. Vaidyanathan, Dr. Abhishek Manu Singhvi and Mr. Vivek Kohli, Senior Advocates alongwith Mr. Nalin Talwar, Mr. Sunil Tyagi, Mr. Manoj Gupta, Ms. Yeshi Rinchhen, Mr. Akash Yadav, Mr. Kustubh Singh and Mr. Juvas Rawal, Advocates.

versus

COMMISSIONER (FOOD SAFETY)
GOVERNMENT OF NCT OF DELHI ..... Respondent

Through: Mr. Chetan Sharma, ASG with Mr. Rakesh Kumar and Mr. Sunil, Advocates for UOI.
Mr. Anil Soni, CGSC and Mr. Devesh Dubey, Advocate for UOI
Mr. Rahul Mehra, Senior Advocate alongwith Mr. Gautam Narayan, ASC with Mr. Chaitanya Gosain and Ms. Asmita Singh, Advocates for GNCTD.

\+ **W.P.(C) 4813/2016 and C.M. No. 20087/2016**

PURUSHOTTAM KUMAR ARYA ..... Petitioner

Through: Mr. Avinash Kumar Trivedi, Advocate.

versus

THE COMMISSIONER (FOOD SAFETY) ..... Respondent

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Through: Mr. Rahul Mehra, Senior Advocate alongwith Mr. Gautam Narayan, ASC with Mr. Chaitanya Gosain and Ms. Asmita Singh, Advocates for GNCTD.

\+ **W.P.(C) 4937/2016 and C.M. No. 20544/2016**

M/S SHIVAM BETELNUT PRIVATE LIMITED .....Petitioner

Through: Mr. C.S. Vaidyanathan, Dr. Abhishek Manu Singhvi and Mr. Vivek Kohli, Senior Advocates alongwith Mr. Nalin Talwar, Mr. Sunil Tyagi, Mr. Manoj Gupta, Ms. Yeshi Rinchhen, Mr. Akash Yadav, Mr. Kustubh Singh and Mr. Juvas Rawal, Advocates.

versus

COMMISSIONER (FOOD SAFETY)
GOVERNMENT OF NCT OF DELHI AND ANR .....Respondents

Through: Mr. Chetan Sharma, ASG with Mr. Rakesh Kumar and Mr. Sunil, Advocates for UOI.

Mr. Harish Kumar Garg and Ms. Falguni Rai, Advocates for R-2

Mr. Rahul Mehra, Senior Advocate alongwith Mr. Gautam Narayan, ASC with Mr. Chaitanya Gosain and Ms. Asmita Singh, Advocates for GNCTD.

\+ **W.P.(C) 4978/2016 and C.M. No. 20764/2016**

M/S S.N. AGRIFOODS PRIVATE LIMITED ..... Petitioner

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Through: Mr. C.S. Vaidyanathan, Dr. Abhishek Manu Singhvi and Mr. Vivek Kohli, Senior Advocates alongwith Mr. Nalin Talwar, Mr. Sunil Tyagi, Mr. Manoj Gupta, Ms. Yeshi Rinchhen, Mr. Akash Yadav, Mr. Kustubh Singh and Mr. Juvas Rawal, Advocates.

versus

COMMISSIONER (FOOD SAFETY)
GOVERNMENT OF NCT OF DELHI AND ANR .....Respondents

Through: Mr. Harish Kumar Garg and Ms. Falguni Rai, Advocates for R-2

Mr. Rahul Mehra, Senior Advocate alongwith Mr. Gautam Narayan, ASC with Mr. Chaitanya Gosain and Ms. Asmita Singh, Advocates for GNCTD.

\+ **W.P.(C) 4979/2016 and C.M. No. 20766/2016**

ASHOK & COMPANY PAN BAHAR LIMITED ..... Petitioner

Through: Mr. C.S. Vaidyanathan, Dr. Abhishek Manu Singhvi and Mr. Vivek Kohli, Senior Advocates alongwith Mr. Nalin Talwar, Mr. Sunil Tyagi, Mr. Manoj Gupta, Ms. Yeshi Rinchhen, Mr. Akash Yadav, Mr. Kustubh Singh and Mr. Juvas Rawal, Advocates.

versus

COMMISSIONER (FOOD SAFETY)
GOVERNMENT OF NCT OF DELHI AND ANR .....Respondents

Through: Mr. Harish Kumar Garg and Ms. Falguni Rai, Advocates for R-2

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Mr. Rahul Mehra, Senior Advocate alongwith Mr. Gautam Narayan, ASC with Mr. Chaitanya Gosain and Ms. Asmita Singh, Advocates for GNCTD.

\+ **W.P.(C) 5438/2016 and C.M. Nos. 22628-629/2016**

VISHNU TOBACCO PRODUCTS ..... Petitioner

Through: Mr. C.S. Vaidyanathan, Dr. Abhishek Manu Singhvi and Mr. Vivek Kohli, Senior Advocates alongwith Mr. Nalin Talwar, Mr. Sunil Tyagi, Mr. Manoj Gupta, Ms. Yeshi Rinchhen, Mr. Akash Yadav, Mr. Kustubh Singh and Mr. Juvas Rawal, Advocates.

versus

COMMISSIONER (FOOD SAFETY), GOVT. OF NCT OF DELHI & ANR .....Respondents

Through: Mr. Ripu Daman Bhardwaj, Advocate for UOI.

Mr. Rahul Mehra, Senior Advocate alongwith Mr. Gautam Narayan, ASC with Mr. Chaitanya Gosain and Ms. Asmita Singh, Advocates for GNCTD.

\+ **W.P.(C) 5487/2016 and C.M. Nos. 22851-852/2016**

SUDESH PARSHAD ARUN KUMAR ..... Petitioner

Through: Mr. C.S. Vaidyanathan, Dr. Abhishek Manu Singhvi and Mr. Vivek Kohli, Senior Advocates alongwith Mr. Nalin Talwar, Mr. Sunil Tyagi, Mr. Manoj Gupta, Ms.

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Yeshi Rinchhen, Mr. Akash Yadav, Mr. Kustubh Singh and Mr. Juvas Rawal, Advocates.

versus

COMMISSIONER (FOOD SAFETY),
GOVT. OF NCT OF DELHI & ANR .....Respondents

Through: Mr. Vikram Jetly and Ms. Shreya Jetly, Advocates for respondent No.2.
Mr. Rahul Mehra, Senior Advocate alongwith Mr. Gautam Narayan, ASC with Mr. Chaitanya Gosain and Ms. Asmita Singh, Advocates for GNCTD.
Mr. Bhagvan Swarup Shukla, Mr. Kamal Deep, Advocates for UOI.

\+ **W.P.(C) 5488/2016 and C.M. Nos. 22853-854/2016**

M/S SATYAPAL SHIVKUMAR ..... Petitioner

Through: Mr. C.S. Vaidyanathan, Dr. Abhishek Manu Singhvi and Mr. Vivek Kohli, Senior Advocates alongwith Mr. Nalin Talwar, Mr. Sunil Tyagi, Mr. Manoj Gupta, Ms. Yeshi Rinchhen, Mr. Akash Yadav, Mr. Kustubh Singh and Mr. Juvas Rawal, Advocates.

versus

COMMISSIONER (FOOD SAFETY),
GOVERNMENT OF NCT OF DELHI & ANR .....Respondents

Through: Mr. Vikram Jetly and Ms. Shreya Jetly, Advocates for respondent No.2.

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Mr. Rahul Mehra, Senior Advocate alongwith Mr. Gautam Narayan, ASC with Mr. Chaitanya Gosain and Ms. Asmita Singh, Advocates for GNCTD.

\+ **W.P.(C) 5538/2016 and C.M. No. 23111/2016**

M/S SHAMBHU KHAINI PVT LTD ..... Petitioner

Through: Mr. C.S. Vaidyanathan, Dr. Abhishek Manu Singhvi and Mr. Vivek Kohli, Senior Advocates alongwith Mr. Nalin Talwar, Mr. Sunil Tyagi, Mr. Manoj Gupta, Ms. Yeshi Rinchhen, Mr. Akash Yadav, Mr. Kustubh Singh and Mr. Juvas Rawal, Advocates.

versus

COMMISSIONER (FOOD SAFETY)
GOVT OF NCT OF DELHI & ANR .....Respondents

Through: Mr. Rahul Mehra, Senior Advocate alongwith Mr. Gautam Narayan, ASC with Mr. Chaitanya Gosain and Ms. Asmita Singh, Advocates for GNCTD.

\+ **W.P.(C) 5539/2016 and C.M. No. 23113/2016**

M/S PRABHAT ZARDA FACTORY
(INDIA) PVT. LTD. ..... Petitioner

Through: Mr. C.S. Vaidyanathan, Dr. Abhishek Manu Singhvi and Mr. Vivek Kohli, Senior Advocates alongwith Mr. Nalin Talwar, Mr. Sunil Tyagi, Mr. Manoj Gupta, Ms. Yeshi Rinchhen, Mr. Akash Yadav,

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Mr. Kustubh Singh and Mr. Juvas Rawal, Advocates.

versus

COMMISSIONER (FOOD SAFETY),
DEPARTMENT OF FOOD SAFETY,
GOVT. OF NCT OF DELHI & ANR .....Respondents

Through: Mr. Vikram Jetly and Ms. Shreya Jetly, Advocates for respondent No.2.

Mr. Rahul Mehra, Senior Advocate alongwith Mr. Gautam Narayan, ASC with Mr. Chaitanya Gosain and Ms. Asmita Singh, Advocates for GNCTD.

\+ **W.P.(C) 5540/2016 and C.M. No. 23115/2016**

M/S RAJAT INDUSTRIES PRIVATE LIMITED ..... Petitioner

Through: Mr. C.S. Vaidyanathan, Dr. Abhishek Manu Singhvi and Mr. Vivek Kohli, Senior Advocates alongwith Mr. Nalin Talwar, Mr. Sunil Tyagi, Mr. Manoj Gupta, Ms. Yeshi Rinchhen, Mr. Akash Yadav, Mr. Kustubh Singh and Mr. Juvas Rawal, Advocates.

versus

COMMISSIONER (FOOD SAFETY),
GOVT. OF NCT OF DELHI & ANR .....Respondents

Through: Mr. Rahul Mehra, Senior Advocate alongwith Mr. Gautam Narayan, ASC with Mr. Chaitanya Gosain and Ms. Asmita Singh, Advocates for GNCTD.

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+ **W.P.(C) 5546/2016 and C.M. No. 23127/2016**

MAHALAXMIDEVI FLAVOURS
PRIVATE LIMITED ..... Petitioner

Through: Mr. C.S. Vaidyanathan, Dr. Abhishek Manu Singhvi and Mr. Vivek Kohli, Senior Advocates alongwith Mr. Nalin Talwar, Mr. Sunil Tyagi, Mr. Manoj Gupta, Ms. Yeshi Rinchhen, Mr. Akash Yadav, Mr. Kustubh Singh and Mr. Juvas Rawal, Advocates.

versus

COMMISSIONER (FOOD SAFETY),
GOVT. OF NCT OF DELHI & ANR .....Respondents

Through: Mr. Bhagvan Swarup Shukla, CGSC with Mr. Sarvan Kumar, Advocate.
Mr. Rahul Mehra, Senior Advocate alongwith Mr. Gautam Narayan, ASC with Mr. Chaitanya Gosain and Ms. Asmita Singh, Advocates for GNCTD.

+ **W.P.(C) 5548/2016 and C.M. No. 23131/2016**

SOM PAN PRODUCTS PVT. LTD. ..... Petitioner

Through: Mr. C.S. Vaidyanathan, Dr. Abhishek Manu Singhvi and Mr. Vivek Kohli, Senior Advocates alongwith Mr. Nalin Talwar, Mr. Sunil Tyagi, Mr. Manoj Gupta, Ms. Yeshi Rinchhen, Mr. Akash Yadav, Mr. Kustubh Singh and Mr. Juvas Rawal, Advocates.

versus

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COMMISSIONER (FOOD SAFETY),
GOVT. OF NCT OF DELHI & ANR .....Respondents

Through: Mr. Rahul Mehra, Senior Advocate alongwith Mr. Gautam Narayan, ASC with Mr. Chaitanya Gosain and Ms. Asmita Singh, Advocates for GNCTD.

\+ **W.P.(C) 5553/2016 and C.M. No. 23141/2016**

MURARI LAL HARISH CHANDRA
JAISWAL PVT. LTD. ..... Petitioner

Through: Mr. C.S. Vaidyanathan, Dr. Abhishek Manu Singhvi and Mr. Vivek Kohli, Senior Advocates alongwith Mr. Nalin Talwar, Mr. Sunil Tyagi, Mr. Manoj Gupta, Ms. Yeshi Rinchhen, Mr. Akash Yadav, Mr. Kustubh Singh and Mr. Juvas Rawal, Advocates.

versus

COMMISSIONER (FOOD SAFETY)
GOVT. OF NCT OF DELHI & ANR .....Respondents

Through: Mr. Bhagvan Swarup Shukla, CGSC with Mr. Sarvan Kumar, Advocate.

Mr. Rahul Mehra, Senior Advocate alongwith Mr. Gautam Narayan, ASC with Mr. Chaitanya Gosain and Ms. Asmita Singh, Advocates for GNCTD.

\+ **W.P.(C) 8313/2016 and C.M. No. 34454/2016**

M/S MNS PERFUMES ..... Petitioner

Through: Mr. Avinash Kumar Trivedi, Advocate

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versus

THE COMMISSIONER (FOOD SAFETY) ..... Respondent

Through: Mr. Bhagvan Swarup Shukla and Mr.Sarvan Kumar, Advocates for UOI.

Mr. Rahul Mehra, Senior Advocate alongwith Mr. Gautam Narayan, Mr. Chaitanya Gosain, Ms. Asmita Singh and Mr. Amanpreet Singh, Advocates for GNCTD.

\+ **W.P.(C) 10742/2016 and C.M. Nos. 42021-022/2016**

FOCUS TOWNSHIPS PRIVATE LIMITED ..... Petitioner

Through: Mr. C.S. Vaidyanathan, Dr. Abhishek Manu Singhvi and Mr. Vivek Kohli, Senior Advocates alongwith Mr. Nalin Talwar, Mr. Sunil Tyagi, Mr. Manoj Gupta, Ms. Yeshi Rinchhen, Mr. Akash Yadav, Mr. Kustubh Singh and Mr. Juvas Rawal, Advocates.

versus

COMMISSIONER (FOOD SAFETY), GOVT. OF NCT OF DELHI & ANR ..... Respondents

Through: Mr. Rahul Mehra, Senior Advocate alongwith Mr. Gautam Narayan, ASC with Mr. Chaitanya Gosain and Ms. Asmita Singh, Advocates for GNCTD.

\+ **W.P.(C) 3674/2015 and C.M. No. 6551/2015**

M/S LOKNATH PRASAD GUPTA & ANR ..... Petitioners

Through: Mr. C.S. Vaidyanathan, Dr. Abhishek Manu Singhvi and Mr.

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Vivek Kohli, Senior Advocates alongwith Mr. Nalin Talwar, Mr. Sunil Tyagi, Mr. Manoj Gupta, Ms. Yeshi Rinchhen, Mr. Akash Yadav, Mr. Kustubh Singh and Mr. Juvas Rawal, Advocates.

versus

COMMISSIONER (FOOD SAFETY),
GOVT. OF NCT OF DELHI ..... Respondent

Through: Mr. Chetan Sharma, ASG with Mr. Rakesh Kumar and Mr. Sunil, Advocates for UOI.
Mr. Aditya Singla and Ms. A. Sahitya Veena, Advocates for FSSAI.
Mr. Rahul Mehra, Senior Advocate alongwith Mr. Gautam Narayan, ASC with Mr. Chaitanya Gosain and Ms. Asmita Singh, Advocates for GNCTD.

\+ **W.P.(C) 3724/2015 and C.M. No. 6634/2015**

S.K. TABACCO INDUSTRIES ..... Petitioner

Through: Mr. Pavan Narang Mr. Shiven Khurana and Ms. Aishwarya, Advocates

versus

COMMISSIONER (FOOD SAFETY),
GOVT. OF NCT OF DELHI ..... Respondent

Through: Mr. Rahul Mehra, Senior Advocate alongwith Mr. Gautam Narayan, ASC with Mr. Chaitanya Gosain and Ms. Asmita Singh, Advocates for GNCTD.

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\+ **W.P.(C) 4477/2015 and C.M. Nos. 8095/2015, 17858/2017, 19525/2018, 18728/2020 & 29610/2021**

DHARAMPAL SATYAPAL LIMITED & ORS ..... Petitioners

Through: Mr. Sanjai Kumar Pathak, Mr. Arvind Kumar Tripathi and Mrs. Shashi Pathak, Advocates.

versus

THE GOVERNMENT OF NCT OF DELHI ..... Respondent

Through: Mr. Bhagvan Swarup Shukla and Mr.Sarvan Kumar, Advocates for UOI.

Mr. Rahul Mehra, Senior Advocate alongwith Mr. Gautam Narayan, Mr. Chaitanya Gosain, Ms. Asmita Singh and Mr. Amanpreet Singh, Advocates for GNCTD.

CORAM:
HON'BLE MR. JUSTICE GAURANG KANTH

J U D G M E N T

GAURANG KANTH, J.

1. The present writ petitions under Article 226 of the Constitution of India raise a common question of law, arising in similar circumstances; hence, they are dealt with and disposed of by a common judgment.

2. The present batch of petitions challenge the legality and validity and seek quashing of the Notification bearing No. F.1(3)DO-I/2012/10503-10521 dated 25.03.2015 and subsequent Notifications dated 13.04.2016, 13.04.2017, 13.04.2018, 13.04.2019, 15.07.2020 and

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06.08.2021 ("**impugned Notifications**") issued by the Commissioner of Food Safety, Government of National Capital Territory of Delhi (**"NCT of Delhi"**) in view of Regulation 2.3.4 of the Food Safety and Standards (Prohibition and Restriction on Sales) Regulations, 2011 ("**Regulation 2.3.4**") in purported exercise of power under Section 30(2)(a) of Food Safety and Standards Act, 2006 ("**FSSA**") on the grounds of being arbitrary and *ultra vires* the FSSA and violative of the fundamental and other legal rights of the Petitioners.

3. The Impugned Notifications sought to prohibit the manufacture, storage, distribution or sale of Gutka, Pan Masala, flavoured/scented tobacco, *Kharra* and similar products in the interest of public health for a period of one year throughout the NCT of Delhi.

4. The Petitioners claim to be *inter alia* engaged in the business of lawful manufacture, trade, distribution and sale of scheduled tobacco products, more particularly chewing tobacco, both flavoured and scented for several decades. The Petitioners have obtained all requisite licenses and permissions under the relevant Statutes and Regulations from the concerned Statutory Authorities. Petitioners are duly registered under the Central Sales Tax Act and VAT, Central Excise etc.

5. In order to understand the ambit and meaning of both the legislations, i.e. Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 ("**COTPA**") and FSSA, it is significant to examine the said enactments in detail.

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LEGISLATIVE HISTORY

6. One of the main issues in the present writ petitions is the legality of imposition of such ban by issuance of a Notification or an order by an administrative body. However, to clearly understand the subject matter, the history of the enactments/legislations involved needs to be expounded.

7. In 1975, the Union made the first attempt to bring tobacco industry under its control through the Tobacco Board Act. Thereafter, the Cigarettes (Regulations of Production, Supply and Distribution) Act, 1975 ("**Cigarettes Act"**) was enacted with the aim and objective to levy certain restrictions in relation to trade and commerce in, and production, supply and distribution of, cigarettes and tobacco products.

8. In a paradigm shift through Notification bearing No. G.S.R. 852(E) dated 13.06.1986, labelling rule was inserted as Clause (zzz) to Rule 42 in the Prevention of Food Adulteration Rules, 1955. The said clause made it compulsory for every package of chewing tobacco to bear a warning. However, the same was omitted by Notification No. G.S.R. 431(E) dated 19.06.2009.

