

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.06.2017

CORAM

THE HONOURABLE MR. JUSTICE M.DURAI SWAMY

W.P.No.21 of 2017 &
W.M.P.No.18 of 2017

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

v.

The Designated Officer
The Food Safety & Drugs Control Dept.
Office of the Food Safety & Standard Authority
38, II Floor, Collectorate Building
Villupuram Dt-605 602 .. Respondents

Prayer : Writ Petition filed under Article 226 of the
Constitution of India praying for the issuance of a writ of
Certiorari, calling for the records relating to the issuance of
the Order in reference in Na.Ka.No. 548/A2/2016, dated
24.11.2016 of the respondent herein and quash the same as
illegal.

For Petitioner : **Mr.K.R. Laxman, Mr.B. Saravanan and
M. Balaji***

For Respondents : Mr.A.N.Thambidurai
Special Govt. Pleader

O R D E R

The petitioner has filed the above writ petition to issue
a Writ of Certiorari to call for the records relating to the
issuance of the order dated 24.11.2016 of the respondent
and to quash the same.

2. According to the petitioner, it is a partnership firm
and has been manufacturing tobacco products since the year 1972.
On 05.10.2016, samples of tobacco products manufactured by the
petitioner was collected by the Food Safety Officer,

Vikkiravaandi, from the shop named "Kalima Stores" located at 116-4/324, Main Road, Vikkiravaandi. On 03.11.2016, a representation was sent to the respondent along with other similar tobacco products manufactured by the petitioner stating that the tobacco does not fall under the food category and the order of the Madurai Bench of Madras High Court passed in CrI.O.P.(MD) No.5505 of 2015, dated 27.04.2015 was also annexed along with the representation. The respondent passed the impugned order dated 24.11.2016 under the Food Safety and Standards (Prohibition and Restrictions on Sales) Regulations Act, 2011 implicating the petitioner for the alleged offences under section 3(1) (zz) (i) (iii) (v) of FSS Act, 2006 and Rules 2.3.4 of the Food Safety and Standards Regulations Act, 2011. According to the petitioner, tobacco is not a food product, therefore, the provisions of Food Safety and Standards Regulations Act, 2011 and FSS Act, 2006, does not apply.

3. Mr.S.Prabhakaran, learned Senior Counsel, appearing for the petitioner submitted that since the tobacco is not a food product, the provisions of FSS Act, 2006 and Food Safety and Standards Regulations Act, 2011 have no application. Further, the learned Senior Counsel, in support of his contention, relied upon the following judgments:-

(i) Judgment of the Hon'ble Supreme Court of India passed in Appeal (Civil) No.4674 of 2004 [Godawat Pan Masala Products I.P. Ltd. & Another v. Union of India & others], dated 02.08.2004, wherein the Apex Court held as follows:-

"As a result of the discussions, we are of the view that:

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, subsection (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 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;

8. The impugned notifications are unconstitutional and void as abridging the fundamental rights of the appellants guaranteed under Articles 14 and 19 of the Constitution.

In the result, we allow the appeals and the writ petition and set aside the impugned judgments of the division benches of the Bombay High Court and Andhra Pradesh High Court and quash the notifications impugned as bad in law, void, illegal and unenforceable against the appellants/petitioners.

No order as to costs."

(ii) The order passed by the Madurai Bench of Madras High Court passed in Crl.O.P.(MD) No.5505 of 2015 [Manufacturer, M/s.Tejram Dharam Paul, Maurmandi, Bhatinda District, Punjab

and another v. The Food Safety Inspector, Ambasamudram] dated 27.04.2015, wherein it has been held as follows:-

"4.The only submission made by the learned counsel for the petitioners is that the sale of tobacco would not attract the provisions of the enactment. He further submits that as per Rule 2.3.4 of the Food Safety and Standards (Prohibition and Restrictions on Sales) Regulations Act, 2011, tobacco shall not be used as ingredients in any food products. As the tobacco does not come within the purview of the food product, the provisions will not apply. Moreover, when the allegation itself is that it has been sold in packet as tobacco.

7.Considering the very same issue with respect to the petitioners, the High Court of Kerala was pleased to hold while dealing with the very same provisions in the following manner:

"30.Having found that chewing tobacco is not a food product as defined under the FSS Act, I am of the view that the writ petitions are only to be allowed as follows:

i)That tobacco or tobacco products are not food as defined under Section 3(j) of the FSS Act and it is not a food product as specified in the Regulation 2.3.4 of the Regulations.

ii)Tobacco and tobacco products are to be manufactured and sold strictly in accordance with the provisions of the CTP Act and the Rules framed thereunder.

iii)The respondents have no right take any action against tobacco or tobacco products by virtue of Government Order dated 22.05.2012 (Ext.P9 in W.P.C.No.13580 of 2012)."

