

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 01.08.2019	Delivered on 07.08.2019
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CORAM:THE HONOURABLE MR. JUSTICE **N. ANAND VENKATESH**

Crl.OP No.17533 of 2019
and
Crl.MP.No.8853 of 2019

Thangaraj @ Thangarasu

..Petitioner

.Vs.

1.State,
rep. by the Inspector of Police,
Paramathi Police Station,
P.Velur Taluk,
Namakkal District.

(Crime No.18/2019)

2.S.Malarvizhi,
Sub- Inspector of Police,
Paramathi Police Station,
P.Velur Taluk,
Namakkal District.

..Respondents

PRAYER: This Criminal Original Petition is filed under Section 482 of the Code of Criminal Procedure, to call for the records relating to FIR in Crime No.18 of 2019 dated 15.01.2019, on the file of the 1st Respondent, the Inspector of Police, Paramathi Police Station, Namakkal District and quash the same.

For Petitioner : Mr.V.Karthik, Senior Counsel
for Mr.C.Prabakaran

For Respondents : Mr.M.Mohamed Riyaz, APP

ORDER

This Criminal Original Petition has been filed seeking to quash the FIR in Cr.No.18 of 2019, pending investigation on the file of the 1st respondent Police.

2.The case of the prosecution is that based on a secret information received from a credible source on 14.01.2019, the 2nd respondent along with other police officers were waiting near Keerambur Toll-Plaza. At about 20.00 hours, they stopped a Lorry and found that it contained banned items like, Tobacco, Gutkha and Panmasala. On enquiry, they found that it was transported from Bangalore and was being taken to the godown owned by the petitioner. The driver of the vehicle and another person accompanying him were arrested and the entire property was seized under the cover of Mahazar and a sample was also sent for expert opinion. Based on the complaint given by the 2nd respondent, an FIR came to be registered against four named accused persons in Cr.No.18 of 2019, for an offence under

Sections 273 & 328 of IPC r/w 7 & 20(1) of COTPA Act, 2003 and Section 52 & 59 of Food Safety and Standards Act, 2006. The petitioner has been added as A-3 in the FIR.

3.Mr.V.Karthick, learned Senior Counsel appearing on behalf of the petitioner made the following submissions:

- The manufacture, storage, transport, distribution or sale of all food products chewable or otherwise in the name of Gutkha, Panmasala and other food products containing Tobacco and/or nicotine as ingredients, has been prohibited in the interest of public health. The G.O., does not provide for the consequence of the violation of the G.O., and therefore the possession of Tobacco products by itself is not an offence.
- No overt act has been attributed against the petitioner except for the confession of the co-accused to the effect that the Tobacco products were brought to be stored in the godown belonging to the petitioner.
- The respondent Police is not the Competent Authority to register the FIR for the offence under the Food Safety

and Standards Act, 2006 and the Act itself contemplates filing of a private complaint by the concerned authority. Therefore, the FIR registered by the respondent Police for the offences under Sections 52 & 59 of the Food Safety and Standards Act, 2006 are not sustainable

- The allegations made in the complaint even if taken as they are, do not attract the provisions of Section 7 and Section 20(1) of Cigarette and other Tobacco Products Act, 2003. The said provision only deals with regulation of production, supply and distribution of Cigarette or any other Tobacco products without there being a specified warning including a pictorial warning. The facts of the present case will have no application to Section 7 of the Act, and consequently the FIR cannot be sustained for the punishment provided under Section 20(1) of the Act.

- The provisions of Section 273 of IPC, are not attracted in the present case since it will apply only in cases where an accused person is involved in selling or offering, as food or drink, any article which has been

rendered or has become noxious or has become unfit for food or drink. In the present case, the product that has been seized cannot be rendered to be noxious without there being any report to that effect and even without a report, the respondent Police ought not to have registered an FIR for an offence under Section 273 of IPC.

- The allegations made in the complaint also does not attract the provisions of Section 328 of IPC since the provision itself contemplates an actus-reus by way of administration or causing somebody to take a poisonous or other substance. In the present case, there is no physical act attributed to the petitioner until now the product that has been seized has not been declared to be poisonous.

- The learned Senior Counsel in order to substantiate his submissions relied upon the following judgments:

I. Shambhu Dayal Agrawal and Ors .Vs. State of Gujarat
reported in **2003 (2) Guj LH 621.**

II. **Jeewan Kumar Raut & Another .Vs. Central Bureau of Investigation** reported in **2009(7) SCC 526**.

III. **Pepsico India Holdings [P] Ltd., and Anr .Vs. State of U.P. And Ors** reported in **[2011 (2) Crimes 250]**

IV. **Christy Fried Gram Industry, Bangalore and Anr. .Vs. State of Karnataka and Others** reported in **[2016 CrI.L.J.482]**.