9. The Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Bill, 2001 was tabled in the Parliament with the intention to enact a comprehensive law on tobacco in public interest and in order to protect public health. The COTPA was enacted to give effect to the principles enshrined in Article 47 of the Constitution of India that the "*State shall endeavour to bring about prohibition of the consumption,*

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except for medicinal purpose of intoxicating drinks and of drugs which are injurious to health". Accordingly, COTPA repealed the Cigarettes Act. It received the assent of the President on 18.05.2003 and was published in the Gazette of India on 19.05.2003.

10. The origin of Statement of Objects and Reasons of the COTPA is from the Resolution passed by the 39th and 43rdAssembly of the World Health Organisation ("**WHO**") wherein the Member States were urged to ensure that non-smokers receive protection from involuntary exposure to tobacco smoke. Further, the WHO *inter alia* urged to promote abstention from the use of tobacco to protect children and young people from getting addicted, and to exhibit prominent health warnings. Furthermore, apart from reiteration of the Resolution of the 39th Assembly, the Resolution of 43rd Assembly of the WHO urged the Member States to consider including progressive financial measures aimed at discouraging the use of tobacco in their tobacco control strategic legislations.

11. The existence of plethora of laws in the food industry and their operations led to a lot of confusion for investors, manufacturers, traders and consumers. A need was felt for integration of all such laws. In 1998, the Prime Minister's Council on Trade and Industry appointed a Subject Group on Food and Agro Industries, which recommended for one comprehensive legislation on Food with a Food Regulatory Authority concerning both domestic and export markets. In 2004, the Joint Parliamentary Committee on Pesticide Residues underscored the need to converge all the present food laws and to have a single regulatory body.

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Further, in 2005, the Standing Committee of Parliament on Agriculture in its 12th Report expressed the need for an integrated food law.

12. After an in-depth study of international state of affairs, the then Member-Secretary of Law Commission of India suggested that all the Acts and orders pertaining to food be subsumed within the proposed integrated food law. Thereafter, the Group of Ministers constituted by the Government of India, after extensive deliberations approved the integrated food law with certain modifications. The integrated food law was named as 'The Food Safety and Standards Bill, 2005'.

13. The Food Safety and Standards Bill, 2005 was drafted by the Ministry of Food Processing Industry. When the Bill was tabled in Lok Sabha, the Members supporting the Bill stated that due to multiplicity of laws involving diverse authorities, the food-processing sector faced severe impediments. The FSSA was introduced to be a single statue relating to food providing for scientific development of food processing industry.

14. Therefore, the introduction of the Bill was drafted to "*consolidate the laws relating to food and to establish the Food Safety and Standards Authority of India for laying down science based standards for articles of food and to regulate their manufacture, storage, distribution, sale and import, to ensure availability of safe and wholesome food for human consumption and for matters connected therewith or incidental thereto*".

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15. The repealing of eight laws governing the food sector under Second Schedule to Section 97 of the FSSA was termed as one of the key features of the Bill. The said laws included:

1. The Prevention of Food Adulteration Act, 1954.
2. The Fruit Products Order, 1955.
3. The Meat Food Products Order, 1973.
4. The Vegetable Oil Products (Control) Order, 1947.
5. The Edible Oils Packaging (Regulation) Order, 1998.
6. The Solvent Extracted Oil, De oiled Meal, and Edible Flour (Control) Order, 1967.
7. The Milk and Milk Products Order, 1992.
8. Any other order issued under the Essential Commodities Act, 1955 relating to food.

16. Further, the FSSA set up the Food Safety and Standards Authority of India ("**FSSAI**") to ascertain the standards and regulate the manufacturing, import, processing, distribution and sale of food. The FSSA incorporated salient features of the Prevention of Food Adulteration Act, 1954 ("**PFA**") and other international laws including Codex Alimentarius Commission.

17. Section 2 of the FSSA makes a declaration to the effect that *'it is expedient in the public interest that the Union should take under its control the food industry'*.

18. Section 3 of the FSSA has exhaustive definitions with 48 entries. Section 2(j) of the FSSA defines food as under:

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> "*Food means any substance, whether processed, partially processed or unprocessed, which is intended for human consumption and includes primary food to the extent defined in clause (zk), genetically modified or engineered food or food containing such ingredients, infant food, packaged drinking water, alcoholic drink, chewing gum, and any substance, including water used into the food during its manufacture, preparation or treatment but does not include any animal feed, live animals unless they are prepared or processed for placing on the market for human consumption, plants, prior to harvesting, drugs and medicinal products, cosmetics, narcotic or psychotropic substances:*
> *Provided that the Central Government may declare, by notification in the Official Gazette, any other article as food for the purposes of this Act having regards to its use, nature, substance or quality.*"

From the inclusive definition of 'food' itself, it is evident that the Act intended to cover everything meant for human consumption.

19. Chapter-II of the FSSA consists of 14 Sections (Section 4 to 17) which deals with the establishment and functioning of FSSAI. Chapter-III & Chapter IV deals with general principles of food safety and general provisions as to the articles of food. Chapter-V (Section 25) makes its mandatory for all the imports to be governed by the FSSA. Chapter-VI (Section 26-28) deals with the special responsibilities of food business operator, manufacturer, packers, wholesale dealers, distributors and sellers and recalling procedure to be adopted in case of any omission in terms of safety norms.

20. Chapter-VII consists of 14 sections, which deals with how the legislature intended to enforce the Act. Power is delegated to the

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Executive to issue various orders in order to ensure the effective implementation of the FSSA. As per the FSSA, the Food Authority and the State Food Authorities are responsible for the implementation of the provisions thereof. Section 30 of the FSSA, reads, *inter alia*, as follows:

> "*Commissioner of Food Safety of the State.–(1) The State Government shall appoint the Commissioner of Food Safety for the State for efficient implementation of food safety and standards and other requirements laid down under this Act and the rules and regulations made thereunder.*
> *(2) The Commissioner of Food Safety shall perform all or any of the following functions, namely:–*
> *(a) prohibit in the interest of public health, the manufacture, storage, distribution or sale of any article of food, either in the whole of the State or any area or part thereof for such period, not exceeding one year, as may be specified in the order notified in this behalf in the Official Gazette;*
> *(b) carry out survey of the industrial units engaged in the manufacture or processing of food in the State to find out compliance by such units of the standards notified by the Food Authority for various articles of food;*
> *(c) conduct or organise training programmes for the personnel of the office of the Commissioner of Food Safety and, on a wider scale, for different segments of food chain for generating awareness on food safety;*
> *(d) ensure an efficient and uniform implementation of the standards and other requirements as specified and also ensure a high standard of objectivity, accountability, practicability, transparency and credibility;*
> *(e) sanction prosecution for offences punishable with imprisonment under this Act;*
> *(f) such other functions as the State Government may, in consultation with the Food Authority, prescribe.*
> *(3) The Commissioner of Food Safety may, by Order, delegate, subject to such conditions and restrictions as may be specified in the Order, such of his powers and functions*

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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."

21. Section 32 deals with the improvement notices. It sets out a detailed process to be followed in cases where the designated officer is of the opinion that a food business operator failed to comply with any regulation. This Chapter envisages two situations under which prohibition orders can be issued against the food operator:

(i) As per Section 33 of the FSSA, the Court, by and before which a food operator is convicted for an offence under the FSSA, is competent to issue a prohibition order against the said food operator.

(ii) According to Section 34 of the FSSA, if the designated officer is satisfied that health risk condition exists with respect to any food business, he may, after affording an opportunity of hearing to the food operator, apply to the Commissioner of Food Safety for issuance of prohibition order. The Commissioner of Food Safety is competent to issue prohibition order in this situation.

In both the aforementioned situations, the prohibition orders can be issued only after affording opportunity of hearing to the food operator.

22. Chapter-VIII (Section 43-47) deals with the object of the FSSA, i.e. scientific analysis of the food. Chapter-IX (Section 48-67) deals with the offences and penalty under the FSSA. It provides for an exhaustive adjudicatory mechanism as mentioned in Chapter-X of the FSSA. Finance aspect of the Food Authority is to be dealt with in accordance with

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Chapter XI of the FSSA. Chapter XII consists of 17 sections which deals with miscellaneous aspects. As per Section 89, FSSA has overriding effect on all other enactments.

23. It is important to note that FSSA envisages rules and regulations to be made by the Central Government, State Government and Food Authority. As per Section 91, Central Government is empowered to make rules under the FSSA with regard to the areas as mentioned therein. As per Section 94, the State Government is empowered to make rules with respect to the areas which are mentioned therein. As per Section 92, the Food Authority is empowered to make regulations with respect to the specific areas as mentioned therein. As per Section 93, all the rules and regulations made under the FSSA needs to be placed before both houses of the Parliament for at least 30 days.

24. Therefore, from the evaluation of the FSSA, it is evident that the intention of the legislature was to include everything capable of human consumption within the ambit of the FSSA. This is a complete Code relating to the food laws in India. The safety of the public was of paramount consideration and hence responsibilities were fixed at various levels to ensure proper implementation of these safety measures. The FSSA established the FSSAI for effective implementation of the said enactment. There are scientific Panels and scientific Committees under the FSSAI to fix the standards for food based on scientific methods.

25. Let us now evaluate the provisions of COTPA. Section 2 of the COTPA makes a declaration that *'it is expedient in the public interest that*

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the Union should take under its control the tobacco industry'. The preamble of the COTPA states as follows:

> "*An Act to prohibit 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.*"

26. The plain reading of the COTPA reveals that it has two stated objectives:

(i) To prohibit advertisement of cigarettes and other tobacco products; and

(ii) To regulate the trade and commerce as well as the production, supply and distribution thereof in cigarette and other tobacco products.

27. Section 3(p) of the COTPA defines '*tobacco products'* as the products specified in the Schedule. Ten products are mentioned in the Schedule, which are 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.

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28. Sections 4 to 6 deal with prohibitions under the COTPA. As per Section 4, no person shall smoke in any public place. Section 5 prohibits advertisement of cigarettes and other tobacco products. Section 6 states that no person shall sell, offer for sale or permit sale of cigarettes or any other tobacco products - (a) to any person who is under eighteen years of age, and (b) in an area within a radius of one hundred yards of any educational institution.

29. Sections 7 to 10 deal with the regulatory measures under the COTPA. Section 7 is regarding the restrictions in trade, commerce and production, supply and distribution of cigarettes and other tobacco products. Sections 8-10 deal with/prescribe the manner in which the prominent warning must be placed on the packaging.

30. Section 11 is regarding the testing laboratories for nicotine and tar contents. Sections 12 to 29 deal with the power of the Authorities to conduct search and seizure, offences & punishments under the COTPA, protection against the offences done under good faith and adjudication mechanism for these offences. Sections 30 and 31 talk about the power of the Central Government to make rules and also to make additions in the schedule. Section 32 has excluded the products which are to be exported from the ambit of the COTPA. Section 33 deals with repeal and savings.

31. From the overall assessment of the COTPA, it is discernible that this enactment is a comprehensive piece of legislation on all tobacco products as mentioned in the Schedule therein. The COTPA clearly prohibits three activities which are mentioned in Sections 4 to 6, i.e., smoking in any public place, advertisement of cigarettes and other

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tobacco products and sale of cigarettes or any other tobacco products: (a) to any person who is under eighteen years of age; and (b) in an area within a radius of one hundred yards of any educational institution. In addition to the aforesaid prohibitions, the COTPA intend to regulate the trade and commerce in cigarettes and other tobacco products including production, supply and distribution thereof.

32. From the analysis of the various provisions of COTPA, it is quite evident that the legislature never intended to prohibit tobacco or products containing tobacco through COTPA, rather it regulates the production, supply and distribution of these products.

SUBMISSIONS MADE ON BEHALF OF THE PETITIONERS

33. The submissions on behalf of the Petitioners were dealt under various aspects. **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 and commerce in, manufacture of, supply and distribution of Tobacco covered under the term 'Food Industry'".*

34. Mr. C. S. Vaidyanathan, learned senior counsel appearing on behalf of the Petitioners opened his arguments by submitting that the Impugned Notifications have been repromulgated sans any significant change. It was emphasized that the FSSA, from which the power to impose a ban flow, envisages such power to be exercised only for a period of one year from the date of publication of the Notification. However, from the issuance of the Impugned Notifications, the same can be seen to be happening in

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perpetuity. He further submitted that as per the Statement of Objects and Reasons of COTPA, 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*". On the other hand, the Statement of Objects and Reasons of the FSSA states that it is an Act to "*consolidate*" the laws relating to food, and to lay down "*science based standards for articles of food*".

35. He further submitted that, through comparative reading of Section 2 of the FSSA and Section 2 of the COTPA, it can be seen that the former concerns "food industry" whereas, the latter concerns "tobacco industry". Through Entry 52 of List I, the Parliament has assumed to itself the power to legislate upon tobacco and food industry. To give full and true meaning to the term "food industry", it would be necessary to ascribe meaning to the terms, "food" and "industry". Apart from Entry 52 of List I, the term 'industry' finds a mention in Entry 24 of List II and Entry 7 of List I of the Constitution. Thus, the term "Industry" in Entry 24 of List II and Entry 52 of List I would comprise of "production and manufacture" only and not an activity prior thereto or subsequent thereof. The said Entries read as follows:

> "***Entry 52 of List I***: *Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest*.
> ***Entry 24 of List II****: Industries subject to the provisions of [entries 7 and 52] of List I.*
> ***Entry 7 of List I****: Industries declared by Parliament by law to be necessary for the purpose of defence or for the prosecution of war*."

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36. Upon a declaration being made under Entry 52 of List I, the Union can only acquire what is available under Entry 24 of List II. However, Entry 24 of List II is a general entry in relation to industries whereas there may be specific entries relating to other entries. To elaborate, industries engaged in production and manufacture of intoxicating liquors is under Entry 8 of List II and hence, beyond the scope of Entry 52 of List I. Learned senior counsel argued that as per the rules of interpretation, 'special excludes the general', the industries engaged in specific activities would not be construed to fall within Entry 24 of List II but within their respective Entries.

37. Hence, the declaration by Parliament in terms of Entry 52 of List I would not transfer industries specified in other Entries of List II or List III to the exclusive domain of the Parliament. Learned senior counsel asserted on the reason why the framers of the Constitution gave special attention to some entries. The express intention of the Constitution which is apparent is to treat certain industries exclusively under the domain of the State subject. It cannot be said that Entry 52 of List I impinge upon, override, and governs other specific entries in the List. Thus, any encroachment by the Union on the specific entries is beyond legislative competence. To substantiate his submission, learned senior counsel relied upon ***ITC Limited v. Agriculture Produce Market Committee*** reported as ***(2002) 9 SCC 232***. Moreover, the degree and extent to which the Union may have control would be subject to the extent and scope of the enactment, the same was corroborated with ***Ishwari Khetan Sugar Mills v. State of U.P.*** reported as ***(1980) 4 SCC 136***.

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38. Learned senior counsel submitted that while taking into account the nature and scope of an Act, every word, which requires interpretation, a word shall be interpreted. Relying on ***Synthetics & Chemical Ltd. & Ors. v. State of U.P. & Ors.*** reported as ***(1990) 1 SCC 109***, it was submitted that it is well-settled that the Constitution must not be construed in a narrow sense and construction having widest possible meaning shall be adopted. Hence, terminologies shall be construed as understood by the framers of the Constitution. Therefore, products i.e., food must be understood as it is and not as what it is capable of being. It may be noted that the term "food" has neither been used nor been defined in any of the Entries in Schedule VII of the Constitution. Thus, the term "food" needs to be understood in the general sense of the word as understood in the common parlance by ordinary people.

39. The term 'food' in common parlance is a substance which possesses the quality to maintain life and its growth; it must have nutritive or nourishing value so as to enable the growth, repair or maintain the body. Relying upon the judgment of ***S. Samuel, M.D., Harrisons M v. Union of India*** reported as ***(2004) 1 SCC 256***, learned senior counsel submitted that when a definition of a term is not sought out, resort shall have to be had to the meaning of the term in common parlance. Further, as per Words and Phrases (Permanent Edition, Vol. 17, at p. 306) "food" is a nutritive material taken into the body for the purpose of growth, repair or maintenance.

40. Furthering the definition of food, he submitted that, as has also been held in ***Collector of Central Excise, Bombay & Anr. v. Parle***

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Exports (P) Ltd. reported as ***(1989) 1 SCC 345***, food is any substance that is taken in the body which serves, through organic action, to build-up normal structure or supply the waste of tissue and includes confectionary. Thus, a product that could neither be nutritive nor restitutive nor promotive would not constitute as 'food' because it is consumed. More so, when the said product is perceived as detrimental to health. Most importantly, it has been observed that tobacco is not foodstuff in ***ITC Limited*** (*supra*).

41. Learned senior counsel, while concluding his arguments, submitted that the declaration under Section 2 of FSSA purporting to take over the "food industry" cannot cover tobacco within its ambit as the same was already covered under the "tobacco industry" when the COTPA was enacted in 2003.

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

42. Mr. Vivek Kohli, learned senior counsel submitted on behalf of the Petitioners that the object of the COTPA is, "*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*". Explicitly, the aim of COTPA is to "prohibit" advertisement while "regulating" the trade & commerce, production, supply and distribution of cigarettes and tobacco products. The COTPA was enacted

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by the Parliament under Entry 52 of List I read with Entry 33 of List II to Schedule VII of the Constitution.

43. Thus, subject to a declaration as envisaged in Entry 52 of List I, the Parliament may take over an industry i.e., manufacturing and production, as submitted before, but not trade & commerce, supply & distribution activities. However, when 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 said Entry reads as follows:

> ***"Entry 33 of List III****:Trade and commerce in, and the production, supply and distribution of—*
> *(a) the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest, and imported goods of the same kind as such products*;"

44. It was further submitted that under the Constitutional framework, 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, as aforesaid, which enables the Parliament to legislate with respect to the aforesaid matters in relation to, among others, the tobacco industry. Thus, 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 *qua* enacting laws on the said subject matters. The said Entry read as:

> ***"Entry 26 of List II****:Trade and commerce within the State subject to the provisions of entry 33 of List III.*
> ***Entry 27 of List II****:Production, supply and distribution of goods subject to the provisions of entry 33 of List III*."

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45. Upon declaration in Section 2 of the COTPA, the scope of the control that the Parliament has taken over the tobacco industry would have to be evaluated based on the provisions of the COTPA itself. Hence, all the activity pertaining to tobacco products under Entry 33 of List III, were brought within the ambit of the COTPA. When 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 and denuded the States *qua* the Scheduled products.

46. That while enacting the COTPA, the Union acknowledged and admitted certain tobacco products under Section 3(p) of the COTPA over which it was going to exercise control. Learned senior counsel argued that as far as the "extent" or "scope" of the control taken over is concerned, the COTPA is a comprehensive, self-contained, seamless legislation regulating the whole field of tobacco and allied products. Sections 4, 5 and 6 provide for prohibition; Section 7 lays down restrictions; Sections 8, 9 and 10 regulates packaging of tobacco products. Thus, it is apparent that the COTPA does not envisage product prohibition.

47. In any view, the fact that COTPA occupies the entire field relating to tobacco products cannot be disputed. Hence, the source of all actions *qua* regulation/prohibition of any form of tobacco shall be governed by the COTPA. Admittedly, the Impugned Notifications have been issued under the FSSA; and since the FSSA transgresses into an "occupied field", such an action would be *ultra vires* and illegal. To substantiate his submission, learned senior counsel relied on the judgment of the Constitution Bench of the Supreme Court in ***Union of India v.***

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Elphinstone Spinning and Weaving Co. Ltd. & Ors. reported as ***(2001) 4 SCC 139*** which held that where the language of an Act is clear, the Preamble must be disregarded though, where the object or meaning of an enactment is not clear, the Preamble may be resorted to explain it.