8. Thus, it is clear that the petitioners who are manufacturing Gutkha and Pan Masala cannot be proceeded under the FSSAI. Tobacco is covered under the COTA (Cigarettes and other Tobacco Products Act, 2003)

9. In the light of the above, this Court is constrained to quash the proceedings. Accordingly, the proceedings initiated against the petitioners in C.C.No.9 of 2014 on the file of the Judicial Magistrate Court, Ambasamudram, is hereby quashed and the criminal original petition is allowed. Consequently, the connected miscellaneous petition is closed. However, it is made clear that this order will not stand in the

way the appropriate authority to take action under COTA (Cigarettes and other Tobacco Products Act, 2003)."

4. Mr.A.N.Thambidurai, learned Special Government Pleader, appearing for the respondent submitted that the respondent has rightly passed the impugned order and there is no illegality in the order passed by the respondent. However, the learned counsel submitted that no appeal has been filed as against the order passed by the Madurai Bench of Madras High Court in Crl.O.P.(MD) No.5505 of 2015. In the said judgment, this court has observed that the petitioners therein, who are manufacturing Gutkha and Pan Masala, cannot be proceeded under the Food Safety and Standards Regulations Act, 2011 and the tobacco is covered under the COTA (Cigarettes and other Tobacco Products Act, 2003).

5. Since the petitioner is manufacturing fine quality tobacco with prior licence obtained without violating any provisions of law, the ratio laid down by the Madurai Bench of Madras High Court squarely applies to the present case.

6. The present writ petition is covered by the decision of the Madurai Bench of Madras High Court passed in Crl.O.P.(MD) No.5505 of 2015. Following the said ratio, the impugned order dated 24.11.2016 is liable to be set aside. Accordingly, the same is set aside. The writ petition is allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CO)
dt. 19.6.2017

Corrected as per order
dated 17.7.2017 in WP.21/17

Sd/-
Assistant Registrar(CO)
dt. 29.7.2017

//True Copy//

Sub Assistant Registrar

Rj

To

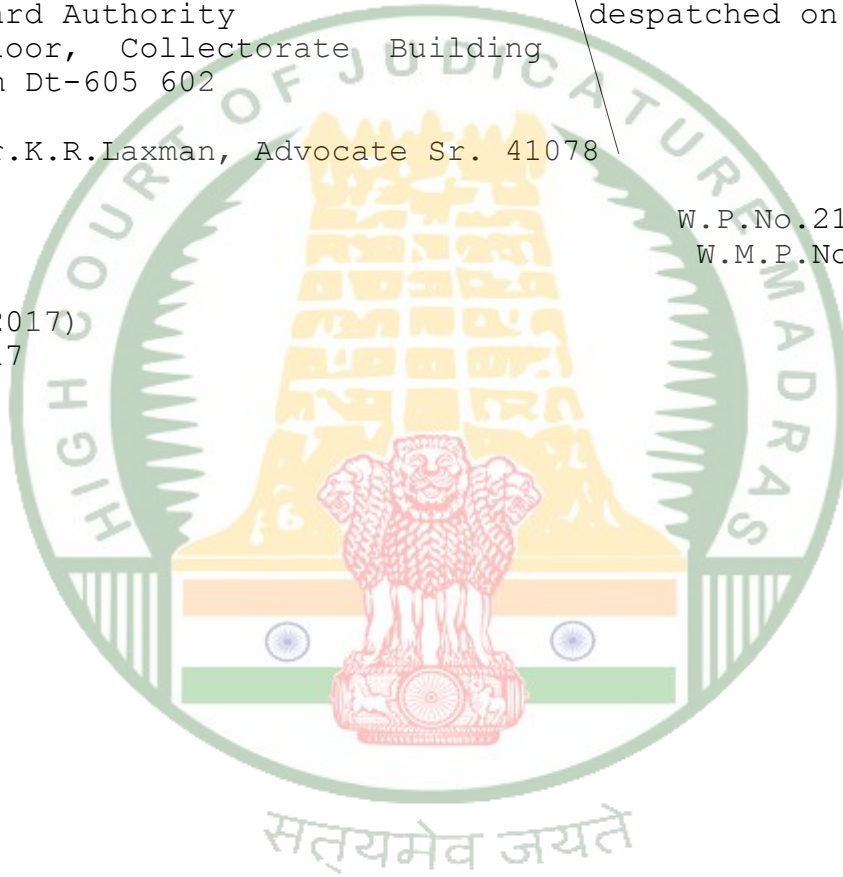
The Designated Officer
The Food Safety & Drugs Control Dept.
Office of the Food Safety &
Standard Authority
38, II Floor, Collectorate Building
Villupuram Dt-605 602

To be substituted the
order already
despatched on 23/06/2017

+lcc to Mr.K.R.Laxman, Advocate Sr. 41078

W.P.No.21 of 2017 &
W.M.P.No.18 of 2017

SJ(CO)
VR(20/06/2017)
EU 31.07.17



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