V. **Sailen Ganguly .Vs. The State of WB & Anr.** reported in **[CDJ 2016 Cal HC 100]**.

VI. **Pankaj Chhabra @ Pankaj .Vs. The State of Bihar** made in **CrI.W.J.C.No.551/2016 (reported in Supreme today)**.

VII. **Mohammad Anis .Vs. State of Bihar** made in **CrI.Mis.No.41634 of 2014**.

VIII. **M/s.Silver Drop Food and Beverages Pvt.Ltd. and Another. .Vs. The State of Assam and Others** made in **CrI.Pet.487 of 2016**.

IX. **Ganesh Pandurang Jadhao .Vs. State of Maharashtra & Ors.** reported in **[ABC 2016(1) 316]**.

X. **The State of Maharashtra and Ors. .Vs. Sayyed Hassan Sayyed Subhan and Ors.** reported in **[MANU/SC/1021/2018]**.

4.Per contra, Mr.M.Mohamed Riyaz, learned Additional Public Prosecutor appearing on behalf of the respondent Police submitted that the G.O. dated 23.05.2018, completely bans/prohibits, manufacture, storage, transport, distribution or sale of Tobacco products and transporting such a huge quantity of Tobacco to the godown belonging to the petitioner certainly requires investigation in public interest. The learned counsel further submitted that the samples have already been sent for expert opinion and based on the expert opinion, a Final Report will be filed for the appropriate offence. It was further submitted that the Tobacco products, certainly attract the offences under Section 273 and 328 of IPC, and the respondent Police will have the right to conduct search and seizure even in cases where the offence involved is under the Cigarettes and other Tobacco Products Act, 2003. The learned counsel submitted that the investigation is at a preliminary stage and the same cannot be interfered at this point of time, more particularly due to the fact that a huge quantity of Tobacco product was seized and the prosecution must be allowed to take the case to its logical conclusion.

5.The learned Additional Public Prosecutor in order to

substantiate his submissions relied upon the following judgments:

a. **Vasim and Others .Vs. The State of Maharashtra and Ors.** reported in **MANU/MH/3205/2018.**

b. **Imran Iqbal Patavekar .Vs. The State of Maharashtra** reported in **915-ABA-1044-19.odt.**

c. **Sanket Foods Products Pvt.Ltd. .Vs. Union of India And Ors.** made in **W.P.No.3398 of 2011/Group.**

6.This Court has carefully considered the submissions made on either side and the materials placed on record.

7.The G.O., passed by the Government of Tamil Nadu dated 23.05.2018, has declared that Tobacco and Nicotine shall not be used as ingredients in any food products since it is injurious to health. The G.O., has taken into consideration the judgment of the Hon'ble Supreme Court in **Central Arecaut Marketing Corporation and Others .Vs. Union of India** and Manufacture and sale of Gutkha and Panmasala with Tobacco and/or Nicotine is now totally banned. In exercise of the powers conferred by clause a(2) of Section 30 of the Food Safety and Standards Act, 2006 the Commissioner of Food Safety of the State of Tamil Nadu, in the interest of public health, prohibited the manufacture,

storage, transport, distribution or sale of all food products chewable or otherwise which is either flavoured or scented or mixed with Tobacco and/or Nicotine as ingredients.

8.The respondent Police upon intercepting the lorry driven by A-1 and accompanied by A-2, found that 3500 kilos of banned Tobacco, packed in nearly 190 boxes was carried in the vehicle. *Prima facie*, the Police were convinced that the vehicle carried Tobacco, Panmasala and Gutkha by means of the distinctive odour that was emanating from the goods that were seized. The Police have also taken sample packets and sent it to the laboratory to get expert opinion and to get a chemical analysis report in order to substantiate/strengthen the case of the prosecution. Therefore, the seizure of the goods and the arrest of A-1 and A-2 is not in dispute.

9.The accused persons who were arrested by the respondent Police have made a confession to the effect that the entire consignment was taken to the godown belonging to the petitioner [A-3]. This is one strong material that was available for the purpose of adding the petitioner as an accused in the FIR. Therefore, these materials are enough for the present in order to add the petitioner as

an accused in the FIR, pending investigation.