> **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*".

48. Learned senior counsel submitted that a general law does not abrogate an earlier special one by mere implication- *generalia specialibus non derogant*. He argued that where there are general words in the later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by an earlier legislation, it would be inadmissible to hold any earlier and special legislation indirectly repealed, altered or derogated from merely by force of such general words, without any indication of a particular intention to do so.

49. While referring to Section 97 of the FSSA that deals with the repeal and savings clause, learned senior counsel submitted that the FSSA specifically repeals certain Central Acts, as specified in the Second Schedule of the FSSA. However, Schedule 2 does not repeal COTPA thereby making it clear that the legislature by passing the FSSA did not intend for the FSSA to encroach upon the domain of COTPA, which specifically deals with scheduled tobacco products. The COTPA has not been repealed either expressly or by implication.

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50. By placing reliance on ***Kishorebhai Khamanchand Goyal v. State of Gujarat*** reported as ***(2003) 12 SCC 274***, it was further submitted that there is a presumption against repeal by implication and the reason of this rule is based on the theory that the legislature, while enacting a law, has complete knowledge of the existing laws on the same subject-matter, and therefore, when it does not provide a repealing provision, the intention is clear not to repeal the existing legislation. Further, he submitted that, when the new Act contains a repealing section mentioning the Acts which it expressly repeals, the presumption against implied repeal of other laws is further strengthened on the principle of *expressio unius est exclusio alterius*.

51. He submitted that the continuance of an existing legislation in the absence of an express provision of repeal being presumed, the burden to show that there has been repeal by implication lies on the party asserting the same. The presumption is, however, rebutted and 'repeal' is inferred by necessary implication when the provisions of the later Act are so inconsistent with or repugnant to the provisions of the earlier Act that the two cannot stand together. But, if the two can be read together and some application can be made of the words in the earlier Act, 'repeal' will not be inferred.

52. Learned senior counsel, while concluding his arguments *qua* the present aspect submitted that, the non-obstante clause of Section 89 of the FSSA, which allegedly has an overriding effect over the COTPA deals with "other food related laws". The COTPA is a legislation governing tobacco products and does not cover or address "food" at all. Moreover,

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while several laws were repealed by the FSSA through Section 97, the COTPA was left untouched. Furthermore, both the COTPA and the FSSA, together have been in operation since the enactment of the FSSA. Therefore, it is apparent that there is an explicit expression of Legislature that both the Acts continue to operate in their respective fields.

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

53. Dr. Abhishek Manu Singhvi, learned senior counsel appearing on behalf of the Petitioners submitted that when the legislature intends to occupy a field by a special law, it does so completely. The COTPA is dealing with tobacco, exclusively, entirely, comprehensively and in all its nuances and shades. It cannot be denied that it is not special Act *qua* tobacco. The FSSA and its earlier version, no doubt deals with issues which will overlap but it is clearly not something dealing with a special category of tobacco. Therefore, merely because a previous act of adulteration was reincarnated with improvements in the FSSA, will not allow it to triumph, override the COTPA unless in its legislative wisdom the draftsman used the technique of non-obstante.

54. While determining whether a statue is special or general, focus must be on the principal subject matter and the particular perspective. For certain purposes, an Act may be general and for certain purposes, it may be special. By placing reliance on ***Life Insurance Corporation of India v. D.J. Bahadur & Ors.*** reported as ***(1981) 1 SCC 315***, Learned senior counsel argued that what is special or general is wholly a creature of the subject and context and may vary with situation, circumstances and angle

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of vision. Law is no abstraction but realizes itself in the living setting of actualities.

55. Through the case of ***Godawat Pan Masala Products Pvt. Ltd. v. Union of India & Ors.*** reported as ***(2004) 7 SCC 68***, learned senior counsel drew the attention of this Court to the concluding paragraph of the judgment wherein it was held that the COTPA is a special Act which intended to deal with tobacco and tobacco products, while the PFA is a general enactment. The COTPA, being a special Act and of later origin, 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.

56. Hence, when a comprehensive legislation clearly defines the subject matter of the law, the extent of the regulation, offences and penalties, the adjudicatory process to be followed and delegation of rule-making power, the later general law will not repeal the earlier law.

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

57. Learned senior counsel for the Petitioners submitted that the Parliament enacted the FSSA in terms of Entry 52 of List I of Schedule VII of the Constitution of India. Section 2 of FSSA carries a declaration mandated under Entry 52 of List I of Schedule VII. He further submitted that what flows downwards from the Constitution is actually the footprint that is available to the legislature; of that footprint, what the legislature chooses to cover is in terms of the Act. The legislature may cover the entire footprint or part of the footprint but they cannot go beyond that, as it

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would be beyond their competence. Learned senior counsel adduced his submission through ***State of A.P. v. McDowell & Co.*** reported as ***(1996) 3 SCC 709*** and submitted that the ambit and scope of a constitutional entry cannot be determined with reference to a Parliamentary enactment. For instance, the definition of 'factory' in clause (c) of Section 3 of the Industries (Development and Regulation) Act, 1951 may be changed tomorrow. However, the meaning and scope of Entry 8 of List II is not subject to provisions of an Act.

58. The definition of 'food' under Section 3(1)(j) of the FSSA comprises of both "means" and "includes". The principle of statutory interpretation says that, where the word defined is declared to 'include', the definition is *prima facie* extensive. Further, when the word 'include' is substituted by the word 'means', it was held to be more extensive. Therefore, the said provision is exhaustive in nature and the definition shall embrace only what is contained within the ordinary meaning of the 'means' part together with what is mentioned in the 'includes' part of the definition. To substantiate his submission, learned senior counsel placed reliance on ***Black Diamond Beverages & Anr. v. Commercial Tax Officer*** reported as ***(1998) 1 SCC 458*** and submitted that the inclusive part of the definition cannot prevent the main provision from enduring its natural meaning.

59. In ***P. Kasilingam v. P.S.G. College of Technology*** reported as ***1995 Supp (2) SCC 348***, it was observed that the use of word 'means' indicates that "*definition is a hard-and-fast definition, and no other meaning can be assigned to the expression than is put down in definition*". The word

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'includes' when used, enlarges the meaning of the expression defined so as to comprehend not only such things as they signify according to their natural import but also those things which the clause declares that they shall include. The words "means and includes", on the other hand, indicate "*an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions*".

60. Reference was also made to ***Mahalakshmi Oil Mills v. State of A.P.*** reported as ***(1989) 1 SCC 164*** for the definition of tobacco under Central Excises and Salt Act, 1994; wherein it was held that tobacco means any form of tobacco, whether manufactured or not, and includes the leaf, stalks and stems of the tobacco plant. The Hon'ble Supreme Court held that the definition is exhaustive and tobacco seeds, which are not mentioned in the inclusive part, do not fall within the purview of the definition. Thus, so far as tobacco products are concerned, they have been defined under Section 3(p) of the COTPA, and merely because the definition of food is very expansive in the FSSA, doesn't mean the competence will flow. Therefore, the fundamental definition of "food" cannot be expanded to include chewing tobacco.

> **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*".

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61. Learned senior counsel on behalf of the Petitioners asserted that 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 and to regulate their manufacture, storage, distribution, sale and import to ensure availability of sale and wholesome food for human consumption. The bare reading of the Statement of Objects and Reasons and the Preamble of the FSSA would reveal that the purpose of the Act is to provide safe wholesome and unadulterated food to consumers.

62. The FSSA would seem to derive its legitimacy by reference to (i) Entry 52 of List I read with Entry 33 of List III, in so far as the industry it seeks to regulate; (ii) Entry 51 of List I, in so far as it seeks to establish standards of quality for goods; and (iii) Entry 18 of List III, in so far as it seeks to address the issue of adulteration. The scope of the exercise of competence under Entry 51 of List I and Entry 18 of List III would be limited to the scope of the competence acquired in terms of Entry 52 of List I. The power to establish standards of quality for goods would not include within its purview the power to "prohibit" the "manufacture, sale, storage and distribution" of any goods.

63. Learned senior counsel drew the attention of this Court to the judgment in the case of ***Himat Lal K. Shah v. Commissioner of Police*** reported as ***(1973) 1 SCC 227*** and submitted 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. Further, he submitted that a mere perusal of the FSSA, would indicate that it focuses only upon powers of regulating and banning. In the distribution of

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powers under the FSSA, it can be noticed that (a) The Central Government has, while retaining essential legislative policy matters to itself, concerned itself with the process of setting up an independent infrastructure that would facilitate implementation of the provisions of the Act; (b) The State Government, while being granted very limited Rule making powers, has been mandated to appoint the Commissioner of Food Safety of the State, who in turn has been authorized to appoint the Designated Officers and Food Safety Officers. Thus, while essential legislative policy powers have been denied to the State, the implementation of the Act within the State is the responsibility of the State Government; and (c) FSSAI, which was to be established by the Central Government, has been mandated to oversee the implementation of the various provisions of the Act.

64. He further emphasized on the fact that in the entire scheme of the Act, neither the Central Government nor the State Government nor the Food Authority has been conferred with any power to prohibit or ban any "food article". There is no *pari materia* clause to Section 23(1A)(f) of the PFA. Section 22 where the embargo is absolute, the Legislature in its wisdom has conferred that power to the Central Government and the Food Authority has no powers to make any Regulations relating thereto. The power to prohibit would fall with the essential Legislative Policy domain and hence, it is not possible to delegate such power.

65. The Foods Safety and Standards (Prohibition and Restrictions on Sales) Regulations, 2011 **("Regulations, 2011")** were initially issued in exercise of powers under Section 92(2)(l) read with Section 26 of the FSSA. Section 92(2)(l) does not in any manner, even remotely, refer to

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any power to prohibit. However, with effect from 08.02.2013, the Preamble was amended to reflect the exercise in terms of Section 92 and sub-section (2)(l) were dropped. It may be noted, as mentioned earlier, that in the entirety of Section 92, the Food Authority has been conferred with no powers to prohibit.

66. Furthermore, even the perusal of Regulation 2.3.4 would demonstrate that there is no intention to prohibit. The only restriction placed is that tobacco or nicotine should not be used as ingredients in any food product. Thus, the "ingredient" is obviously visualized as separate and distinct from the "food product". Where the Food Authority has desired to prohibit, it has specifically stated so. It is no one's contention that any foreign substance is being added to adulterate any food product; neither the product is adulterated nor anything is surreptitiously being added to tobacco products.

67. Referring to Section 30(3) of the FSSA, learned senior counsel submitted that the power to prohibit impinges on Article 19(1)(g) of the Constitution as the Parliament has not delegated the power to ban to either the Central Government, State Government or the Food Authority. The Food Commissioner under Section 30(2)(a) of the FSSA is artificially exercising the power.

> **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*".

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68. Learned senior counsel Mr. Vivek Kohli avowed that *arguendo*, assuming without conceding that the food industry would cover tobacco and the definition of 'food' includes 'tobacco'. The Court had to opine that in the interest of public health, the Respondent had the power to ban/prohibit a particular item. He argued that even if we assume that the Respondent had the power to ban/prohibit a particular item, the process/procedure which has to be followed before such ban/prohibition is effectuated, is mandatory. The FSSA was enacted *inter alia* for having one comprehensive legislation on food instead of the multitude of Food Laws; migrating from a multi-level and multi departmental control to an integrated line of command; to call for a single reference point i.e., FSSAI; to lay science-based standards for articles of food with the assistance and guidance; to shift from a merely regulatory regime to self-compliance regime. Before any Regulations are made or notified by the Food Authority under the FSSA, a detailed procedure has to be mandatorily followed as prescribed under the Act.

69. The FSSA establishes the entire infrastructure for: (i) the identification of areas that require a regulatory framework; (ii) the identification of risks; (iii) the specialist bodies (Scientific Panels, Scientific Committees and the Central Advisory Committee) that consider and analyze the risk; (iv) interact with all stake holders in the value chain; (v) then recommend the best response; and (vi) assist the Food Authority in the framing of Regulations.

70. Further, it was submitted that Section 18 of the FSSA lays down the general principles that have to be mandatorily followed in

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administration of the Act. No prevention can be exercised until alternative policies are evaluated; interested parties are consulted *qua* consideration of risk assessment; interested parties are consulted *qua* factors relevant for protection of health; selecting appropriate prevention/control options, if needed. Thus, it is apparent that for any action with respect to food products there has to be exchange of information and opinions between the risk managers, consumers and other interested parties after proper risk assessment, risk analysis and risk management.

71. The use of the word "shall" in the beginning of Section 18 of the FSSA would clearly and unequivocally demonstrate the mandatory nature of the procedure to be followed. It was therefore, submitted that the Impugned Notifications clearly failed to follow the mandatory procedure prescribed under the Act and thus, are bad in law.

72. Learned senior counsel relied on ***Lakshmanasami Gounder v. C.I.T., Selvamani & Ors.*** reported as ***(1992) 1 SCC 91*** and submitted that where the consequences are harsh, with respect to deprivation of property, the Court has interpreted in a way that it shall be mandatory. In the present case, where we are dealing with a ban/prohibition, the word "shall" in Section 18 would be mandatory. Thus, not conceding with the procedure laid down and disregarding it completely is fatal.

> **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*".

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73. Learned senior counsel submitted that under the PFA, the power to prohibit any substance was within the exclusive domain of the Central Government. In terms of Section 7(iv) of the PFA, the Health Safety Authority could prohibit any product for limited reasons and for a limited period of time. In ***Godawat Pan Masala*** *(supra)*, the Hon'ble Supreme Court held that Section 7(iv) of PFA was not an independent source of power vested in the Heath Officer but was merely an enabling provision to implement what has already been prohibited by the Central Government in exercise of its powers under Section 23(1A)(f) of the PFA; the power to prohibit vested exclusively with the Central Government and was not, and indeed could not, be delegated as it was an essential Legislative Policy issue.The use of the term "for the time being" in Section 7(iv) of the PFA would indicate the temporary nature of the power and hence, no permanence could be attached to the exercise of such power by the Health Officer.

74. When in 2006, the FSSA was enacted; the PFA was repealed by Section 97 of the FSSA. A closer inspection would reveal that Section 7 of the PFA was bifurcated into Section 26 and Section 30 of the FSSA. The Legislative intent was expressly clarified in terms of Section 26(2)(iv) of the FSSA, wherein it is categorically reflective that the power to prohibit, being an element of essential Legislative policy, vested only with the (i) Central Government; or (ii) the State Government; or (iii) the Food Authority, with the prior approval of the Central Government. Thus, the power to prohibit did not vest in the Food Commissioner at all. The regime had moved from implementation and monitoring to self-regulation. Further, under Section 30(2)(a) of the FSSA, while conferring

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a power to prohibit upon the Food Commissioner, the said power was specifically limited and subjected to three dimensions: (i) product - being an article of food; (ii) geographical area - being the whole state or any area or part thereof; and (iii) time - upto a maximum period of one year. The overarching pre-requisite for any exercise of power under this Section would be that it is "in the interest of public health". Thus, the temporary nature of the power was clearly stated to make explicit the legislative intent.

75. From ***Godawat Pan Masala*** (*supra*), it was further elucidated that power of the State Health Authority is a limited power to be exercised locally for a temporary duration. The decision for banning an article of food or an article containing any ingredient of food injurious to health can only arise as a result of broadly considered policy. If such a power be conceded in favour of a local authority i.e., the Food (Health) Authority, paradoxical results would arise. The same article could be considered injurious to public health in one local area, but not so in another and hence inconsistent.

76. While concluding, the learned senior counsel referred to Section 30 of the FSSA, which deals with the functions of the Commissioner of Food Safety of the State and submitted that the perusal of the section suggests that the power granted under a statute to be exercised under specific conditions, cannot travel the boundaries which have been set up. If the power cannot be exceeded territorially, it shall not exceed on the basis of the time period as well. The Commissioner of Food Safety, by exercise of the power conferred under Section 30(2)(a) of the FSSA, seeks to

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arrogate unto itself policy making powers that have consciously and deliberately not been conferred on it. This is impermissible in law and against the very grain of a temporary power.

> **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*".

77. Learned senior counsel asserted that the entire premise on which this Notification has been issued is "public health". However, if noble intentions fall foul on the fundamental rights, the Act must not proceed further. It may be relevant to note that during the discussion of the Draft Constitution in the Constituent Assembly, a specific proposal had been moved to add the word "tobacco" between the words "intoxicating drinks" and "drugs". After a complete debate on the pros and cons of adding "tobacco" specifically to the phrase, the proposal was put to vote and was decided in negative. Thus, the founding fathers of our Constitution in their wisdom specifically felt that tobacco did not belong to the category of subversive or inherently pernicious substances that there should be a State Policy to prohibit it.

78. It is a well settled principle of interpretation that the intent of the Parliament can be ascertained from certain external aids - most of all from the Constituent Assembly Debates. Further, once the Court is able to decipher the intent, full effect must be given to that intent. The fact that the matter captured the attention of the Constituent Assembly and after due consideration a decision was taken - irrespective of whether the

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decision was in favour of or against the motion - would demand that the decision so taken be given the persuasive value due to it.

79. Learned senior counsel further argued that, pertinently, in 2003, the COTPA was enacted where the Parliament did not impose any ban on tobacco. The COTPA was enacted pursuant to Article 47 to "*provide regulation of trade and commerce in, and production, supply and distribution of, cigarettes and other tobacco products*".

80. By placing reliance on ***Narinder S. Chadha v. State of Maharashtra*** reported as ***(2014) 15 SCC 689***, it was further submitted that it must not be forgotten that 'equity follows the law'. Hence, in the garb of public health, an illegal act shall not be promoted. Further, referring to ***Jacob Puliyel v. Union of India & Ors***. reported as ***2022 SCC OnLine SC 533***, learned senior counsel submitted that the power delegated by a statute is limited by its terms. The delegate should act in good faith reasonably *intra vires* the power granted and on relevant consideration of material facts. All the decisions made by a delegate should be in harmony with the Constitution and other laws of the land. They must be relatable to the purposes of the enabling legislation and if they are manifestly arbitrary, unjust and outrageous or directed to an unauthorized end and do not tend some degree to the accomplishment of the objects of the delegation, the Court might as well say, the Parliament never intended to give authority to such rule which is unreasonable and progressed.

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

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81. Learned senior counsel Dr. Singhvi submitted that every day in every activity Article 14 has its interconnection. Many rights under Part III of the Constitution can be waived but not Article 14 & 21. The facets of Article 14 circumferences around, all equals be treated equally, unequal not be treated equally and equals not be treated as unequally. However, we may treat supposed equals as unequal provided there is a classification. It needs to be examined whether the classification has a rational nexus to the object sought. Justice P.N. Bhagwati has held that Article 14 not only talks about arbitrariness and classification, but also frowns upon where there is procedural violation. Mere prescription of procedure is not sufficient; it shall be fair, just and reasonable.

82. In the present case, the Respondents are purporting to ban an artificially created sub-category of tobacco by calling it 'smokeless tobacco', known by the names of chewing tobacco, pan masala, etc. but not touching the myriads forms of tobacco which are listed in the Schedule of the COTPA. This artificial sub-classification has no rational nexus to object sought to be achieved. The object sought to be achieved by the prohibitory order is "public health". Chewing tobacco (smokeless tobacco) and smoking tobacco may have difference in their forms but their impact on public health has no difference. The COTPA under a seamless web covers tobacco, it does not make a distinction under the Schedule. This classification is clearly hit by Article 14 of the Constitution.

83. Learned senior counsel submitted that Section 3(1)(j) of the FSSA strikes at *"intended for human consumption"*. What food does in tracts,

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inhaling does in lungs. If taken for the sake of understanding, the distinction between ingestion and inhaling, is a distinction without a difference, is a difference without a distinction. The said difference/distinction has no connection with the object sought to be achieved by the impugned Notifications. Further, the purported ban on smokeless tobacco alone out of various other forms of tobacco products [e.g. cigarettes, cigars, cheroots, bidis, cigarette tobacco, pipe tobacco and hookah tobacco, all listed in Schedule to the COTPA read with Section 3(p) of the COTPA] is clearly discriminatory and hence violative of Article 14 of the Constitution since it creates an artificial class of products (viz. smokeless tobacco) which are subjected to the disability and prejudice.

84. That the impugned Notifications are discriminatory, *ultra vires* and unconstitutional as being hit by Article 14 in as much as within the class of tobacco products, it creates an artificial sub-class/distinction prohibiting *inter-alia* sale, manufacture, storage of smokeless tobacco. Indeed, the discriminatory operation of Regulations, 2011 is evident from the fact that while Regulation 2.3.4 itself purports to prohibit the use of "tobacco and nicotine" as ingredients, the Respondents by self-serving, arbitrary and artificial interpretation purport to apply it only to smokeless tobacco out of the various tobacco products mentioned under the Schedule of the COTPA.

85. Tobacco and nicotine cannot only be found in smokeless tobacco. *Firstly*, there is no justification for using the word tobacco in its un-circumscribed, unrestricted and unqualified manner but applying it only

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to one sub-class (viz. smokeless tobacco). The Regulation must be taken as it is and, assuming without conceding its validity, its plain and natural meaning and scope must be implemented, namely, its application to all forms of tobacco without artificially truncating that word. *Secondly*, not only is the language referring to "tobacco and nicotine" used in Regulation 2.3.4 is clear, unequivocal and unqualified, as explained above, but it must be deemed to take colour from pre-existing definitions of tobacco, e.g. the clear elaborations found in the Schedule read with Section 3(p) of the COTPA.

86. *Thirdly*, it is a basic rule of statutory interpretation that the statutory delegated legislation rule maker must be deemed to know the pre-existing corpus of statutory law and must, in the delegated rule making legislation which he is drafting, be intended to use the words in the same meaning as found in the pre-existing legislation, unless, categorical, clear and unequivocal departure from that pre-existing corpus of law is indicated. Admittedly, no such departure is remotely reflected in Regulations 2.3.4 from the exhaustive meaning of tobacco, found *inter alia*, in the COTPA.

87. When the legislature acts, the statutory interpretation rule is that it is obliged and deemed to know the pre-existing corpus which could be either the COTPA or Section 3(p) or the Schedule. Therefore, when COTPA was being legislated, it cannot be said that artificially two categories were made out. When the legislature drafted FSSA, it was aware of the COTPA and the Schedule thereto, thus, it is not permissible to artificially read it in exclusion thereof.

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88. *Fourthly*, no real reason has been advanced by the Respondent Government Authorities as to why the word "tobacco" should not be used in its plenary sense found in COTPA. It is not discernible why the term "tobacco" has been limited to "smokeless tobacco". This is especially so when tobacco in either form i.e., smoking or smokeless, would be consumed by the person intaking it. If the reading of Regulation 2.3.4 is taken as "smokeless" tobacco, it is *ultra vires* and arbitrary.

89. *Fifthly*, the larger constitutional issue is that the burden of proof rests on the Respondents to justify the aforesaid artificial intra-tobacco class purported to be created by the Respondents. In other words, the Respondents have to sufficiently discharge the burden of proof, that the creation of an artificial sub-class within tobacco products, being the sub-class of consumable/eatable tobacco products like smokeless tobacco, while excluding other tobacco products listed above, bears a clear or reasonable nexus to the objects sought to be achieved by the impugned Notifications i.e., public interest. Unless this burden of proof in terms of the aforesaid demonstrable nexus is established, the impugned Notifications must fail on the test of Article 14 of the Constitution. The Petitioners discharged the burden of proof by raising the issue, the entire burden to show the classification stands the test of Article 14, is on the Respondents.

90. *Sixthly*, it has been repeatedly held that once *prima facie* a valid challenge is raised by the Petitioners under Article 14, the burden of proof to justify the classification/sub-classification made by the Respondents shifts and is placed entirely on the Respondents. Learned senior counsel

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relied on the judgment of ***D.S. Nakara & Ors. v. Union of India*** reported as ***(1983) 5 SCC 730*** and stated that the burden of proof is to be discharged by the Respondents by affirmatively placing material on record. Further, to substantiate his submission that the Respondents have to discharge the burden, reliance has been placed on the judgment of ***State of Maharashtra v. Manubhai Pragaji Vashi & Ors.*** reported as ***(1995) 5 SCC 730.***

91. *Seventhly*, ex-facie, there can be no nexus much less direct nexus to artificially segregate ingested tobacco from inhaled tobacco for purposes of banning, especially when both are tobacco products and are consumed by the users as mild intoxicants to achieve the same result. If tobacco manifests itself in more than 10 manifestations statutorily listed in Schedule of the COTPA, it becomes inexplicable and completely mysterious as to how only smokeless tobacco is harmful/prejudicial and injurious and the other i.e., smoking tobacco remains harmless and desirable. Consequently, there is no nexus much less direct and appreciable with the objects sought to be achieved by the Impugned Notifications, so as to justify a valid classification under Article 14. The object is and can only be the prevention of harm caused by tobacco and that harm/prejudice necessarily has to be product neutral.

92. The only distinction is that in one form, its ingesting tobacco, and in another its inhaling. It's not ingesting chalk, and inhaling cheese. It is nobody's case that there can be any other ground to ban, it is not that from one a person is harmed more and from the other is harmed less. Learned senior counsel pointed that when a sub-class is created, the

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prohibition is not indirectly but directly driving the user to the other sub-class which has not been prohibited.

93. *Eighthly*, for the same reasons as aforesaid, the related test of justifying/upholding legislative/executive order under Article 14 viz. the test of valid classification also fails and the impugned Notifications are directly hit by Article 14 as not creating a valid classification within the seamless class of diverse tobacco products. The principle of reasonable classification is the part of the original Article 14.

94. *Lastly*, the established and hallowed principles of anti-discrimination under Article 14, failure to create a valid classification as violative of Article 14 and absence of nexus to the object sought to be achieved as violating Article 14 has been repeatedly emphasized and underlined in a catena of judicial precedents. The said legal proposition was also dealt in the landmark judgment of ***R.C. Cooper v. Union of India*** reported as ***(1970) 1 SCC 248.***

95. Learned senior counsel, while concluding his arguments, referred to the Counter Affidavit filed on behalf the Respondents and submitted that the Counter is pregnant with silence, and the Respondents have not been able to explain why smoking tobacco is left out of the purview of the ban/prohibition when the object sought to be achieved is public health. He submitted that hard cases shall not make a bad law.

96. In view of the aforesaid submissions, it has been argued on behalf of the Petitioners that the impugned Notifications are arbitrary and *ultra vires* the FSSA, COTPA and abridges the fundamental rights enshrined

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under Article 14, 19 and 21 of the Constitution of India. The Petitioners have also argued that the impugned Notifications have been issued by Respondent No.1 in excess of the jurisdiction vested in him under the FSSA. Respondent No.1 has *in fact* arbitrarily expanded the scope of Regulation 2.3.4 since he is not empowered to legislate in respect of a field occupied under the COTPA. The Petitioners have accordingly sought for quashing of the impugned Notifications.

SUBMISSIONS MADE ON BEHALF OF THE RESPONDENTS

97. Mr. Rahul Mehra, learned senior counsel appearing on behalf of the Respondents opened his arguments by stating that this matter is a challenge to the impugned Notifications issued by Respondent No.1 and the Petitioners' case is that Respondent No. 1 does not have the power to prohibit the sale of chewing tobacco as it is not "food" within the ambit of Section 3(1)(j) of the FSSA since it is regulated by the COTPA.

98. He further pointed out that the impugned Notifications do not seek to ban pure tobacco but it seeks to ban/prohibit tobacco mixed with additives which makes it chewing tobacco. It extends to premixed tobacco with additives and also sale of tobacco and additives separately. He further submitted that this is in compliance with various orders and directives passed by the Hon'ble Supreme Court.

99. In this backdrop, he submitted that the use of tobacco and nicotine in any food product was banned pursuant to a study undertaken by the Central Government at the behest of the Hon'ble Supreme Court vide its order dated 07.12.2010 in SLP (C) No. 16308/2007, ***Ankur Gutka v. Indian Asthma Care Society & Ors.***

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> "*...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, 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 finalized, 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...*"

100. He further navigated this Court to the report submitted by the ***National Institute of Health and Family Welfare***, Munirka, New Delhi in the view of the judgment in ***Ankur Gutka*** (*supra*) and submitted that Pan Masala in one sachet and flavored and scented tobacco in another sachet, when mixed together makes it very palatable for consumers. He further emphasized that consuming raw tobacco otherwise is very bitter and is not palatable to most of the consumers. So, in order to enhance its taste and increase sales, this mixture which is well known as Gutka is sold in the market circumventing the orders of the Hon'ble Supreme Court. Relevant part of the report submitted by the National Institute of Health and Family Welfare, Munirka, New Delhi is reproduced hereunder:

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"RESULTS

I. CONTENTS OF ARTICLES

The term 'smokeless tobacco' includes a large variety of commercially or non-commercially available products and mixtures that contain tobacco as the principal constituent and are used either orally (through the mouth) or nasally (through the nose) without combustion (Annexure1 (a)).

Oral use of smokeless tobacco is widely prevalent in India and different methods of its consumption include chewing, sucking and applying tobacco preparations to the teeth and gums (Annexure 2). According to the monograph developed by the International Agency for Research in Cancer (lARC) of the World Health Organization (Annexure 1 (a)), the three forms of smokeless tobacco which are commonly used orally include:

a) Tobacco alone (with aroma and flavourings) - e.g Creamy or dry snuff, Gudakhu, Gul, Mishri, Red tooth powder

b) Tobacco with other components (lime, sodium bicarbonate, ash) - e.g Khaini, Zarda, Maras, Naswar

c) Betel quid with tobacco (includes areca nut, slaked lime, catechu and tobacco with spices) - e.g Betel quid, Gutkha, Mawa

For nasal use, a small quantity of very fine tobacco powder mixed with aromatic substances called dry snuff is inhaled. This form of smokeless tobacco use, although still practiced, is not very common in India. Snus is a form of snuff using moist tobacco powder, consumed by placing it under the lip for extended periods of time (Annexure 2).

The brands and common names of different products of chewing tobacco (smokeless tobacco) used in India have been enumerated in the proceeding of a meeting conducted by the National Cancer Institute, USA and the Centre for Disease Control, USA (Annexure 3).

In addition to the above mentioned smokeless tobacco products used orally, various mixtures of betel-quid without tobacco are also commonly used in India. A 'betel quid' (synonymous with 'pan' or 'paan') generally contains betel leaf, areca/betel nut (or supari) and slaked lime, and may or

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> *may not contain tobacco. In other words, it usually contains at least one of the two basic ingredients tobacco or areca nut, in raw or any manufactured or processed form. Other substances, particularly spices, including cardamom, saffron, cloves, aniseed, turmeric, mustard or sweeteners, are added to betel quid according to local preferences. (Annexure 4 (a))*
> *Pan masala is very similar to a betel quid except that all its ingredients are in dehydrated and granular/powdered form. Gutkha is a mixture of Pan masala and chewing form of tobacco.*"

101. Learned senior counsel drew the attention of this Court to Page 5 of the said report, where the review of evidence of harmful effects of tobacco, has been recorded. He submitted that on the basis of various data and studies conducted, it is evident that 21% adults used only smokeless tobacco and only 9% use smoking tobacco, and 5% use smoking as well as smokeless tobacco. He further emphasized that the study suggests that it is almost impossible to quit smokeless tobacco. Relevant part of the report referred by the learned senior counsel is reproduced hereunder:

> "*II.* ***REVIEW OF EVIDENCE ON HARMFUL EFFECTS***
> *The two key ingredients of smokeless tobacco and betel-quid products are tobacco and arecanut, and the chemical composition and effects of these two ingredients are quite different. Hence the evidence on the harmful effects of smokeless tobacco and areca/betel nut (or supari) has been reviewed under separate sections.*
>
> *Section I deals with smokeless tobacco and includes evidence on harmful effects from 105 studies from India and abroad. Section 2 is a compilation of harmful effects of areca nut and includes 93 Indian and International studies.*

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Altogether 184 scientific articles have been included in this review.

Effort has been made to include all the relevant studies identified from literature search and which met the pre-defined selection criteria.

SECTION I: SMOKELESS TOBACCO (OR CHEWED TOBACCO)

Prevalence in India

The Global Adult Tobacco Survey India (GATS India) is the global standard for systematic monitoring of adult tobacco use (smoking and smokeless) in the country. The survey, conducted in 2009-10 by the International Institute for Population Sciences (IIPS) Mumbai, covered about 99.9 % of the total population of India. Its findings revealed that more than one-third (35%) of adults in India used tobacco in some form or the other. Among them, 21 % adults used only smokeless tobacco, 9 % only smoke, and 5 % smoke as well as smokeless tobacco. Based on these, the estimated number of tobacco users in India was 274.9 million, with 163.7 million users of only smokeless tobacco, 68.9 million only smokers, and 42.3 million users of both smoking and smokeless tobacco. The prevalence of overall tobacco use among males was 48 % and among females 20 %, while the use of smokeless tobacco products among males (33%) was higher than among females (18%). The quit ratio for the use of smokeless tobacco use was 5% (Annexure 10).

Studies from different parts of the country have found high prevalence of smokeless tobacco use in the Indian population (Annexure 11 - 22). This has been endorsed in the monograph developed by the International Agency for Research in Cancer (lARC) of WHO (Annexure 1 (c).

Many studies have also reported on the prevalence of smokeless tobacco products amongst children and youth of the country (Annexure 1 (c), 23 - 38). An annotated bibliography of research on smokeless tobacco in India published by the Human Development Network of the World Bank also provides evidence of its widespread use in India (Annexure 28)."

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102. Learned senior counsel further argued that consuming smokeless tobacco or chewing tobacco have number of harmful effects and it further causes various diseases like oral pre-malignant lesions/conditions, oral cancer, oesophageal cancer, stomach cancer, pancreatic cancer, throat (pharynx and larynx) cancer and many more. He further pointed out that consuming smokeless tobacco have non-cancerous conditions as well like oro-dental health, nervous system diseases, metabolic abnormalities, reproductive health, other diseases (gastro-intestinal and respiratory). Placing reliance on the above-mentioned report, he stated that direct medical costs incurred in treating smokeless tobacco associated cancers and diseases come to USD 285 million, while indirect morbidity costs (including costs of caregivers and work loss due to illness) amounted to USD 104 million. In conclusion he stated that, the total economic cost of tobacco use was reported as USD 1.7 billion which was many times more than the annual government expenditure on tobacco control and about 16% more than the total tax revenue generated from tobacco.

103. It was submitted by the learned senior counsel for the Respondents that an assertion has been made from the Petitioners' side that no study was undertaken by the Government before banning the sale of tobacco vide the impugned Notifications and a whimsical approach has been adopted by the Government. However, *au contriare*, he submitted that the date of this report is 09.02.2011, which is prior to the date on which Regulation 2.3.4 came into force. Prior to the Regulation coming into existence, a detailed study was undertaken in view of the orders of the Hon'ble Supreme Court in ***Ankur Gutka*** *(supra)* and subsequent to the detailed study the Regulations and Notifications came into force.

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104. He further took this Court through the Notification dated 01.08.2011 issued by the Ministry of Health and Family Welfare vide which the Regulations, 2011 were born and Regulation 2.3.4 also forms part of the said Notification. Learned senior counsel pointed out that the objections and suggestions were invited from the persons who were likely to be affected and the whole process was undertaken before the said Regulations saw the light of the day. He further submitted that the Petitioners were hence put to notice before the said Regulations came into force. He vehemently submitted that Regulation 2.3.4 has not been challenged till date.

105. Learned senior counsel referred to the circular dated 21.11.2012 issued by the Special Secretary, Ministry of Health & Family Welfare, Government of India and submitted that chewing tobacco is "food" in view of the Judgments of the Hon'ble Allahabad High Court in ***Manohar Lal v. State of U.P***, reported as **1989 All LJ 1292** and ***M/s Khedal Lal & Sons v. State of U.P***, reported as ***1980 SCC OnLine All 526***. In view of the said circular, the learned senior counsel submitted that the Central Government considers chewing tobacco as "food" and till date the position is the same.

106. Learned senior counsel further pointed towards the order dated 03.04.2013 passed by the Hon'ble Supreme Court in ***Ankur Gutka*** *(supra)* and submitted that the ban imposed on sale of Gutka and Pan Masala with tobacco and nicotine are being circumvented by selling Gutka and Pan Masala into two separate pouches.

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107. Learned senior counsel, while referring to the order dated 23.09.2016 of the Hon'ble Apex Court in Transfer Case (Civil) No.1/2010) titled ***Central Arecanut Marketing Corp & Ors. v. Union of India***, tried to emphasize the stand of the Union Government and submitted that the Hon'ble Supreme Court has not granted any stay on Regulation 2.3.4 of the FSSA and hence the concerned authorities are duty bound to enforce the said Regulations.

108. He further argued by referring to the Notification dated 05.12.2016 issued by the Secretary, Ministry of Health & Family Welfare, Government of India and submitted that once again the Central Government, in view of the order dated 23.09.2016 of the Hon'ble Supreme Court in ***Central Arecanut Marketing*** *(supra)*, reiterated the ban on the manufacture, storage, distribution or sale of Gutka and Pan Masala (containing tobacco or nicotine) and any other products marketed separately having tobacco or nicotine in the final product by whatever name called, whether packaged or un-packaged 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. Relevant part of the order dated 05.12.2016 is reproduced hereunder:

> "*In this context, the Hon'ble Supreme Court in Central Areca-nut Marketing Corporation & Others Vs Union of India & Ors (Transfer Case (C) 1 of 2010) on 23rd October, 2016, passed an order recording and directing asunder:*
> *Ld. 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 and Restrictions on sales) Regulations, 2011 and the concerned authorities ate duty bound to enforce the said regulation framed under Section*

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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." (copy enclosed)

It is relevant to mention in this context that, States such as Bihar, Karnataka, Mizoram, Kerala and Madhya Pradesh have issued orders in compliance of the Hon'ble Supreme Court order dated 23.09.2016. (copy of order of Bihar and Karnataka is enclosed).

In view of the above, I request you to please get the necessary orders passed in compliance of the Hon'ble Supreme Court direction/order dated 23.09.2016 and ensure that the manufacture, storage, distribution or sale of gutka and pan masala (containing tobacco or nicotine) and any other products marketed separately having tobacco or nicotine in the final product by whatever name called, whether packaged or un-packaged 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 is prohibited in your jurisdiction."

109. Learned senior counsel referred to a letter dated 09.10.2017 issued by the FSSAI to the Commissioners of Food Safety/officers-in-charge of Food Safety, of all States and Union Territories and pointed out that vide the said letter, the FSSAI had requested the States and Union Territories to ensure compliance of the express provisions under Regulation 2.3.4 and the directions of the Hon'ble Supreme Court and FSSAI which are issued/passed from time to time.