10.This Court will now go into the main issue that has been raised by the learned Senior Counsel appearing for the petitioner to the effect that the FIR does not make out an offence under Section 273 and 328 of IPC. The main ground that was raised by the learned Senior counsel was that there is no material that is available as on date to conclude that the consignment seized is noxious or adulterated in order to attract the offence under Section 273 or it is poisonous in order to attract the offence under Section 328 of IPC. The learned Senior Counsel further raised the ground that there must be some positive act (actus reus) that has to be attributed to the petitioner to make him as an accused for an offence under Section 273 and 328 of IPC.

11.In view of the above finding given by this Court on the seizure of the banned consignment, it is clear that any transportation or storage is completely banned by virtue of the Government Order. Of course, the Government Order does not speak about the consequences of the violation of the Government Order. The harmful effects of Tobacco on a human body is a well known phenomenon which does not require any detailed or elaborate explanation. Abundant research materials that are available have established beyond any doubt that

Tobacco and/or Nicotine have deleterious effect on the human body. That is the reason, why many State Governments have issued Government Orders totally banning/prohibiting food products containing Tobacco and/or Nicotine.

12. Section 273 of IPC punishes/penalises selling or offering or exposing for sale any article as food or drink which has become noxious or is in a state unfit for food or drink. The expression "noxious" is defined in the Black's Law Dictionary as 1. Harmful to Health; injurious. 2. Unwholesome; Corruptive. 3. Archaic; Guilty. Therefore, any food or drink which is harmful to health should also be considered to be noxious and repugnant to human use. By no stretch, Tobacco and/or Nicotine can be said to be good for human health. That is the reason why it has been banned by the Government Order. Therefore, Tobacco per se is noxious since it is harmful to health and injurious to health.

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13. The fact that the lorry carried 3500 kilos of the banned product, cannot be said to be for the personal use of this petitioner. A Court should apply the test in all these cases by considering the matters before it, like how a prudent man under such circumstances will think.

The presumption, the Court has to make must be having regard to the common course of natural events and human conduct. The banned products that were taken to the godown belonging to the petitioner was obviously meant for sale, going by the volume that was carried in the vehicle. For the purpose of registering an FIR under Section 273 of IPC, there are materials in this case, and therefore the FIR is sustainable for registering the case for an offence under Section 273 of IPC.

14. Section 328 of IPC will get attracted where the substance in question was a poison or any stupefying, intoxicating or unwholesome drug or other thing is administered or caused to be taken by any person with an intent to cause hurt or with an intent to commit or to facilitate the commission of an offence or knowing it to be likely that he will thereby cause hurt, becomes punishable under this provision.

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15. Broadly speaking a poison may be defined as any substance when administered, in whatever way, produces ill health, disease or death. So far as criminal prosecutions in India are concerned, the law does not insist on the precise definition of a poison.

Since the provisions themselves use some self-explanatory terms. For instance, under Section 328 of IPC, it uses self-explanatory terms such as stupefying, intoxicating or unwholesome drug. In order to test under which category the consignment that has been seized, will fall, the prosecution must necessarily await for the chemical analysis report. For the present, only a broad understanding can be taken into account and the Tobacco product to an extent of 3500 kilos which has been seized has to be presumed, to be poisonous, taking into account the fact that it will result in ill-health to the general public, if it is put to use.

16.The next ground that has been raised by the learned Senior Counsel is to the effect that the petitioner should have done a positive Act in order to bring him under Section 328 of IPC. This argument sounds attractive but it is far from convincing. It is important to notice the language used under Section 328 of IPC. Two important terms that have been used under Section 328 are (a) Causes to be taken by any person and (b) knowing it to be likely that he will thereby cause hurt ; If these two ingredients, are *prima facie* made out, the offence under Section 328 of IPC is sustainable.

17.The judgment of the Bombay High Court (Aurangabad

Branch) throws a lot of light in this regard. In **Vasim and Others .Vs. The State of Maharashtra and Others** reported in **MANU/MH/3205/2018**, the Bombay High Court has dealt with the very same issue, and the relevant portions are extracted hereunder:

"5. It is not disputed that in Maharashtra, there is prohibition to manufacture, possess and on sale of aforesaid food articles and the possession or sale or manufacture is made punishable under the Act. The relevant provisions of this Enactment 26 (2) (1), 3 (1) (ZZ), 27 (3) (E) r/w. 59 and 27 (3) (d) are also mentioned by the Food Safety Officer. There was no question of licence of any kind with the applicants and from the huge quantity which is recovered, it can be said that they had the intention to sell these articles as food articles.