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110. Learned senior counsel drew the attention of this Court to the ***Tata Institute of Social Sciences (TISS) Mumbai and Ministry of Health and Family Welfare, Government of India report onGlobal Adult Tobacco Survey***, Second Round, India, ***2016-2017*** and submitted that the prevalence of chewing tobacco in its various forms is almost twice more than smoking tobacco. It is mainly because of two reasons. *Firstly*, it is palatable in nature. *Secondly,* it is cheap and caters to almost all segments of the society especially in the lower strata. He further submitted that the number of users of smokeless tobacco in rural areas is higher than that in urban areas, partly because of the higher prevalence of smokeless tobacco use in rural areas and partly because of the larger rural population. The survey records that the prevalence of smokeless tobacco use is 21.4% which is more than twice that of smoking tobacco at 10.7%. Therefore, the estimated number of current adult smokeless tobacco users in India was recorded as 199.4 million i.e., twice that of the current tobacco smokers at 99.5 million. Further, learned senior counsel asserted that according to GATS Survey 2009-10, the total number of smokeless tobacco users in India was 163.7 million as mentioned above, this number had increased to 199.4 million in 2016-17. Relevant part of the report is reproduced hereunder:

> "***4.3.1 Prevalence of use of smokeless-***
> *Table 4.24 presents prevalence of smokeless tobacco in India by gender and place of residence. The prevalence of smokeless tobacco use (21.4%) is more than twice that of smoking (10.7%). Of the 21.4 percent of all adults who use smokeless tobacco, 85 percent (18.2% of all adults) use smokeless tobacco every day, and the remaining 15 percent (3.1% of all adults) use it occasionally. Two percent of the*

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adults, who were using smokeless tobacco in the past, either daily (1.2%) or occasionally (0.8%), have stopped the use completely. The extent of use of smokeless tobacco among men (29.6%) is higher than among women (12.8%). In rural areas, 24.6 percent adults use smokeless tobacco, whereas in urban areas, 15.2 percent use smokeless tobacco. In each category of adults, either by residence or gender, 84-87 percent of the current smokeless tobacco users use it every day.

4.3.2 Number of users of smokeless tobacco

The estimated number of current adult smokeless tobacco users in India is 199.4 million, twice that of current tobacco smokers (99.5 million). The number of male smokeless tobacco users (141.2 million) is more than twice that of female smokeless tobacco users (58.2 million). Similarly, the number of smokeless tobacco users in rural areas (150.3 million) is about three times that in urban areas (49.0 million)."

111. It was asserted by the learned senior counsel, while relying on the above mentioned report, that it is shocking to see the age at initiation of use of smokeless tobacco and more than half the consumers are minor i.e. below the age of 18 years, in spite of various Regulations in force. He further pointed out that in comparison to the quit ratio for smoking tobacco (16.8%), the quit ratio for smokeless tobacco use is very low (5.8 %) of daily smokeless tobacco users successfully quitting the use of smokeless tobacco. Relevant part is reproduced hereunder:

"***4.3.7. Age at initiation of use of smokeless tobacco***

The age at Initiation of daily use of smokeless tobacco among ever daily users of smokeless tobacco in the age-group 20-34 years, according to selected background characteristics, is presented in Table 4.31. The age pattern of Initiation of smokeless tobacco use is quite similar to that

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> *of smoking tobacco use: 12 percent of daily users of smokeless tobacco started using tobacco on a daily basis by the age of 15; 24 percent started when in the age-group 15-17 years; 20 percent at age-group 18-19 years and the remaining 44 percent started after they had crossed the age of 20. More than one third (36%) of daily users of smokeless tobacco aged 20-34 started daily use of smokeless tobacco before the age of 18, i.e., when they were minor. The mean age of Initiation of use of smokeless tobacco is 18.8 years, almost the same as for initiation of smoking. Male daily users of smokeless tobacco started tobacco use at a younger age compared to their female counterparts…*
>
> *…*
>
> ***4.3.8 Prevalence of former daily use of smokeless tobacco and quit ratio***
>
> ***…****In comparison to the quit ratio for smoking (16.8%), the quit ratio for smokeless tobacco use is very low: 5.8 percent of daily smokeless tobacco users successfully stopped the use of smokeless tobacco.*"

112. Learned senior counsel referred to an article titled '***Banning smokeless tobacco in India: Policy Analysis***' by Aroral M, Madhu R., published in the Indian Journal of Cancer in 2012 and submitted that multiple legislations have failed to effectively control or regulate smokeless tobacco in India and regionally hence there is an immediate need to strengthen smokeless tobacco control efforts as "no ordinary product".

113. He furthermore referred to a report titled '***Smokeless Tobacco and Public Health: A Global Perspective***' published by the US Department of Health and Human Services, Centers for Disease Control and Prevention and National Institutes of Health, National Cancer Institute and submitted that smokeless tobacco products cause a widespread challenge to public

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health and has received limited attention from researchers and policymakers. Attention was drawn to Chapter 4 of the said report and he emphasized on the health consequences of the usage of smokeless tobacco and the various diseases caused by consuming smokeless tobacco. Relevant part of the report is reproduced hereunder:

> "*The health risks associated with smokeless tobacco (ST) can vary substantially by product characteristics and ingredients, manner of use, and potential interactions with other tobacco use behaviors, such as cigarette smoking. Based on epidemiologic studies of traditional ST products, such as snuff, chewing tobacco, and betel quid, the International Agency for Research on Cancer (lARC) concluded that these products are carcinogenic to humans and, specifically, that there is sufficient evidence that ST products cause precancerous oral lesions and cancers of the oral cavity, esophagus, and pancreas. Additionally, there is sufficient evidence that ST products cause addiction as well as reproductive and developmental toxicity. (lARC defines evidence as sufficient when "a causal relationship has been established and chance, bias, and confounding could be ruled out with reasonable confidence.") Given that over 300 million people use ST worldwide, the total burden of ST use is likely to be substantial. Moreover, ST use in some regions appears concurrently with cigarette smoking, thus contributing to the total health burden of tobacco use.*"

114. Learned senior counsel, while relying on the above-mentioned report, elaborately discussed various diseases caused by the usage of smokeless tobacco which includes snuff, chewing tobacco, naswar, shammah and toombak etc. The various diseases include oral cancers, precancerous lesions and other oral conditions, esophageal cancer, pancreatic cancer, lung cancer, cervical cancer, hypertension, heart disease and stroke, and other miscellaneous diseases and conditions like

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diabetes and insulin resistance, conditions of the nasal cavity, reproductive outcomes, addiction etc.

115. Learned senior counsel further referred to Chapter 5 titled as 'The Economics of Smokeless Tobacco' of the above-mentioned report and submitted that smokeless tobacco is different from the cigarette market in several aspects. Relevant part of Chapter 5 relied upon is reproduced hereunder:

> **"*Smokeless Tobacco and Cigarette Markets***
> *The ST market is different from the cigarette market in several key aspects.*
> *First, the cigarette market offers, in most cases, a relatively homogenized and consistent product within and between countries. A pack of Marlboro cigarettes purchased in Cameroon is similar to a pack of Marlboro cigarettes purchased in Canada or Cambodia. On the other hand, ST purchased in Sweden is very different in terms of ingredients and types of products from ST purchased in India or Sudan.*
> *Second, although cigarettes are a legal product in every nation of the world (except Bhutan), the sale of ST has been effectively banned in nearly 40 countries, most of which are in Europe or the Western Pacific. As a result, and because ST is not widely used in many nations, the consumption of ST is largely concentrated in a few specific regions of the world. Cigarettes, in contrast, are consumed in almost all parts of the world.*
> *Third, ST markets in low- and middle-income countries are not yet dominated by multinational tobacco corporations; the products consumed in those countries are often homemade or manufactured within a fragmented network of small, locally owned businesses. The ST market in many high-income countries, however, has become more highly concentrated, with multinational tobacco corporations owning the largest share. This concentration among*

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multinationals has implications for tobacco surveillance, the regulatory environment, and economies of scale.
Fourth, ST markets are much less regulated than cigarette markets, particularly in low- and middle-income countries, and this lack of regulation affects tax levels and the effectiveness of collecting taxes on smokeless tobacco."

116. Learned senior counsel further referred to Chapter 13 of the above-mentioned report titled "Smokeless Tobacco use in the South-East Asia Region" and described the wide variety of smokeless tobacco products that are made and used in this region. Relevant part of Chapter 13 relied upon is reproduced hereunder:

> ***"Types of Products and Patterns of Use***
> *This chapter will first describe the wide variety of smokeless tobacco (ST) products that are made and used in this region. Various ST products are chewed, sucked (dipped), applied to the gums and teeth, snuffed, or gargled. Products may be as simple and inexpensive as unmanufactured, loose flakes of tobacco leaves that are sold by weight and may be chewed with only slaked lime (calcium hydroxide) paste, or as complex as a paste made from boiled tobacco and spice flavorings (e.g., kiwam) and sold in small glass bottles.*
> *A common way of consuming chewing tobacco in the region is as an ingredient in betel quid. Use of betel quid is an ancient practice. Tobacco was added as an ingredient in the quid beginning around 1600, and it is now used in betel quid in many parts of South-East Asia. Betel quid is composed of pieces of areca nuts (from the Areca catechu palm), betel leaf from the Piper betle L. (Piperaceae) vine, aqueous slaked lime paste (calcium hydroxide, made from roasted limestone or seashells), and other minor ingredients such as catechu (for astringency), cardamom, and clove, according to the taste of the user. Some of these components are agricultural products (e.g., betel leaf, areca nut), and others are simple ingredients that could be cottage industry products (e.g., slaked lime). They are combined by Vendors*

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and users and made into fresh betel quids for immediate consumption. Historically, betel quid has been incorrectly believed to have beneficial medicinal properties. The user who incorporates tobacco into it may not consider tobacco a harmful addition.

Smokeless tobacco products of different kinds with different names are often incorporated into betel quid, although some are also-used separately. The most common type of tobacco incorporated into betel quid is plain tobacco flakes (also called sada pata); sometimes flavored tobacco flakes such as zarda or khaini may be added. Snuff-type products, which tend to be applied to gums or teeth rather than chewed, are not used with betel quid. Although areca nut itself is mildly addictive, a betel quid user may not understand the much higher addictive potential of tobacco in the quid.

In India, some products have been manufactured on an industrial scale since 1975. These commercially produced ST products, such as pan masala and gutka, are modeled after betel quid and contain many of the same ingredients but in a dried form and without fresh betel leaf. The manufactured products were designed to be easily carried and consumed anywhere at any time, unlike betel quid, which is highly perishable and inconvenient to carry because of its high moisture content. In addition to being dried and packaged in single-use doses, these manufactured products contain preservatives to lengthen their shelf life. They may also contain other ingredients, such as small pieces of areca nut, calcium hydroxide, catechu, sweeteners, perfumes, tobacco flakes and/or powder, and flavorings such as menthol, cardamom, and clove. Gutka always contains tobacco, but most brands of pan masala do not. Gutka and pan masala products frequently carry the same brand names, allowing manufacturers to circumvent laws banning tobacco advertisements since they are able to advertise a product that appears identical to tobacco-containing gutka."

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117. He further pointed out that each country has its own set of smokeless tobacco products. He described that India is a country with widest product range:

(a) Products for chewing: (i) products made with unprocessed tobacco (sada pata): betel quid with tobacco, zarda, and khaini; (ii) Products made with cured tobacco includes gundi, kadapan, and flavored zarda; (iii) Products containing areca nut includes gutka, mawa, Mainpuri tobacco and dohra. Some forms of khaini contain areca nut as well as-tobacco.

(b) Products for oral application: snuff products including mishri/masheri, bajjar, gudakhu, tapkeer, red toothpowder, kiwam, creamy snuff and gul.

(c) Other products or uses include snuff used nasally, and tobacco water for gargling (tuibur).

118. He again emphasized on the health problems associated with the use of smokeless tobacco. He also pointed out that a review article from 1990 found that the peak age of occurrence of oral cancer was at least a decade earlier in India than in Western countries. Learned senior counsel concluded with the help of the report that the relative risks of premature death associated with the use of smokeless tobacco were significant for both women (25% higher risk) and men (16% higher risk).

119. He further submitted that smokeless tobacco products are made palatable by adding areca nut, sweeteners and scents. They are further made attractive to consumers by colorful packaging, and this packaging is convenient as well. Subsequently, he dealt with the issue of distribution

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and sales of smokeless tobacco in the South-East region and submitted that India is one of the world's largest exporters of tobacco, exporting approximately 50% of its total tobacco production to other countries, according to the Directorate of Tobacco Development of the Government of India. Relevant part of the report is reproduced hereunder:

> "*India is one of the world's largest exporters of tobacco, exporting approximately 50% of its total tobacco production to other countries, according to the Directorate of Tobacco Development of the Government of India. From 2000-2001 to 2009-2010, legal exports of chewing tobacco from India increased nearly 450%, from 1,953 tons to 8,725 tons. The value of exported chewing tobacco products in 2009-2010 was around US$63.6 million. In addition to legal exports, some amount of ST is smuggled to other countries in South-East Asia, and possibly around the world. During 2009-2010, India exported chewing tobacco products to more than 48 countries, and snuff to at least 6 countries. The countries to which India exported 11 tons or more of tobacco for chewing include: the United Arab Emirates, 4,477 tons; Saudi Arabia, 980 tons; Malaysia, 323 tons; the United States, 160 tons; and Kenya, 77 tons. India also exported 85 tons of snuff products in 2009—2010, primarily to China, Tanzania, and the United States.*"

120. Learned senior counsel referred to an article dated July 2018 titled as '***Global Challenges in smokeless tobacco control***' published in Indian Journal of Medical Research and submitted that every study contradicts the stand taken by the Petitioners that smoking cigarettes is more harmful than smokeless tobacco.

121. Learned counsel drew the attention of this Court to Section 2(v) of the PFA which defines "food" and compared its definition with Section

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3(1)(j) of FSSA which also defines "food". He further referred to the definitions of "substance", "ingredient" and "food additive" defined under Sections 3(1)(zw), 3(1)(y) and 3(1)(k) of the FSSA respectively.

> ***Section 2(v) of PFA, 1954 defines "Food" as:***
> *"any article used as food or drink for human consumption other than drug and water and includes—*
> *(a) any article which ordinarily enters into, or is used in the composition or preparation of, human food,*
> *(b) any flavouring matter or condiments, and*
> *(c) any other article which the Central Government 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."*
> ***Section 3(1)(j) of FSSA, 2006 defines "Food" as:***
> *"Food means any substance, whether processed, partially processed or unprocessed, which is intended for human consumption and includes primary food to the extent defined in clause (zk), genetically modified or engineered food or food containing such ingredients, infant food, packaged drinking water, alcoholic drink, chewing gum, and any substance, including water used into the food during its manufacture, preparation or treatment but does not include any animal feed, live animals unless they are prepared or processed for placing on the market for human consumption, plants, prior to harvesting, drugs and medicinal products, cosmetics, narcotic or psychotropic substances: Provided that the Central Government may declare, by notification in the Official Gazette, any other article as food for the purposes of this Act having regards to its use, nature, substance or quality."*
> ***Section 3(1)(zw) of FSSA, 2006 defines "Substance" as:***
> *"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"*
> ***Section 3(1)(y) of FSSA, 2006 defines "ingredient" as:***

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> *"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"*
> ***Section 3(1)(k) of FSSA, 2006 defines "Food Additive" as:***
> *"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*"

122. Learned senior counsel compared both the definitions of "food" and submitted that unlike the PFA, the definition under Section 3(1)(j) of the FSSA is expansive enough to include products which are intended for consumption or even if not intended/advertised for consumption can be consumed. He further emphasized that definition should take meaning from the context and facts and circumstances. He further submitted that flavored/scented chewing tobacco, which is the subject matter of the impugned Notifications, constitute "food" within the meaning of Section 3(1)(j) of the FSSA. It is clearly evident from the definition that food means "*any substance intended for human consumption"*.

123. It was also the contention of the learned senior counsel with regard to the definition of "substance" that flavoured or scented chewing tobacco constituted "food" within the definition incorporated under Section 3(1)(j) of the FSSA in as much as it is a substance as defined

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under 3(1)(zw) intended for human consumption. A bare reading of Section 3(1)(j) makes it clear that ingredients used in a food product are also included within the definition of "food". He further submitted that in case of flavored/scented chewing tobacco, various ingredients such as food additives are added to chewing tobacco to make it palatable for consumption.

124. Learned senior counsel, while referring to the definition of "food additive", submitted that the definition of "ingredient" explicitly includes "food additives" as well. He further argued that as the definition of "food" also includes ingredients which are used in the preparation of food, food additives which are ingredients used in the preparation of food are included within the definition of food under Section 3(1)(j) and since flavored or chewing tobacco consists of food additives to make it palatable for consumption, it is "food" within the definition under Section 3(1)(j) of the FSSA.

125. With regard to the impugned Notifications, he submitted that the purpose of it is to ensure that the ban imposed by Regulation 2.3.4 on the use of tobacco or nicotine in any food product is not defeated by the sale of pan masala and chewing tobacco in separate sachets as noted by the Hon'ble Supreme Court. He further submitted that the question of whether chewing tobacco is *per se* food or not is irrelevant in as much as the impugned Notifications seek to ban the mixing of chewing tobacco with pan masala before consumption. To enforce the spirit of Regulation 2.3.4 and to prevent its circumvention, the impugned Notifications analysed in this context are only in furtherance of Regulation 2.3.4 and

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the orders of the Hon'ble Supreme Court and various letters of the Government of India and the FSSAI. He therefore submitted that since the impugned Notifications seek to ban chewing tobacco which is flavored or scented in as much as it is mixed with Pan Masala which is sold separately to be consumed as Gutka, which has been banned under Regulation 2.3.4, it is not seeking to create any prohibition which is independent or exclusive of Regulation 2.3.4 and is merely seeking to enforce the mandate of the Regulation in its letter and spirit and is thus justified.

126. Learned senior counsel submitted that Courts in various judgments have interpreted "food" expansively enough to include products which are consumed/intended for consumption. In this regard, he referred to the judgment of the Hon'ble Supreme Court in ***State of Bombay v. Virkumar Gulabchand Shah,*** reported as ***AIR 1952 SC 335*** wherein the issue before the Apex Court was whether turmeric is a "foodstuff" within the meaning of clause 3 of the Spices (Forward Contracts Prohibition) Order, 1944 read with Section 2(a) of the Essential Supplies (Temporary Powers) Act, 1946). Learned senior counsel referred to Para 12 thereof and submitted that, whether "food" has to be interpreted narrowly or strictly, will depend on the facts and circumstances and context. Further, he submitted that the Hon'ble Court noted with approval of the decision in ***James v. Jones*** of the Queen's Bench, which held Baking Powder to be an article of food within the meaning of English Sale of Food and Drugs Act, 1875 and thus expanded the definition of food to include not only foodstuffs strictly so called but also ingredients which go into their preparation to ensure that the object

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of the legislation which was to conserve the health of people was not defeated. Further, he referred that the Hon'ble Court also referred to a narrower view which was taken by the King's Bench in ***Hinde v. Allmond*** with regard to tea. In the context of the Food Hoarding Order of 2017, the Judges deliberately took a narrower view of the word "food" to exclude tea from the ambit of the order to prevent the prosecution of a housewife for hoarding a quantity of tea which exceeded the quantity required for ordinary use and consumption in her household. The Hon'ble Court noted that a diametrically opposite view was taken in a later decision, ***Sainsbury v. Saunders*** where the Court concluded that tea indeed was food in the context of the Defence of the Realm Regulations for regulating the food-supply of country. He further submitted that the Hon'ble Court held turmeric to be a foodstuff within the meaning of the Regulations. However, it unequivocally held that the meaning of "food" and "foodstuff" would have to be interpreted in the background and context of the issue before the Court.

127. Learned counsel Mr. Gautam Narayan referred to the judgment of the Hon'ble Supreme Court in ***Pyarali K. Tejani v. Mahadeo Ramchandra Dange and Others,*** reported as ***(1974) 1 SCC 167*** and submitted that a similar approach was adopted by the Courts in the context of the definition of food under the PFA. The question before the Hon'ble Court was whether supari is "food" within the meaning of the definition under Section 2(v) of the PFA. The Hon'ble Court, in Para 14 of the judgment, held that the definition was wide enough to include all articles that are eaten by men for nourishment or taste and it takes in subsidiaries. In this context, it was held that supari, which was eaten with

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relish by men for taste, was food. In consonance with the law laid down in ***Virkumar Gulabchand Shah*** *(supra)*, the Court held that the meaning of common words, presumably food, should be understood in a common-sense way. The Hon'ble Court further rejected the challenge to the ban on cyclamates and held that it would defer to legislative wisdom when the question pertained to the lives of millions of Indians who are, by-and-large, less aware and health conscious than people in other parts of the world.