6. In support of aforesaid submissions made by the learned counsel for applicants, he placed reliance on some observations made by the Division Bench of this Court at this seat in Criminal Writ Petition No. 1027/2015 (Ganesh Pandurang Jadhao and Anr. Vs. The State of Maharashtra and Ors.) decided with other matters on 4.3.2016. In these matters, Gutkha which is also called as Pan Masala was seized and it was seized for violation of provisions of Government notification dated 15.5.2014. The crime was registered for aforesaid offences of [IPC](#) and also for offences punishable under [sections 26](#) and [30](#) of the Act. In that case, the said Court observed that it cannot be said that Gutkha, Pan Masala were stupefying, intoxicating, unwholesome drug. It was also observed by that Court that intention mentioned in the aforesaid provisions of [IPC](#) to cause hurt cannot be inferred only due to possession of such

articles and so the provisions of IPC are not applicable in such case. With due respect, this Court holds that those observations cannot be used in the present matters as there were some already decided cases on this point and they were not considered by the said Court and contrary observations were already made.

7. The learned APP placed reliance on the decision given in Writ Petition No. 1631/2012 (M/s. Dhariwal Industries Limited and Anr. Vs. The State of Maharashtra and Ors.) decided with other matters at Principal Seat of this Bench on 15.9.2012. This decision is not referred in the case of Ganesh cited supra. At Principal Seat, in this case not only the provisions of the Act are considered, but the research made on the components of these articles which have harmful effect is also discussed. Notification of the year 2014 was also considered. It is specifically observed that Pan Masala, Gutkha contain harmful component like magnesium carbonate and admittedly, tobacco contains nicotine. These harmful substances can even take life and they cause disease like cancer.

8. Prior to giving of the decision at Principal Seat, at this Court in Writ Petition No3398/2011 (Sanket Foods Products Pvt. Ltd. Vs. Union of India and Ors.) which was decided with connected matters on 23.11.2011 had considered the bad effects of the components of Gutkha, Pan Masala on health. In that matter, the manufacturers had challenged the action taken against them. This case is also not considered in the case of Ganesh cited supra. This Court had considered relevant rules under the Act in the case of Sanket Foods Products Limited cited supra which show that magnesium carbonate is injurious to health. This Court had also considered the applicability of the provisions of IPC like

section 272 of IPC in such a case and it was laid down that these provisions of [IPC](#) can be used as there is no specific bar in Special Enactment to file prosecution under the provisions of [IPC](#) also. In the case of Ganesh cited supra, the relevant provisions of the Act ([section 25](#)) which show that the Act does not prohibit the prosecution for offences committed under other Acts are not referred.

9. In Writ Petition No. 830/2016 (Umraosing Julalsingh Patil Vs. The State of Maharashtra and Ors.) decided on 10.1.2017 at this seat though by Single Judge, the possibility of use of provision of [section 328](#) of IPC was considered by this Court in relation to the similar substance. This Court had considered the notification of the State Government dated 15.7.2014 and the provisions of the Act. In that case, the Single Judge had held that these substances contain nicotine and magnesium carbonate and they can take life. This Court had considered the ingredients of provision of [section 328](#) of IPC like

(i) causes to be taken by any person unwholesome drug and

(ii) knowing it to be likely that he will thereby cause hurt.

Thus, if these two ingredients are made out, then the prosecution for offences punishable under [section 328](#) of IPC is also possible. In present two matters, huge quantity of tobacco and Pan Masala is recovered and only inference from the circumstance like the food article was in huge quantity is that the applicants wanted to make money by selling it in this State as there was ban for manufacture, possession and sale of these articles. When there is such ban, the persons like applicants are making more money as the persons who are addicted to these substances are ready to pay any price.

In recently decided case Criminal Application No. 4968/2016 (Zahir Ibrahim Panja and Ors. Vs. The State of Maharashtra and Anr.) decided with other case on 16.10.2018, this Court has again considered the applicability of provisions of [sections 273](#) and [328](#) of IPC and also the provisions of the Act when such articles are found in possession in Maharashtra. The relevant portion of the observations are at paragraph Nos. 3, 4 and 5 and they are as under :-

"3. The learned counsel for applicants in both the proceedings made following submissions :-

(i) When there are the provisions to cover such offences in Food Safety and [Standards Act](#) 2006 and Rules framed thereunder, police ought not to have register the crime.

(ii) The offences punishable under [sections 328, 272, 273](#) of IPC are not made out due to allegations and so, police ought not to have taken cognizance. However, it is admitted that there was the order issued by the Government and the provision of [section 188](#) of IPC could have been used.

(iii) The provisions of aforesaid Special Enactment with regard to sending copy of report to Commissioner etc. were not strictly followed, so J.M.F.C. ought not to have entertained the complaint.

4. Recently in Criminal Application No. 1195/2018 [The State of Maharashtra and others Vs. Sayyed Hasan and others] decided on 20.09.2018, the Apex Court has considered the various provisions of Special Enactment, the provisions [of Indian Penal Code](#) and also the provision of [section 26](#) of General Clauses Act and the

Apex Court has laid down that in aforesaid Special Enactment, there is no specific bar to register the crime under the provisions of IPC even if the provisions of Special Enactment are attracted due to the offences committed. In view of these circumstances, this Court holds that there is no force in the contention that the crime ought not to have been registered. Second contention made against use of provisions of sections 272 and 273 of IPC is also not having any force. The provision of section 272 covers the persons who are responsible for adulteration of any food article, to make such article noxious as found and which is intended for sale. The provision of section 273 of IPC covers the seller and also the person who is exposing the articles for sale and those articles are noxious or in the state unfit for consumption as food. Both provisions can be used against the present applicants as huge quantity of prohibited food articles was found in their possession. There is copy of order issued by the Government in that regard dated 15.7.2016.

5. The contention that the provision of section 328 of IPC cannot be used in the present case also is not acceptable. This provision shows that whoever administers to or causes to be taken by any person anything which is likely to cause hurt then he can be punished under provision of section 328 of IPC. Specific person to whom the thing is administered or the specific incident in which it was caused to be taken need not be mentioned in the case like present one. The persons who are indulging in to illegal activity like possessing and selling the substances which are likely to cause hurt are covered by the provision of section 328 of IPC. This point was dealt with by this Court in Criminal

*Application No. 560/2013 [Manik More Vs. State and others].
How these substances are injurious to health is considered by*

this Court while deciding in Writ Petition No. 3398 of 2011 [Sanket Food Products Private Limited Vs. Union of India and others] decided in the year 2011 itself. Further, the aforesaid order dated 15.7.2016 of the State Government shows that for issuing that order of prohibition, the State Government considered the research material of Tata Memorial Hospital, Tata Institute of Fundamental Research, research work done by James E. Harner and many other institutes from India and abroad. Scientifically, it is established that areca nut chewing has been classified as carcinogenic to humans. Tobacco and such food, substance like Pan Masala and Gutkha which contain the substances cause cardiac arrest, oral cancer, esophageal cancer, stomach cancer and other diseases. They cause diseases of various internal organs and glands also. The study revealed that in India in the year 2011, the amount has been spent on treatment in respect of such diseases for persons of age group 35 to 69 was Rs.1,04,500/- Crore. The States like Maharashtra, West Bengal, Uttar Pradesh and Andhra Pradesh together contributed 60% of the diseases born from tobacco attributable C.V.D. as the study strongly recommends prohibition of manufacture, sell of tobacco products and in view of the aforesaid substances the order was issued by the State Government. These circumstances need to be kept in mind while considering the grounds raised by the persons like present applicants."

18.The Bombay High Court has held that both the offences

under Section 273 and 328 of IPC are attracted in cases of this nature. This Court is in complete agreement with the judgment of the Bombay High Court in the decision referred supra.

19. There is yet another angle in which this issue can be dealt with;

20. In 1975, the Cigarettes (Regulation of Production, Supply and Distribution) Act, 1975 was enacted to regulate and restrict the production, supply and distribution of cigarettes. The restrictions imposed by this legislation were, however, minimal. Section 3 of the Act imposed a conditional ban on the sale, supply and distribution of cigarette packets unless the package bore a specified warning on its label. Vide Section 5 a similar prohibition was prescribed for advertisements of cigarettes.

21. The 39th World Health Assembly (WHO), in its Fourteenth Plenary meeting held on the 15th May, 1986 urged the member States of WHO which have not yet done so to implement the measures to ensure that effective protection is provided to non-smokers from involuntary exposure to tobacco smoke and to protect children and young people from being addicted to the use of tobacco. These

concerns were reiterated in the 43rd World Health Assembly in its Fourteenth Plenary meeting held on the 17th May, 1990, and Member States were urged to consider in their tobacco control strategies plans for legislation and other effective measures for protecting their citizens with special attention to risk groups such as pregnant women and children from involuntary exposure to tobacco smoke, discourage the use of tobacco and impose progressive restrictions and take concerted action to eventually eliminate all direct and indirect advertising, promotion and sponsorship concerning tobacco.