128. Learned counsel referred to the Judgment of the Hon'ble Supreme Court in ***State of Tamil Nadu v. R. Krishnamurthy***, reported as ***(1980) 1 SCC 167***. The issue before the Hon'ble Court was whether "gingerly oil" allegedly being sold for external application only could be considered as "food" within the meaning of the PFA. The Hon'ble Court went beyond the test in ***Pyarali K. Tejani*** *(supra)* and held that the intention of the manufacturer was irrelevant for the purpose of including an article within the definition of food. The Court held that it was not necessary that the article was intended for human consumption or preparation of human food. However, it was enough if the article was generally or commonly used for human consumption. The Court's view was guided by the social reality of the country in which the vast number of people living beneath ordinary subsistence level are ready to consume that which may otherwise be thought as not fit for human consumption or intended for it. In this context, the Court held that, *"in order to be food for the purposes of the act, an article need not be "fit" for human consumption; it need not be even described or exhibited as intended for human consumption; it may be otherwise described or exhibited; it need not be even necessarily*

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intended for human consumption; it is enough if it is generally or commonly used for human consumption or in the preparation of human food". Learned counsel therefore submitted that even in the regime existing prior to the FSSA, Courts in India liberally and expansively interpreted the definition of "food" in order to protect people against consumption of harmful substances and articles. He further submitted that the test laid down in ***Pyarali K. Tejani*** *(supra)* was reiterated by the Court in the ***Krishna Gopal Sharma & Anr. v. Govt. of NCT of Delhi***, reported as ***(1996) 4 SCC 513***, where the Court held that pan masala and mouth freshener are undoubtedly within the definition of "food" under the PFA. Learned counsel further submitted that the wider definition of "food" has also been accepted by this Hon'ble Court in ***Bishan Dass Mehta & Ors. v. Union of India & Ors***, reported as ***1970 SCC OnLine Del 94*** and the judgment of the High Court of Madras in ***M. Mohammed v. Union of India***, reported as ***2015 SCC Online Mad 3271***.

129. Learned counsel further referred to the judgment of the Hon'ble Supreme Court in ***Godawat Pan Masala*** *(supra)* where the Court, after relying on the law laid down in ***Pyarali K. Tejani*** *(supra)*, unequivocally rejected the submission that Pan Masala and Gutka were not "food" within the meaning of Section 25 under the PFA. He further submitted that in the context of the decision in ***Godawat Pan Masala*** *(supra)*, it is pertinent to reiterate that Gutka is nothing but a mixture of betel quid in dehydrated form with chewing tobacco, i.e., chewing tobacco along with betel nut, slaked lime, catechu and number of spices. The endeavour of the Respondents, by way of the impugned Notifications, is to prevent the sale of chewing tobacco, which is either flavoured or scented in order to

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ensure that it is not available in pre-mixed form for mixing with pan masala sold separately in order to defeat the ban imposed under Regulation 2.3.4. Learned counsel submitted that the impugned Notifications fall squarely within the ambit of the law laid down in ***Godawat Pan Masala*** *(supra)* as it seeks to ban the sale of flavoured or scented tobacco, which can readily be mixed with Pan Masala as noted by the Hon'ble Supreme Court in orders dated 03.04.2013 and 23.09.2016 respectively.

130. Learned counsel placed reliance on the judgment of the Division Bench of the Allahabad High Court in ***Khedan Lal*** *(supra)*, wherein the issue before the Court was precisely whether chewing tobacco, which was sold placing in paan was "food" within the meaning of definition under the PFA. The Court in Para 6 interpreted Section 2(v) of the PFA to mean that "food" includes not only the articles which normally a person eats or drinks with a view to nourish his body but also an article which normally is not considered to be food but which ordinarily enters into or is used in the composition or preparation of human food. The Court further held that since tobacco is commonly used in the preparation of paan, which is indisputably food, chewing tobacco was also an article of food within the meaning of Section 2(v) of the PFA.

131. Similarly, in the case of ***Manohar Lal*** *(supra)*, the learned Single Judge of the Lucknow Bench of the High Court of Allahabad once again held that tobacco was "food" because it was consumed with other articles of food such as betel leaves. The Court rejected the argument that food comprises of only those articles which are nutritious and reiterated the

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tests laid down in ***Pyarali K. Tejani*** *(supra)* and ***R. Krishnamurthy*** *(supra)* to hold that any article or substance which is commonly consumed by human beings would be included in the definition of "food" under the PFA.

132. Learned counsel further referred to the judgment of the High Court of Bombay in ***Dhariwal Industries Ltd & Anr. v State of Maharashtra*** reported as ***2013 (2) BomCR 383***, wherein it has accepted the contention of the State Government that the definition of "food" under the FSSA was sufficiently wide to include any item intended for human consumption. The Court further held that *"intended for human consumption"* does not necessarily include only those items which enter the digestive system therefore even though Gutka which according to the Court is chewed for some time and then thrown out and does not enter the digestive system, would also constitute "food" within the meaning of the FSSA. The Court also relied on the fact that Gutka and Pan Masala were not specifically excluded from the definition of "food" under the FSSA in the exclusionary clause under Section 3(1)(j). It was therefore submitted by the learned counsel that the interpretation accorded to Gutka and Pan Masala would apply to chewing tobacco with equal force because chewing tobacco is also consumed often with additives such as sweeteners and fragrances without entering the digestive system and would therefore fall under the definition of "food" as interpreted by the High Court of Bombay.

133. Learned senior counsel Mr. Rahul Mehra appearing on behalf of the Respondents, while asserting that Gutka and Pan Masala are "food"

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within the meaning of the FSSA relied on ***J. Anbazhagan v. The Union of India*** reported as ***2018 SCC OnLine Mad 1231*** and submitted that the definition of "food" which includes any substance whether processed, partially processed or unprocessed, which is intended for human consumption, and even includes chewing gum, is clearly wide enough to include Gutka and other forms of chewable tobacco intended for human consumption. Further, the definition of "food" in Section 3(1)(j) of the FSSA is expansive than the definition of "food" in Section 2(v) of the PFA. He contended that the COTPA is in addition to and not in derogation of other laws relating to food products. There is no non-obstante clause in the COTPA which excluded the operation of other Acts. In the larger interest of the most vulnerable sections of the society, judicial notice of circumvention of the ban shall be taken.

134. From the decision in ***Shri Kamdhenu Traders v. State of Telangana and Ors.*** reported as **MANU/TL/1327/2021** of the Hon'ble High Court of Telangana, learned counsel submitted that the issue in the present case and the writ petition before the High Court of Telangana are identical. The common order observed that keeping in view the definition of "food" under the FSSA, which is wide and exhaustive certainly includes smokeless tobacco products.

135. Further, the Hon'ble Supreme Court in ***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. In ***Godawat Pan Masala*** (*supra*), the Apex Court has held gutka, pan masala, supari as food articles. The Hon'ble Court of

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Allahabad in ***Manohar Lal*** *(supra)* and in ***M/s. Khedan Lal and Sons*** *(supra)* has held that "chewing tobacco" is an article of food. Moreover, the FSSA has defined "ingredient" and "food additive", and thus, gutka and pan masala which contains tobacco and other tobacco products do fall within the definition of "food".

136. Learned counsel, reading Section 16 of the COTPA, submitted that it was never the intent of the Parliament that the COTPA would cover the entire field *qua* tobacco. If, it did, the phrase "any other law" would lose its meaning. Section 16 of the COTPA reads as follows:

> "*16. No confiscation made, costs ordered to be paid under this Act shall prevent the infliction of any punishment to which the person affected thereby is liable under the provisions of this Act or under any other law*."

137. It is pertinent to note that the Hon'ble Supreme Court in ***Godawat Pan Masala*** *(supra)* has held gutka and pan masala to be food. Only on a limited issue of jurisdiction, it was held that the power of prohibition is only vested with the Central Government and not with the State Authority.

138. Learned senior counsel pointed that the Hon'ble Supreme Court in ***State of Haryana v. M/s. Dharampal Satyapal Ltd. & Ors***. in ***SLP(C) No(s). 3973-3976/2016*** has stayed the interim order of the Hon'ble High Court of Punjab & Haryana in ***CWP No. 19771/2015***. In ***Mohammad Yamin Naeem v. The State of Maharashtra*** reported as ***2021 SCC OnLine Bom 26***, it was held that the Court was in complete agreement with the enunciation and exposition of the legal position in ***Dhariwal***

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Industries Ltd. (*supra*). The decision of ***Sanjay Anjay Stores v. The Union of India*** reported as ***2017 SCC OnLine Cal 16323*** was distinguished which held that tobacco and tobacco products do not fall within the definition of "food" under Section 3(1)(j) of the FSSA. The restrictive meaning was not permissible in light of the wider and expansive definition.

139. It was emphasized that the COTPA is restricted to ensuring the sale, storage, distribution of cigarettes and other tobacco products. It does not deal with effects of smoking and consumption of tobacco on the health of the citizens. Conversely, the FSSA is a more comprehensive Act, dealing with issues of safety and standards of food.

140. Learned senior counsel submitted that for an Act to be termed as 'general' or 'special', the objects and reasons for the enactment, the aspects covered by it, the import of the Act(s) and other facts shall be taken into consideration. Referring to a decision dated 02.08.2012 in ***All Kerala Tobacco Dealers' Association v. State of Kerala*** in ***W.P.(C) No.12352/2012***, he submitted that, both the enactments i.e., the COTPA and the FSSA will have to be treated as special enactments since the former deals with tobacco and the latter deals with food and other items including the ones specified under the former enactment.

141. Further, it was pointed that Section 30(2)(a) of the FSSA gives the power to pass a prohibitory order for a period not exceeding one year. However, there cannot be a situation wherein 'unsafe food' under Section 3(1)(zz) and (v) can be a matter for manufacture and distribution. As tobacco and nicotine are not permitted to be added, the same will be

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"unsafe food". That, whether the power is exercised under Section 30(2)(a) of the FSSA or to implement the provision under the general powers, the outcome will be the same. Section 30(2)(a) has given the Commissioner of Food Safety the power to prohibit *"the manufacture, storage, distribution or sale of any article of food…"*. It is an independent power conferred on the Commissioner himself.

142. It was further submitted that the exclusionary part of the definition of "food" under Section 3(1)(j) of the FSSA is exhaustive. Through ***Narpatchand A. Bhandari v. Shantilal Moolshankar Jani & Anr***. reported as ***(1993) 3 SCC 351***, it was asserted that where there is an exclusion clause, it has to be read narrowly and strictly. If the Parliament wanted to exclude tobacco, it would have specifically mentioned it in the list of the exclusion as included.

143. By placing reliance on ***K.H. Nazar v. Mathew K. Jacob & Ors***. reported as ***(2020) 14 SCC 126***, learned counsel contented that provisions of a beneficial legislation have to be construed with a purpose-oriented approach. The Act shall receive a liberal construction to promote its objects, and literal construction has to be avoided. It is the duty of the Court to discern the intention of the legislature in making the law. While interpreting a statute, the mischief rule shall be applied, and then a construction that suppresses the problem and advances the remedy should be adopted. The Statement of Objects and Reasons of the FSSA is "*to ensure availability of safe and wholesome food for human consumption*".

144. Learned counsel further contended that chewing tobacco due to its deleterious effect on public health constitutes a class by itself and the

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prohibition of flavoured/scented tobacco is a reasonable restriction on the right to carry out trade of the petitioners. Adducing his submission with ***Sakhawant Ali v. State of Orissa*** reported as ***AIR 1955 SC 166***, he argued that it is for the Legislature to determine what categories it would embrace within the scope of the legislation and merely because certain categories which are left out would not render the legislation discriminatory and violative of Article 14 of the Constitution. The entire data placed before the Court is far more injurious to health as compared to smoking tobacco; the quit ratio is lesser as compared to smoking tobacco.

145. Quoting from ***Municipal Corporation of the City of Ahmedabad v. Jan Mohammed & Anr***. reported as ***(1986) 3 SCC 20***, learned senior counsel contended that if the law requires that an act which is inherently dangerous, noxious and injurious to the public interest, shall be done under a permit of an executive authority, it is not unreasonable and no person may claim a permit to do that act as of right. Hence, imposition of restriction on the exercise of a fundamental right may be in the form of control or prohibition.

146. The tests of reasonableness have to be viewed *qua* the issues faced by the Legislature. While judging the validity of such laws, the Courts must approach the problem from the point of view of furthering the social interest which was the purpose of the legislation. Learned counsel reiterated his submissions through ***Akshay N. Patel v. RBI*** reported as ***(2022) 3 SCC 694***, that the right to carry on trade is subject to reasonable restrictions which are imposed in the interests of the general public.

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147. The Hon'ble Supreme Court has laid down several tests for determining "reasonableness" for the purpose of Article 19(1)(g) of the Constitution. It ranges from test of arbitrariness, excessiveness, and discerning their objective compliance with the Directive Principles of State Policy. In ***Chintaman Rao v. State of M.P***. reported as ***(1950) SCC 695***, the importance of striking the balance between social control and individual freedom was discussed. He vehemently contended that the State has acted within the walls of the proportionality standard in determining violations of fundamental rights laid down in ***K.S. Puttaswamy v. Union of India*** reported as ***(2017) 10 SCC 1***.

148. Lastly, learned counsel made an attempt to distinguish the judgments of various High Courts which have held tobacco as not food. He urges the Court to take cognizance of the action of the welfare State which is towards the betterment of the society.

149. In the light of the aforementioned submissions, the Respondents have accordingly prayed for dismissal of the present writ petition.

150. Before analysing the submissions made on behalf of the parties, it will be worth discussing the judicial pronouncements which have been passed by various Courts with regard to the issues involved in the present case in order to understand the position of law.

JUDICIAL PRONOUNCEMENTS

151. There are various judicial pronouncements by the Hon'ble Supreme Court and other High Courts which throws light on how the relevant enactments are to be interpreted. For a better clarity and

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understanding of the issue and the position of law, it is necessary to revisit the judgments and orders passed by the Hon'ble Courts in this regard.

152. The judicial pronouncements relating to tobacco and tobacco products can be broadly classified into two parts: (A) Judicial pronouncements dealing with the provisions of PFA; and (B) Judicial pronouncements dealing with the provisions of the FSSA.

A. JUDICIAL PRONOUNCEMENTS DEALING WITH THE PROVISIONS OF PFA

153. Prior to the enactment of FSSA, PFA was holding the field of adulteration of food. The most important judgment passed by the Division Bench of the Hon'ble Supreme Court under the PFA relating to the issue of banning of tobacco product is ***Godawat Pan Masala*** *(supra)*. Before analysing the judgment in the matter of ***Godawat Pan Masala*** *(supra)*, it is important to examine the definition of 'food' under the PFA. Section 2(v) of the PFA defines 'food' as:

> "2*(v) "food" means any article used as food or drink for human consumption other than drugs and water and includes—*
> *(a) any article which ordinarily enters into, or is used in the composition or preparation of, human food,*
> *(b) any flavouring matter or condiments, and*
> *(c) any other article which the Central Government 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;*"

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154. The Hon'ble Supreme Court in the matter of ***Pyarali K. Tejani*** *(supra)* was dealing with the issue of whether supari is "food" within the meaning of the definition under Section 2(v) of the PFA and held as follows:

> "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, pharma-copic 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 betelnut, drew our attention to Dr. Nandkarni's Indian Materia Medica, invited us to the 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 effects 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 man for*

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> *nourishment and takes in subsidiaries. Is supari eaten with relish by man for taste and nourishment? It is. And so it is food. Without carrying further on this unusual argument we hold that supari is food within the meaning of Section 2(v) of the Act.*"

155. The Hon'ble Supreme Court in the matter of ***R. Krishnamurthy*** *(supra)* was dealing with the issue whether "gingerly oil" allegedly being sold for external application only could be considered as "food" within the meaning of the PFA. The Hon'ble Court held that it was not necessary that the article was intended for human consumption or preparation of human food. However, it was enough if the article was generally or commonly used for human consumption. The Hon'ble Apex Court held as follows:

> "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 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,*

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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."

156. The Division Bench of the Hon'ble Supreme Court in ***Godawat Pan Masala*** *(supra)*, while dealing with a batch of petitions, held that pan masala and gutka to be "food" within the meaning of the definition in Section 2(v) of the PFA. The relevant portion of the judgment, *inter alia*, reads as follows:

"*Is it food?*

64. Mr. Nagaraja, learned counsel appearing for the petitioners in writ petition No. 173 of 2003, raised a further contention that pan masala or gutka which is the subject matter of the impugned notification does not amount to food

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within the meaning of its definition in Section 2 (v) of the Act. Section 2(v) of the Act reads as under:

"2. (v) "food" means any article used as food or drink for human consumption other than drugs and water and includes-

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

(b) any flavouring matter or condiments, and

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

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 P.K Tejani Vs M.R Dange, this Court held that the word "food" is a very general terms 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 C.A. No. 12746-12747 of 1996 (decided on 6th November 2003). In our view, this judgment is of no aid to us. In the first place, this judgment arises under the provisions of the Essential Commodities Act, 1955, read with the Tamil Nadu Scheduled Articles (Prescription of Standards) Order, 1977 and the notification dated 9th June, 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

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> *concerned with tea. It is not possible to extrapolate the reasoning of this judgment pertaining to tea into the realm of pan masala and gutka. In any event, the judgment in Tejani (supra) was a judgment of the Constitutional Bench which does not seem to have been noticed.*
> *We are, therefore, unable to agree with the contention that pan masala or gutka does not amount to "food" within the meaning of definition in Section 2(v) of the Act."*

157. The Division Bench of the Allahabad High Court in ***Khedan Lal*** *(supra)* was dealing with the issue whether tobacco, which was taken with paan was "food" within the meaning of definition under the PFA. The Hon'ble Court interpreted Section 2(v) of the PFA to mean that "food" includes not only the articles which normally a person eats or drinks with a view to nourish his body but also an article which normally is not considered to be food but which ordinarily enters into or is used in the composition or preparation of human food. The Court held that since tobacco is commonly used in the preparation of paan, which is indisputably food, chewing tobacco was also an article of food within the meaning of Section 2(v) of the PFA.

158. The Constitution Bench of the Hon'ble Supreme Court in the matter of ***ITC Limited*** *(supra)*, in the context of levy of taxes, observed that tobacco is not a "foodstuff".

159. The Division Bench of the Chhattisgarh High Court in the matter of ***K.P Sugandh Limited & ETC., v. State of Chhattisgarh & Ors.,*** reported as ***2008 SCC OnLine Chh 31***, dealt with a writ petition wherein the petitioners had questioned the correctness and constitutional validity of the order passed by the Controller, Food and Drugs Administration and

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Food (Health) Authority, Chhattisgarh in purported exercise of the powers conferred under Section 7(iv) of PFA and had banned the sale of tobacco blended Gutka by whichever name it is known in the State of Chhattisgarh, for a period of five years. The Hon'ble High Court, relied on the judgment of the Hon'ble Supreme Court in ***Godawat Pan Masala*** *(supra)*, held that "*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*."

160. This Court in the matter of ***Ram Babu Rastogi & Ors. v. State,*** reported as ***2011 SCC OnLine Del 5552***, while dealing with a petition under Section 482 of the Code of Criminal Procedure, 1973 challenging an order, wherein the petitioners were summoned by the learned Metropolitan Magistrate in the complaint filed by the Food Inspector of the department of PFA, alleging violation of Section 7 read with Section 16 of the PFA. This Hon'ble Court held that none of the items mentioned in Section 3(p) of COTPA including the chewing tobacco could be said to be falling within the meaning of 'food' under Section 2(v) of the PFA.