22.The dangers and ill-effects of public smoking were brought to sharp focus before the Kerala High Court in **K. Ramakrishnan v State of Kerala** reported in (**AIR 1999 Ker 385**). The Division Bench declared public smoking of tobacco in any form whether in the form of cigarettes, cigars, beedies or otherwise is illegal, unconstitutional and violative of Article 21 of the Constitution of India, and directed the District Collectors to promulgate suitable orders under Section 133 Cr.P.C prohibiting public smoking. Violators were to be dealt with under Section 268 of the Indian Penal Code

23.It was not until 2003, that a comprehensive legislation

on tobacco in the form of the Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 was enacted in public interest and for protection of public health. The statement of objects and reasons, inter alia, states as under AND WHEREAS, it is expedient to prohibit the consumption of cigarettes and other tobacco products which are injurious to health with a view to achieving improvement of public health in general as enjoined by article 47 of the Constitution; AND WHEREAS, it is expedient to prohibit the advertisement of, and to provide for regulation of trade and commerce, production, supply and distribution of, cigarettes and other tobacco products and for matters connected therewith or incidental thereto:

The scope of the Act is captured in its preamble which reads as under "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."

A perusal of the provisions of the 2003 Act, clearly reveals that Parliament did not intend a total ban on the sale of tobacco and tobacco products. The ban on sale was confined to Section 6 of the Act, which is as under:

"6. Prohibition on sale of cigarette or other tobacco products to a person below the age of eighteen years and in particular area.–

No person shall sell, offer for sale, or permit sale of, cigarette or any other tobacco product–

- (a) to any person who is under eighteen years of age, and
- (b) in an area within a radius of one hundred yards of any educational institution."

It is, therefore, clear that even under the 2003 Act, which is a comprehensive legislation on tobacco and tobacco products, a total prohibition on the sale of tobacco products was not intended by the legislature.

24. The aforesaid conclusion is fortified by a decision of the Hon'ble Supreme Court in **Godawat Pan Masala Products I.P. Ltd. v. Union of India**, reported in **(2004) 7 SCC 68**. The Hon'ble Supreme Court dealt with a batch of cases from concerning the validity of notifications issued by the States of Maharashtra, Tamil Nadu, Karnataka and Andhra Pradesh under Section 7(iv) of the Prevention of

Food Adulteration Act, 1954. The common issue before the Court concerned the power of the Food (Health) Authority to pass an order banning the sale of chewing tobacco, pan masala and gutkha, whether permanently or quasi-permanently, under Section 7(iv) of the Act.

In so far as Tamil Nadu was concerned, the notification has been alluded to by the Hon'ble Supreme Court in the following terms:

"6. The petitioners also challenge another notification dated 19-11-2001 issued by the Director for Public Health and Preventive Medicine and State Food (Health) Authority, Government of Tamil Nadu, under Section 7(iv) of the Act directing that no person shall himself or by any person on his behalf, manufacture for sale or store, sell or distribute: (i) chewing tobacco; (ii) pan masala; (iii) gutka, containing tobacco in any form or any other ingredients injurious to health, under whatever name or description in the State of Tamil Nadu. This notification is purported to have been issued in the "interest of public health", for a period of five years with effect on and from 19-11-2001."

The Hon'ble Supreme Court discussed the scope of the 2003 Act, and noticed that that the prohibition imposed by the Act was merely conditional. The Court observed as under:

"37. The aforesaid internal evidence in the

statute, by reason of the preamble, and the external evidence in the Statement of Objects and Reasons, indicate that Parliament has evinced its intention to bring out a comprehensive enactment to deal with tobacco and tobacco products. However, the provisions of the statute do not suggest that Parliament had considered it to be expedient to ban tobacco or tobacco products in public interest or to protect public health. Act 34 of 2003 passed by Parliament does not totally ban the manufacture of tobacco or tobacco products. Section 6 merely prohibits sale of cigarettes and tobacco products to a person under the age of eighteen years. There are stringent provisions made in the Act containing the prohibition of advertisement of cigarettes and tobacco products. Section 3(p) defines the expression "tobacco products" as the products specified in the Schedule. Entry 8 of the Schedule to the Act reads:

"8. Pan masala or any chewing material having tobacco as one of its ingredients (by whatever name called)."

Thus, pan masala or any chewing material having tobacco is also one of the products in respect of which the Act could have imposed a total prohibition, if Parliament was so minded. On the other hand, there is only conditional prohibition of

these products against sale to persons under eighteen years of age."

The Court eventually concluded that the notifications infringed Article 19(1)(g) of the Constitution. It is, however, important to notice that an argument founded on the dangers of tobacco and tobacco related products as res-extra commercium was specifically raised and rejected by the Court in the following passages:

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

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

63. There is a plethora of legislation dealing with tobacco products, gutkha and pan masala and the fact that licences have been issued to the appellants to manufacture the articles concerned, does not lead to the conclusion that the trade or business in the articles concerned, is an activity which is "criminal in propensity, immoral, obnoxious, injurious to the health of general public" or that the ban is a result of "public expediency and public morality".

25. Pursuant to the decision in *Dhariwal Tobacco Products*, supra, the Food Adulteration Act, 1954 was repealed by the Food and

Safety Standards Act, 2006. By virtue of the powers conferred under Section 91 of the FSSAI Act, 2006 the Central Government notified the Food Safety and Standards Rules 2011. Simultaneously, the Food Safety and Standards (Prohibition and Restriction on Sales) Regulation, 2011 came into force with effect from 05.08.2011. Regulation 2.3.4 of the said Rules specifically proscribes the use of tobacco and nicotine as an ingredient in any food products.

26. The constitutional validity of Rule 2.3.4 was called into question, primarily on the basis of the decision in *Godawat, supra*, in ***Dhariwal Industries Ltd. v. State of Maharashtra***, reported in **(2013) 1 Mah LJ 461**, where the First Bench of the Bombay High Court repelled the challenge and held that the fact that tobacco and tobacco products are not excluded from the purview of Food Safety Act, 2006 clearly indicated that Parliament did not intend to exclude tobacco or tobacco products being used or being intended for human consumption from the purview of Food Safety Act, 2006. Moreover, as the 2011 Regulations including the impugned regulations 2.3.4 and 3.1.7 were laid before each House of Parliament under section 93 of the Food Safety Act, and the fact that Parliament did not modify or nullify any of those Regulations was sufficient to hold that the regulations

were perfectly valid. The Division Bench went on to hold as under:

"26. Since we have already held that the definition of "food" in the Food Safety Act is wide enough to include gutka and pan masala, it is obvious that the above regulations also apply to gutka and pan masala, Apart from, and even before, conferring powers of enforcement on the authorities under the Act in Chapter VII, Parliament has in Chapter VI of the Act cast special responsibilities as to food safety on the food business operators, manufacturers, workers, distributors and sellers. Food business operator is defined by section 3(o) as a person by whom food business is carried on or owned and is responsible for ensuring the compliance. Food business is defined as any undertaking carrying out any of the activities related to any stage of manufacture, processing, packaging, storage, transportation, distribution of food. Section 26(1) provides that every food business operator shall ensure that the articles of food satisfy the requirements of the Act and the rules and regulations made thereunder at all stages of production etc. within the businesses under his control. The Parliament has not stopped at requiring the food business operator to comply with the legal requirements in such general terms

alone. Clause (i) of sub-section (2) further casts a duty on the food business operator in the following express terms

No food business operator shall himself or by any person on his behalf manufacture, store, sell or distribute any article of food—

(i) which is unsafe; or (ii)..... or (iii)....., or (iv) which is for the time being prohibited by the Food Authority or the Central Government or the State Government in the interest of public health. (Emphasis supplied)

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

respondents and the intervenors and which is not seriously disputed at the hearing of interim relief.

27. *By an order dated 7 December, 2010 in SLP No. 16308 of 2007, Ankur Gutka v. Asthama Care Society, the Hon'ble Supreme Court had directed the Central Government "to undertake a comprehensive analysis and study of the contents of gutka, tobacco, pan masala and similar articles manufactured in the country, and harmful effects of consumption of such articles." The Report of National Institute of Health and Family Welfare submitted, pursuant to the above analysis and study, reveals that more than one-third of adults in India use tobacco in some or other form, more than 16 crore people are users of only smokeless tobacco and 4 crore people are users of both smoking and smokeless tobacco. Several studies in India have reported a strong association between smokeless tobacco use and oral pre-malignant/pre-cancerous lasions. The risk increases with the duration and frequency of smokeless tobacco use. There are consistent results of an increased risk of oral cancer with the use of different forms of smokeless tobacco used in the country. There is also strong association between smokeless tobacco and pancreatic cancer,*

throat cancer, oesophageal cancer, renal cancer and higher mortality rate. The use of smokeless tobacco also causes non-cancerous diseases/conditions including nervous system diseases, metabolic abnormalities, reproductive complications and other diseases like gastrointestinal and respiratory diseases.