161. The Single Bench of the Hon'ble Delhi High Court in the matter of ***Food Inspector v. Rupesh Jain,*** reported as ***2017 SCC OnLine Del 12391***, held that:

> "20. *It is clear after going through the Schedule of the CPT Act that 'Chewing Tobacco' and 'Pan Masala' which has*

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tobacco as one of its ingredients comes within the definition of 'Tobacco Products' as per Section 3(p) of the CPT Act. None of the items including chewing tobacco mentioned in the Schedule could be included in the definition of 'food' under Section 2(v)(a) of the PFA, 1954 since none of these items could be said to be used as food for human consumption or ordinarily enter into or are used in the composition or preparation of human food. Further if the legislature intended to include Pan Masala having tobacco as one of its ingredients or Chewing Tobacco as a "food" item under Section 2(v)(a) of the PFA, 1954 then it would have been specifically mentioned in Appendix B which contains the standards of quality of all food items falling under the PFA, 1954…"

162. Let us now discuss the judgment passed by the Division Bench of the Hon'ble Supreme Court in the matter of ***Godawat Pan Masala*** *(supra)*.

Discussion on the judgment in the matter of Godawat Pan Masala (*supra*)

163. Various State Food (Health) Authorities had issued Notifications under Section 7(iv) of the PFA and banned the storage, manufacture, sale and distribution of Pan Masala and Gutka for different periods. As per Section 7(iv) of the PFA, the Food (Heath) Authorities may prohibit the manufacture for sale, storage, sale and distribute the articles of food for the time being in the interest of public health. While examining the validity of the said Notifications, the Hon'ble Supreme Court held that Section 7(iv) of the PFA is not an independent source of power for the State Authorities. The power under Section 7(iv) is transitory in nature and can be exercised only during local emergencies. The relevant portions of the said judgment, *inter alia*, reads as follows:

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> "*47. We find it difficult to agree with the submissions of Mr. Lalit. That all provisions of a statute have to be read harmoniously and any interpretation as to be ex visceribus actus, is a trite doctrine of construction of statutes. Undoubtedly, if Section 7(iv) is read in isolation, it gives the impression that this is an independent source of power, not subject to any limitation other than the guideline "in the interest of public health". But, when the scheme of the Prevention of Food Adulteration Act is analysed in the light of its preamble and the Statement of Objects and Reasons, it becomes clear that there is no independent source of power under Section 7(iv). Had it been so, there was no need for the rule making power of the State Government under Section 24(2)(a) to define the powers and duties of the Food (Health) Authority or local authority and Local (Health) Authority under the Act. The interplay of sections 23(1A)(f) and 24(2)(a) read with the existing rules in the different states, even after the amendment of Section 7(iv) by the Act 49 of 1964, leads us to conclude that the contention of the states in this regard cannot be accepted.*"

164. The Hon'ble Supreme Court further held that whether any 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.

165. While negating the contention of the State Authorities to the effect that the impugned Notifications are a result of legislative Act and not an administrative act, the Hon'ble Supreme Court observed that the words "*in the interest of public health*" used in clause (iv) of Section 7 of the PFA cannot operate as an incantation or mantra to get over all the constitutional difficulties posited. According to the Hon'ble Supreme Court, the collocation of the words in the impugned Notification suggests

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not a matter of policy, but a matter of implementation of policy. According to the Hon'ble Supreme Court, a decision for banning an article of food or an article containing any ingredient of food injurious to health can only arise as a result of broadly considered policy. If such a power be conceded in favour of a local authority like the Food (Health) Authority, paradoxical results would arise. The same article could be considered injurious to public health in one local area, but not in another. Hence, the Hon'ble Apex Court opined that 'the construction of the provisions of the statute must not be such as to result in such absurd or paradoxical consequences'.

166. While considering the aspect of whether the State Authorities were right in not following the principle of natural justice, the Hon'ble Supreme Court held, *inter alia*, as follows:

> "*73.Learned counsel for the State of Maharashtra cited Union of India and Anr. v. Cynamide India Ltd. and Anr. (vide para 7) where this Court observed thus:*
> *"7.The third observation we wish to make is, price fixation is more in the nature of a legislative activity than any other. It is true that, with the proliferation of delegated legislation, there is a tendency for the line between legislation and administration to vanish into an illusion. Administrative, quasi-judicial decisions tend to merge in legislative activity and, conversely, legislative activity tends to fade into and present an appearance of an administrative or quasi-judicial activity. Any attempt to draw a distinct line between legislative and administrative functions, it has been said, is 'difficult in theory and impossible in practice'. Though difficult, it is necessary that the line must sometimes be drawn as different legal rights and consequences may ensue. The distinction between the two has usually been expressed as 'one between the general and the particular'.*

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'A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; an administrative act is the making and issue of a specific direction or the application of a general rule to a particular case in accordance with the requirements of policy'. 'Legislation is the process of formulating a general rule of conduct without reference to particular cases and usually operating in future; administration is the process of performing particular acts, of issuing particular orders or of making decisions which apply general rules to particular cases'. It has also been said: 'Rule-making is normally directed toward the formulation of requirements having a general application to all members of a broadly identifiable class' while, 'adjudication, on the other hand, applies to specific individuals or situations'. But, this is only a broad distinction, not necessarily always true. Administration and administrative adjudication may also be of general application and there may be legislation of particular application only. That is not ruled out. Again, adjudication determines past and present facts and declares rights and liabilities while legislation indicates the future course of action. Adjudication is determinative of the past and the present while legislation is indicative of the future. The object of the rule, the reach of its application, the rights and obligations arising out of it, its intended effect on past, present and future events, its form, the manner of its promulgation are some factors which may help in drawing the line between legislative and non-legislative acts."

74. We are, however, unable to accept the contention of the learned counsel for the state of Maharashtra that, because the notification is generally intended, it is necessarily a legislative act and therefore there was no question of complying with principles of natural justice. If that were so, then every executive act could masquerade as a legislative act and escape the procedural mechanism of fair play and natural justice.

75. In State of Tamil Nadu v. K. Sabanayagam and Anr. (vide para17), this Court after referring to the aforesaid observations of Chinnappa Reddy, J. in Cynamide (supra),

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observed that even when exercising a legislative function, the delegate may in a given case be required to consider the view point which may be likely to be affected by the exercise of power. This Court pointed out that conditional legislation can be broadly classified into three categories: (1) 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 (as in Tulsipur Sugar Co. case); (2) 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; (3) 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. This Court emphasised that in the third type of cases the satisfaction of the delegate must necessarily be based on objective considerations and, irrespective of whether the exercise of such power is judicial or quasi-judicial function, still it has to be treated to be one 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.

76. In our view, even if the impugned notification falls into the last of the above category of cases, whatever the material the Food (Health) Authority had, before taking a decision on articles in question, ought to have been presented to the appellants who are likely to be affected by the ban order. The principle of natural justice requires that they should have been given an opportunity of meeting such facts."

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167. While declaring the Notifications issued by the State food (Heath) authority as unconstitutional, the Hon'ble Supreme Court concluded as under:

> *"77 …..*
> *1. Section 7(iv) of the Act is not an independent source of power for the state authority;*
> *2. The source of power of the state Food (Health) Authority is located only in the valid rules made in exercise of the power under Section 24 of the Act by the State Government, to the extent permitted thereunder;*
> *3. The power of the Food (Health) Authority under the rules is only of transitory nature and intended to deal with local emergencies and can last only for short period while such emergency lasts;*
> *4. The power of banning an article of food or an article used as ingredient of food, on the ground that it is injurious to health, belongs appropriately to the Central Government to be exercised in accordance with the rules made under Section 23 of the Act, particularly, sub-section (1A)(f).*
> *5. The state Food (Health) Authority has no power to prohibit the manufacture for sale, storage, sale or distribution of any article, whether used as an article or adjunct thereto or not used as food. Such a power can only arise as a result of wider policy decision and emanate from Parliamentary legislation or, at least, by exercise of the powers by the Central Government by framing rules under Section 23 of the Act;*
> *6. The provisions of the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 are directly in conflict with the provisions of Section 7(iv) of the Prevention of Food Adulteration Act, 1954. The former Act is a special Act intended to deal with tobacco and tobacco products particularly, while the latter enactment is a general enactment. Thus, the Act 34 of 2003 being a special Act, and of later origin, overrides the provisions of Section 7(iv) of the Prevention of Food*

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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;
7. The impugned notifications are ultra vires the Act and, hence, bad in law…"

B. JUDICIAL PRONOUNCEMENTS DEALING WITH THE PROVISIONS OF THE FSSA

168. The FSSA is a consolidated Act which regulates the manufacture, storage, distribution, sale and import of food and to ensure availability of safe and wholesome food for human consumption. After the enactment of the FSSA, there were many occasions when the State Health Authorities tried to impose ban on tobacco and tobacco products and there are some important judicial pronouncements to cover the field.

169. In this regard, it is pertinent to mention that the Indian Asthma Care Society approached the Hon'ble Rajasthan High Court seeking a direction to ban on the sale of Gutka and prohibit the use of plastic sachet packaging for Gutka. The order passed by the Hon'ble Rajasthan High Court was challenged before the Hon'ble Supreme Court in the matter of ***Ankur Gutka*** *(supra)*. The Hon'ble Supreme Court vide its interim order dated 07.12.2010**,** directed the learned Solicitor General to instruct the concerned ministries to approach National Institute of Public Health to undertake a comprehensive analysis and study the contents of Gutka, Pan Masala and similar articles manufactured in the country and harmful effects of consumption of such articles. Relevant part of the order is reproduced hereunder:

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> "*...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, 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 finalized, 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...*"

170. Further the Hon'ble Apex Court,vide its order dated 03.04.2013 in ***Ankur Gutkha*** *(supra)*, directed the Secretaries Health Department of all 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 Gutka and Pan Masala with tobacco and/or nicotine. Relevant part of the order dated 03.04.2013 is reproduced hereunder:

> "*Ms. Indira Jaisingh, learned Additional Solicitor General invited the Court's attention to the notification issued by the Government of 23 States and the Administrators of 5 Union Territories for imposing complete ban on Gutka and Pan Masala with tobacco and/or nicotine and then stated that notwithstanding the ban, the manufactures have devised a*

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subterfuge for selling Gutkha and Pan Masala in separate pouches and in is manner the ban is being flouted.
Ms. Indira Jaisingh also placed before the Court xerox copy of D.O.No.P.16012/12/ll-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 any action pursuant to letter dated 27.08.2012.
We also direct the Secretaries, Health Department of all 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."

171. It is also pertinent to mention that the Hon'ble Apex Court in ***Central Arecanut Marketing Corp*** *(supra)*, vide its order dated 23.09.2016, directed 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 Gutka and Pan Masala with tobacco and/or nicotine. Relevant part of the order dated 23.09.2016 of the Hon'ble Apex Court is reproduced hereunder:

"*Learned Amicus Curiae has also invited out attention to paragraph 21 of the Written Submissions on behalf of the*

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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 guthka, 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 guthka 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 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."

172. In pursuance of the directions of the Hon'ble Supreme Court, many states issued Notifications imposing ban on tobacco/tobacco products. The Notifications issued by the State Food (Health) Authorities were challenged before the respective High Courts. Therefore, the views expressed by various High Courts in this regard is important to examine and have been discussed herein below.

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173. The Division Bench of the High Court of Bombay in the matter of ***Dhariwal Industries Limited*** *(supra)*, dealt with the challenge to Regulations 2.3.4 and 3.1.7 of the FSSA as well as the statutory order passed by the Commissioner of Food Safety, State of Maharashtra under Section 30(2)(a) of FSSA. While rejecting the prayer of the petitioner for interim relief, the Bombay High Court *prima facie* opined that:

(a) The definition of "food" used in FSSA is much wider than the 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". Further, the Hon'ble Court observed that even while holding the COTPA to be a special Act, the Hon'ble Supreme Court did not accept the contention of the petitioners that the PFA had no role to play in the matter of regulation of manufacture and sale of Gutka and Pan Masala. In fact, the Hon'ble Supreme Court held that tobacco and tobacco products will come under the ambit of "food" for the purpose of the FSSA.

(b) Section 30(2)(a) of the FSSA conferring power to ban Gutka or Pan Masala under the PFA was vested in the Central Government under Section 23(1A)(f) of PFA and not in the State Government under Section 7(iv) thereof. The Hon'ble Supreme Court thus did not accept the petitioners' contention in ***Godawat Pan Masala*** (*supra*) that the COTPA was the only legislation occupying the field of tobacco and tobacco products and that the PFA had nothing to do with any tobacco product. Furthermore, the Hon'ble Court held that the power conferred on the

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Food Safety Commissioner of the State is not similar to the power of the State Government under Section 7(iv) of the PFA.

(c) Section 30(2)(a) confers independent power on the Food Safety Commissioner of the State.

(d) FSSA is a later Act and a comprehensive legislation on food safety and contains a non-obstante clause in Section 89 thereof, in the field of safety and standards of food (which includes gutka, pan masala and supari) and thus, the FSSA occupies the entire field.

(e) The Commissioner of Food Safety, Maharashtra exercising his powers under Section 30(2)(a) of the FSSA, is a delegate of Parliament.

(f) When action based on experts' report is taken by a delegate of Parliament, it should not in the normal course, be disturbed.

(g) There is an obligation on the food business operator under Section 26(2)(i) of the FSSA not to manufacture or sale any food which is unsafe. Hence, if there is any violation of the said Section, the Commissioner of Food Safety has the power to issue a quasi-legislative order under Section 30(2)(a) of the FSSA. Thus, the Commissioner of Food Safety need not follow the principles of natural justice before the issuance of order under Section 30(2)(a) of the FSSA.

174. The decision in ***Dhariwal Industries Limited*** (*supra*) was followed by the Division Bench of the Bombay High Court in ***Mohammad Yamin Naeem Mohammad*** *(supra).*

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175. The Division Bench of the Hon'ble Patna High Court in the case of ***M/s. Omkar Agency v. The Food Safety and Standards Authority of India,*** reported as ***2016 SCC OnLine Pat 9231***, dealt with the challenge of the orders issued by the Commissioner of Food Safety, Patna whereby the Commissioner, in exercise of powers, under Section 30(2)(a) of the FSSA, had prohibited the manufacture, storage, distribution or sale of Zarda, Pan Masala and Gutka. There was also a challenge to the vires of Regulation 2.11.5 of the Food Safety and Standards (Food Products Standards Food Additives) Regulation, 2011, whereby Pan Masala (not Zarda) has been included as an item of food and the standards for the same have been prescribed and separate provisions for their packaging and labeling have been made. While dealing with the issue, the Hon'ble Division Bench of the Patna High Court held as follows:

(a) When the preamble to FSSA states that science-based standardization would be adopted in laying down standards of food, the Commissioner, while exercising powers under Section 30 of the FSSA, must be in possession of objective materials that the food, sought to be prohibited, does not conform to the standards as prescribed by the Regulations.

(b) Section 30(2)(a) of the FSSA has to be understood in the light of Section 34. As a result, a prohibition order can be issued by the Commissioner of Food Safety only when a report is laid down by the Designated Officer that the health risk condition exists with respect to any food business.

(c) A prohibition order cannot, therefore, be made a permanent order and/or be made to run for years together defeating thereby the legislative

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will, which warrants the executive to exercise its power under Section 30 of the FSSA in emergent circumstances.

(d) 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.

(e) The tenure of the prohibitory order has to be temporary 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 the executive fiat.

(f) The principle of *audi alteram partem* applies in exercise of powers under Section 30(2)(a) and the aggrieved persons should be heard before continuing with the prohibition order.

(g) 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 being carried out.

(h) The provisions of Section 30(2)(a) of the FSSA are referable to Section 7(iv) of the PFA (since repealed) and, hence, the powers are transitory in nature and intended to deal with emergent circumstances for a short period, while such emergency lasts.

(i) The Commissioner of Food Safety has been issuing Notifications from time to time exceeding the period of 1 (one) year, which amounts to an act of legislation, a power not vested in the Commissioner of Food

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Safety. The power conferred by Section 30 of the FSSA upon the Commissioner of Food Safety, cannot be used on a permanent basis or else, it would amount to doing of an act or prohibiting an act by resorting to executive fiat and not by legislative act.

(j) The COTPA, being a parent legislation, is the comprehensive law, which deals with the sale, manufacture and production of tobacco and tobacco products notified in the Schedule of the COTPA, whereas the FSSA is exclusive law, which deals with foods other than tobacco.

(k) Regulation 2.3.4, which prohibits use of tobacco and nicotine with respect to scheduled tobacco and tobacco products under the COTPA, must yield to the COTPA.

(l) The order of the Commissioner of the Food Safety, in so far as it prohibits the use of tobacco and nicotine with respect to scheduled tobacco products under the COTPA, is not only arbitrarily but is also beyond the scope of powers conferred by the FSSA.

176. The Hon'ble Single Judge of the High Court of Kerala in ***Joshy K.V. v. State of Kerala,*** reported as ***2012 SCC OnLine Ker 31407*** was dealing with the issue relating to "chewing tobacco" and prevention of their supply and sale as violative of the provisions of FSSA. The Hon'ble Single Judge held that chewing tobacco or tobacco products are not food as defined under Section 3(j) of the FSSA and it is not food product as specified in Regulation 2.3.4. Tobacco and tobacco products are to be manufactured and sold strictly in accordance with the provisions of COTPA and the rules framed thereunder.

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177. The Division Bench of the Guwahati High Court in the matter of ***Dharam Pal Satyapal Ltd and Anr. v. State of Assam***, reported as ***(2018) 2 Gauhati Law Reports 168*** was dealing with the constitutional validity of the Assam Health (Prohibition of Manufacturing, Advertisement, Trade, Storage, Distribution, Sale and Consumption of Zarda, Gutka, Pan Masala etc., containing Tobacco and/or Nicotine) Act 2013. The Hon'ble High Court, while quashing the aforementioned legislation, held that COTPA is a comprehensive piece of legislation on all tobacco products including cigarettes, chewing tobacco, pan masala, gutka, etc. In other words, this Act covers both smoking tobacco and chewing tobacco. The Hon'ble Court held that not only the Assam Legislative Assembly lacked legislative competence to have enacted the Assam Health (Prohibition of Manufacturing, Advertisement, Trade, Storage, Distribution, Sale and Consumption of Zarda, Gutka, Pan Masala etc., containing Tobacco and/or Nicotine) Act 2013 but the said Act also suffers from the vice of repugnancy vis-à-vis the Central Act, namely, the COTPA and therefore cannot be sustained. Furthermore, it also held that unlike intoxicating drinks, trade and commerce in tobacco cannot be said to be *res extra commercium*.

178. The learned Single Judge of the Calcutta High Court in the matter of ***Sanjay Anjay Stores and Ors. v. Union of India,*** reported as ***2017 SCC OnLine Cal 16323*** was dealing with a petition, where the petitioners prayed that they are producers within the meaning of Section 3(k) of the COTPA and are outside the purview of the FSSA and Regulation 2.3.4. Further, the petitioners also challenged a Notification issued by the Commissioner of Food Safety, West Bengal, prohibiting zarda, khaini and

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all tobacco products in the State of West Bengal, in exercise of its powers under Section 30(2)(a) of the FSSA read with Regulation 2.3.4. The main questions before the Hon'ble Court were whether the said products are "food" within the meaning of the FSSA and secondly, whether the FSSA would apply to such products or the COTPA would apply for regulating the manufacturing, storage, distribution and sale of such products. The Hon'ble Calcutta High Court held that the above-mentioned items are not "food" within the meaning of the FSSA as tobacco products provide stimulant which is more psychological rather than real. Further, the Hon'ble Court held that on the strength of a delegated legislation in the form of the Regulations framed under the FSSA, the authorities cannot seek to prohibit trade and commerce in the said products. That would amount to an exercise of a power which they do not have. Furthermore, the Hon'ble Court held that the COTPA is a comprehensive legislation to regulate trade and commerce in tobacco products. The FSSA, no doubt is a subsequent legislation. Section 97(1) of the FSSA provides that the statues specified in the Second Schedule to the FSSA shall stand repealed, which does not include the COTPA. Hence, the COTPA remains an effective piece of legislation in its own field, not being touched by FSSA. The Hon'ble Court further held that the provisions of the COTPA would override the provisions of the FSSA. The relevant portions from the aforesaid judgment are reproduced herein below:

> "*(39) If it is assumed that tobacco is food within the meaning of FSSA then there must be a science based standard for tobacco to regulate manufacture, storage, distribution, sale and import of tobacco products to ensure availability of safe and wholesome tobacco for human*

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consumption. Unless such standards can be laid down, tobacco cannot be termed as food. Obviously such standards cannot be laid down. Consumption of tobacco and tobacco products are universally acknowledged as injurious to human health and that is why COTPA has been promulgated to regulate trade and commerce in tobacco and tobacco products. Such products cannot, in my opinion, be considered as food by any stretch of imagination……
(40) ……..Hence, in my opinion, in spite of the expansive definition of 'food' in Section 3(j) of FSSA, tobacco and tobacco products cannot be said to be within the purview of the said Act.

(41) Even if for the sake of argument I were to hold that the said products come within the definition of food as provided in the FSSA, I would still hold that the Commissioner of Food Safety has no jurisdiction to issue notifications like the one under challenge in the present writ applications, for the following reasons:
(42) FSSA is a regulatory statute. It empowers the authority to regulate the manufacture, storage, distribution, sale and import of food products for human consumption. Such regulatory power does not authorize the authorities to prohibit the manufacture, etc. of tobacco or tobacco products even if the same can be called 'food'. Trade in tobacco is not impermissible in India. In Godawat Pan Masala (supra) the Apex Court held that tobacco or tobacco products are not res extra commercium. If consumption of tobacco or products containing tobacco or nicotine was considered to be so inherently dangerous for human health, the Parliament could have banned altogether trade and commerce in tobacco and tobacco products even in the face of Art. 19(1)(g) of the Constitution of India. But the Parliament did not do so. It has instead chosen to regulate rather than prohibit trade and commerce in tobacco and tobacco products by promulgating COTPA. Hence, on the strength of a delegated legislation in the form of FSS Regulations framed under the FSSA, the authorities cannot

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seek to prohibit trade and commerce in the said products. That would be an exercise of a power that they do not have.

(43) In view of my considered opinion that the said products are not food within the meaning of FSSA, according to me there is no conflict between the FSSA and COTPA. The two statutes operate in different fields and there is no repugnancy between them. The conflict is between the COTPA and the FSS Regulations. It is trite law and I need not cite any authority for it that if there is a conflict between a central legislation and a delegated legislation, the later must yield to the former.

(44) As I see it, the FSSA has been enacted to ensure minimum standard of food for human consumption in the interest of public health and the COTPA has been promulgated to regulate the trade and commerce in tobacco and tobacco products also in the interest of public health. There is no overlapping and hence no repugnancy or conflict between the two enactments. Reasonable restrictions may be imposed on the trade and commerce in tobacco and allied products under the COTPA but the Commissioner of Food Safety has no jurisdiction to impose any such restriction or prohibition under the FSSA.

(45) I am not for a moment suggesting that consumption of tobacco or tobacco products is not injurious to public health. However, I am of the firm opinion that the Commissioner of Food Safety or any other authority does not have the power or jurisdiction under the FSS Regulations or the FSSA to prohibit the trade and commerce in the said products. Restriction may be imposed on the trade and commerce of the said products only to the extent permitted under the COTPA."

179. The Hon'ble Division Bench of Madras High Court in the matter of ***J.Anbazhagan Member of Legislative Assembly*** *(supra)*, which was pertinently a public interest litigation, and was directed against the illegal manufacture and sale of chewable forms of tobacco like gutkha and pan

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masala, which are believed to cause life threatening and/or fatal ailments such as cancer, *inter alia*, in the State of Tamil Nadu. The Division Bench of Madras High Court disagreed with the decision of the learned Single Judge of the High Court in ***Jayavilas tobacco Traders LLP v. The Designated Officer and Ors***., reported as ***2017 SCC OnLine Mad 2458*** and the decision of the Madurai Bench of the High Court of Madras 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, wherein it was held that the petitioners who are manufacturing Gutka and Pan Masala cannot be proceeded under the FSSA. The Hon'ble Division Bench further agreed with the Single Bench of the High Court of Bombay in ***Dhariwal Industries Limited*** *(supra)* and held that Gutka and Pan Masala are "food" within the meaning of the FSSA. The Hon'ble Court further held that the judgment of the Hon'ble Supreme Court in ***Godawat Pan Masala*** *(supra)* was rendered in the context of the PFA and will not have any application in the facts and circumstances of the instant case, as the definition of "food" under the FSSA is different and far more expansive than the definition of "food" in Section 2(v) of the PFA. The said decision in ***J.Anbazhagan Member of Legislative Assembly*** *(supra)* has further been affirmed by the Hon'ble Supreme Court in ***E. Sivakumar v. UOI,*** reported as ***(2018) 7 SCC 365***.

180. In ***Prabhat Zarda Factory India Private Ltd. v. Lieutenant Governor*** reported as ***2018 SCC OnLine Cal 221***, an Order issued by the Commissioner of Food Safety was challenged before the Hon'ble High Court of Calcutta, Circuit Bench at Port Blair. The said Order issued

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under Regulation 2.3.4 in exercise of the powers conferred by Section 92(2)(1) read with Section 26 of the FSSA, provides that products are not to contain any substance which may be injurious to heath and tobacco and nicotine shall not be used in any food product. The learned Single Judge held that the Respondent cannot obtain benefit of the judgment passed in the matter of ***Godawat Pan Masala*** *(supra)* as the Hon'ble Supreme Court has held that the provisions of the COTPA are directly in conflict with Section 7(iv) of the PFA. The COTPA is a special Act intended to deal with tobacco products and the PFA is a general enactment. The Hon'ble Court further held that Regulation 2.3.4 is a delegated legislation, even if it brings the relevant products within the meaning of "food", it cannot supersede the parent Act. The Regulation did not empower the respondent to issue the impugned Notification.

181. Further, the learned Single Judge of the Hon'ble High Court of Madras in ***Jeetmal Ramesh Kumar v. Commissioner, Food Safety and Drug Administration Department and Others,*** reported as ***2019 SCC OnLine Mad 18993*** held that a conjoint reading of Section 3(1)(j) of the FSSA, Regulation 2.3.4 and Notification No. 1418/2013/S8/FSSA, dated 23.05.2018 in light of the decision of the Hon'ble Court in the case of ***J.Anbazhagan*** *(supra)* leads one to the irresistible inference that chewing/chewable tobacco is a banned substance and that, it falls under the purview of the FSSA.

182. The learned Single Judge of the Hon'ble High Court of Andhra Pradesh in the matter of ***Dasa Shekar v. State of Andhra Pradesh*** in W.P.No.7336 of 2021 dated 21.09.2021 was dealing with a batch of

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petitions wherein the petitioners were aggrieved by the action of the police authorities and in some cases the authorities under the FSSA, seizing tobacco products, either at the stage of transportation or at the stage of storage or sale of these products. The Hon'ble Single Bench of the High Court referred the matter to the Division Bench of the Andhra Pradesh High Court and observed as under:

> "*34. In view of the above judgements of the Hon'ble Supreme Court in Pyarali K. Tejani v. Mahadeo Ramchandra Dange and Godawat Pan Masala Products I.P. Limited & Anr., v. Union of India & Ors.,the tobacco products, viz., Chewing Tobacco, Pan Masala or any chewing material having tobacco as one of its ingredients (by whatever name called), Gutka and Tooth Powder containing tobacco would have to be construed as food.*
> *35. However, the earlier decisions of this Court on the basis of Godawat Pan Masala Products I.P. Limited & Anr., v. Union of India & Ors., have been to the effect that, the above tobacco products are not Food. There are now two contradictory views being expressed by this court, on the basis of the very same judgements….*
> *36. In the circumstances, the issue as to whether Chewing Tobacco, Pan Masala or any chewing material having tobacco as one of its ingredients (by whatever name called), Gutka and Tooth Powder containing tobacco would have to be construed as food or not is referred for the consideration of a Division Bench of this Court.*"

It is pertinent to note that the Hon'ble Court referred the above judgment to the Division Bench in W.P 10500 of 2021, which is a pending consideration.

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183. After the judgment in ***Dasa Shekar*** *(supra)*, the learned Single Judge passed a judgment in ***Uppara Veerendra v. State of Andhra Pradesh,*** reported as ***2021 SCC OnLine AP 4005***, dated 28.12.2021 wherein the learned Single Judge held that chewing tobacco is not "food" under the FSSA.

184. Further, the Hon'ble Division Bench of the High Court of Telangana in the matter of ***Shri Kamdhenu Traders*** *(supra)* was dealing with a challenge to a Notification issued by Commissioner of Food Safety, in exercise of its powers under Section 30(2)(a) of the FSSA. It is pertinent to note that the petitioner's business in this case was broadly concerned with pure tobacco and scented tobacco, which are marketed under the brand names Phoolchap (pure tobacco) and VI Tobacco (scented tobacco). The Hon'ble Court held that:

> "*45.It is thus material to note that Section 89 of the FSSA, gives the provisions of the FSSA, an overriding effect on all other food related laws. Once it is held that tobacco and other products, fall within the definition of food as enumerated in Section 3(j) of the FSSA, the overriding effect of Section 89 of the FSSA, would make the FSSA hold the field instead of COTPA...*"

LEGAL ANALYSIS

185. Heard the learned counsels for the parties in detail and examined the documents placed on record as well as the judgments relied upon by the parties.

186. One of the main grounds on which the impugned Notifications have been challenged by the Petitioners is them being arbitrary and *ultra*

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vires the FSSA as Respondent No.1 is not empowered under the provisions of the FSSA, or the rules and regulations made thereunder to impose such a prohibition on manufacture, storage, distribution or sale of chewing tobacco since the same is a scheduled product under the COTPA and cannot in any manner be construed as "food" within the ambit of the FSSA. The Respondents, on the contrary, have argued that Respondent No.1 was well within his rights to issue the impugned Notifications under Regulation 2.3.4, who has been mandated with power under Section 30(2)(a) of the FSSA to prohibit the manufacture, storage, distribution and sale of any article of food, such as chewing tobacco, in the interest of public health and welfare.

187. Before addressing the aforementioned contentions of the parties, it is important to analyse some of the provisions of the FSSA and rules and regulations made thereunder. Section 30 of FSSA deals with the functions of the Commissioner of Food Safety and Section 30(2)(a) provides as follows:

> "*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;*
> ……."

188. Regulation 2.3.4 of Regulations, 2011 states the following:

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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.*"

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

192. The Regulations, 2011 have been made by the FSSAI in exercise of the powers conferred by Section 92(2)(l) read with Section 26 of the

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FSSA. Section 26 of the FSSA provides for responsibilities of the food business operators. The terms, 'food business' and 'food business operator' are defined under the FSSA. Moreover, Section 31(1) of the FSSA provides that no person shall commence or carry on any food business except under a license as per the provisions of the FSSA. However, as per the FSSA, the persons dealing with tobacco and tobacco products are not required to obtain any license(s) under the FSSA.

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.

194. Referring to Section 30(3) of the FSSA, learned senior counsel submitted that the power to prohibit impinges on Article 19(1)(g) of the Constitution as the Parliament has not delegated the power to ban/prohibit to either the Central Government, State Government or the Food Authority. Moreover, the power to prohibit would lie with the essential Legislative Policy domain and hence, it is not possible to delegate such power.

195. It is further significant to note that the executive power of the State is not to act as an independent law-making agency in as much as the

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function of enacting law under the Constitution does not vest with the executive and its function is only to fill up the gaps. It is settled that the power to make the laws lies with the Legislature and not with the Executive. The Executive has to merely implement the policies/laws made by the Legislature. If the State is permitted to take recourse to its executive powers to make laws, then the same would result in laws being made by the Executive and not by the Legislature in contravention to the intent of the Constitution of India.

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.

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

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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

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override 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*"

201. The Hon'ble Supreme Court, in the case of ***Godawat Pan Masala*** *(supra)*, observed that the legislation enacted to deal with tobacco does not suggest that the Parliament has ever treated tobacco as *res extra*

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commercium nor has the Parliament ever attempted to ban its use absolutely. Merely licensing regulation, duties and taxes have been imposed on tobacco products. The Hon'ble Supreme Court further examined whether tobacco can be treated as '*res extra commercium*', and held as under:

> "*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 Regulations) 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. 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 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*

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> *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.*"

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.

203. The Preamble of the COTPA read with Section 2 thereof establishes that the COTPA is a comprehensive law dealing with the prohibition of advertisement and Regulation of trade and commerce, production, supply and distribution of tobacco and tobacco products. Section 3(p) of the COTPA defines tobacco products i.e., the products defined in the Schedule to the COTPA. Various provisions of the COTPA provides for permissible quantity of nicotine and tar in cigarettes and tobacco products and testing thereof. In view thereof, it is evident that use of nicotine and tar is permissible in tobacco products.

204. Every law has certain purpose to achieve, so while interpreting a statute those purposes should be taken into consideration and it should be

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read as a whole while interpreting. The rule of interpretation requires that while interpreting two statutes, the courts should make an effort to interpret the provisions so as to harmonise them so that the purpose of the enactment may be given effect to and both the legislations may be allowed to operate without rendering either of them otiose.

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 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'.

207. Another issue which arises for consideration before this Court is whether the enactment of the FSSA impliedly repeals the COTPA. The

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answer to this question, in the considered opinion of this Court, is answered in negative for the reasons discussed herein below.

208. It has been argued on behalf of the Petitioners that a general law does not abrogate an earlier special law by mere implication. Section 97 of the FSSA specifically repeals certain Central Acts, as specified in the Second Schedule of the FSSA. However, the COTPA has not been repealed either expressly or by implication.

209. It is a settled position of law that there is a presumption against repeal by implication. Thus, when a new Act contains a repealing section mentioning the Acts which it expressly repeals, then there is a presumption against implied repeal of other laws which are not specifically mentioned therein. In such cases, the burden to show that there has been repeal by implication lies on the party asserting the same.

210. Moreover, Section 89 of the FSSA provides for an overriding effect of the FSSA over all other food related laws. The COTPA, being a legislation governing tobacco products, does not deal with "food" and can therefore, by no stetch of imagination, be covered within the meaning of "other food related laws" as provided under Section 89 of the FSSA. Moreover, the COTPA existed prior to enactment of the FSSA and both the legislations have been in operation since their respective enactments, which makes it apparent that both the Acts continue to operate in their respective fields. Furthermore, even after enactment of the FSSA in the year 2006, various rules have been made in exercise of Section 31 of the COTPA and several amendment(s) have been brought about in provisions

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of the COTPA, which clearly shows there is no question of implied repeal of the COTPA by enactment of the FSSA.

211. In view of the aforementioned, the doctrine of implied repeal has no application to the present case because both the aforementioned Acts i.e., FSSA and COTPA occupy different fields i.e., the former applies to the food industry while the latter applies to the tobacco industry. Hence, in the considered view of this Court, the FSSA does not impliedly repeal the provisions of the COTPA.

212. Now the next question to be examined is whether tobacco and tobacco products can be termed as "food" under the FSSA. The FSSA was enacted to consolidate the laws relating to food. As per Section 3(1)(j) of the FSSA:

> "*Food means any substance, whether processed, partially processed or unprocessed, which is intended for human consumption and includes primary food to the extent defined in clause (zk), genetically modified or engineered food or food containing such ingredients, infant food, packaged drinking water, alcoholic drink, chewing gum, and any substance, including water used into the food during its manufacture, preparation or treatment but does not include any animal feed, live animals unless they are prepared or processed for placing on the market for human consumption, plants, prior to harvesting, drugs and medicinal products, cosmetics, narcotic or psychotropic substances.*"

213. It has been argued on behalf of the Respondents that Section 2(v) of the PFA had a narrower definition of food as compared to Section 3(1)(j) of the FSSA. These are beneficial legislations and therefore while

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interpreting the provisions thereof, liberal interpretation is to be adopted so that maximum benefits can be extended to the public at large. The Respondents have relied on various judgments to substantiate their said contention.

214. The Petitioners, on the contrary, have argued that chewing tobacco is a scheduled product under the COTPA and cannot be construed as "food" under the FSSA. Moreover, chewing tobacco has no health or nourishment value. It has further been argued that chewing tobacco can be differentiated from Gutka, Pan Masala and other similar products as the former contains 100% pure tobacco whereas the latter comprises of other food items such as betel nut, saffron, lime, cardamom, etc. besides tobacco. Chewing tobacco is also a product different from Gutka, Pan Masala, etc. under various taxing statutes.

215. With regard to the question whether tobacco and tobacco products fall within the definition of Section 3(1)(j) of the FSSA, different High Courts have given divergent views on this aspect, which have been discussed in detail herein above.

216. It can be safely presumed that at the time of enactment of the FSSA, a legislation governing the food industry, the Legislature would have known the existence of the COTPA, a Central Act enacted to take control of the tobacco industry. Various amendments and framing of rules under COTPA even after the enactment of the FSSA explains and strengthens the aforementioned presumption and belies the theory of an implied repeal of the COTPA by the FSSA.

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217. It is noteworthy to mention that the FSSA warrants to lay down science-based standards for food and regulate their manufacture, storage, distribution, sale and import to ensure availability of wholesome food for human consumption. In view of the aforesaid, tobacco cannot be termed as "food" within the meaning of the FSSA as no science-based standards can be laid down for tobacco to regulate its sale, distribution and storage in order to ensure safe and wholesome tobacco for human consumption.

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 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

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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.

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 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.

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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

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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?*
> *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*

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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 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."

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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 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

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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.

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

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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.

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

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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 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

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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.

233. This Court has taken note of the fact that the Hon'ble Supreme Court in the matter of ***Ankur Gutka*** *(supra)* and ***Central Arecanut*** *(supra)* has directed the Secretaries, Health Department of the States and Union Territories to ensure compliance of the ban imposed on manufacturing and sale of Gutka and Pan Masala with tobacco and/or nicotine. We understand that the aforesaid matters are still pending disposal before the Hon'ble Apex Court.

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

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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.

235. It is further significant to take note of the fact that it has been vehemently argued on behalf of the Respondents, while placing reliance on various reports including the one provided by National Institute of Health and Family Welfare, that the use of tobacco has various harmful effects on public health. Reliance has also been placed by the Respondents on various studies, data and statistics in this regard to substantiate their contentions. Attention of this Court has also been drawn on numerous harmful effects and various diseases caused by the use of smokeless tobacco, such as oral and various other types of cancers, heart disease and stroke, besides many more.

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236. This Court is conscious of the harmful effects and various diseases caused by the use of tobacco, both smokeless and smoking. In addition to the ill-effects of smokeless tobacco pointed by the Respondents, this Court is of the view that tobacco, in any form, not only smokeless but also smoking, is injurious to public health and this Court accordingly condemns and discourages the use of any form of tobacco. Public health is one of the most important part of the society and country and therefore, it is necessary to take all steps to preserve the same in all possible manners.

237. Undisputedly, this Court agrees that tobacco and nicotine are injurious to health, however, the present case involves certain questions of law which cannot be decided merely on the basis of public conscious and sentiments but have to be decided and settled based on the fair interpretation of law in the light of the judicial precedents.

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

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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 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.

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(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.

239. In light of the aforementioned discussion and reasoning, this Court is of the considered view that while issuing the impugned Notifications, the Respondent No.1/Commissioner of Food safety exceeded its power and authority in contravention of the powers vested in him under the FSSA and therefore, the said impugned Notifications are hereby quashed and set aside.

240. The present Writ Petitions are allowed in the above terms. All the pending applications are disposed off. No order as to cost.

GAURANG KANTH, J.

SEPTEMBER 27, 2022
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