The study further reveals that areca-nut or supari causes harmful effects like oral pre-malignant lasions, oral cancer, throat cancer, oesophageal cancer, liver cancer and non-cancerous diseases/conditions like hypertension and cardiovascular diseases, nervous system disease, metabolic abnormalities, reproductive abnormalities, liver and kidney diseases.

The corresponding provision in section 26(2)(a) of the Food Safety Act casts obligation on the food business operator not to manufacture, etc. "any article of food - (i) which is unsafe", without limiting the obligation to any time frame, much less "for the time being". Hence, the idea of an emergent situation which would go with the expression "for the time being" does not apply to the obligation of the Food Business Operator to provide safe food."

27. In **Jayavilas Tobacco Traders LLP .Vs. The Designated Officer** made in (W.P 21 of 2017 dated 09.06.2017) a

learned single judge of the Madras High Court held that tobacco is not a food product within the meaning of the FSSAI Act, and that consequently, the said act will have no application to Tobacco. However, in ***J. Anbazhagan .Vs. Union of India*** reported in **(2018 3 CTC 449)**, the First Bench specifically dissented from the aforesaid view. The First Bench noted that *Dhariwal Products* was distinguishable as it was rendered in the context of the Prevention of Food Adulteration Act, 1954, and opined as under :

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

The First Bench endorsed the decision of the Bombay High Court in [Dhariwal Industries Limited and another v. State of Maharashtra and others](#), referred supra, and held as follows:

81. We agree with the view of the learned Single Bench of the Bombay High Court that gutkha and pan masala are food within the meaning of the

Food Safety Act. Gutkha also being a tobacco product might be governed by the provisions of the COTA. COTA deals with regulation of cigarettes or other tobacco products. The Food Safety Act is not in conflict with the provisions of COTA in any manner. COTA does not deal with adulteration, though it may remotely touch upon misbranding.

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

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

On appeal, the decision of the First Bench was affirmed by the Hon'ble Supreme Court in ***E. Sivakumar .vs. Union of India*** reported in **(2018 10 SCC 753)**. It may also be noted that the validity of

Regulation 2.3.4 has been assailed before the Hon'ble Supreme Court in **Centre Arecanut Marketing Corporation .Vs. Union of India** (Transfer Case 1 of 2010). Vide an order dated 23.09.2016, the Hon'ble Supreme Court directed all States to ensure strict compliance of Rule 2.3.4 of the Food Safety and Standards (Prohibition and Restriction on Sales) Regulation, 2011.

28. Section 2(j) of the FSSAI, Act 2006 defines "food" in the following terms *"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 2(zz), in so far as it is material for the present purpose, defines “*unsafe food*” as under

“means an article of food whose nature, substance or quality is so affected as to render it injurious to health :—

(i) by the article itself, or its package thereof, which is composed, whether wholly or in part, of poisonous or deleterious substance;”

(v) *by addition of a substance directly or as an ingredient which is not permitted”*

The injurious effects of tobacco and tobacco products have been elaborately set out in the decision of the Bombay High Court in Dhariwal Products, extracted *supra*. The word “*deleterious*” is defined in the Black’s Law Dictionary to mean “*unwholesome or physically harmful*”.

That tobacco and tobacco related products are physically harmful is a proposition too well established to be contested. It would, therefore, squarely fall within the definition of the term “*unsafe food*” under Section 2(zz) of the Act.

Section 59 of the FSSAI Act declares the manufacture, sale, storage, distribution and import of unsafe food to be an offence and prescribes varying punishments.

29. In order to bring home the commission of an offence under Section 328 of the Indian Penal Code, the prosecution must show

a. that the substance in question was a **poison**, or any **stupefying, intoxicating or unwholesome drug or other thing**

b. that the accused administered the substance to the complainant or caused the complainant to take such substance,

c. that he did so with intent to cause hurt or knowing it to be likely that he would thereby cause hurt, or **with the intention to commit or facilitate the commission of an offence.**

It is, therefore, essential for the prosecution to prove that the accused was directly responsible for administering poison etc. or causing it to be taken by any person, through another. In other words, the accused may accomplish the act by himself or by means of another. In either situation direct, reliable and cogent evidence is necessary. (vide ***Joseph Kurian .Vs. State of Kerala*** reported in **(1994) 6 SCC 535**). The import of the words "other thing" occurring in Section 328 IPC was considered by a Division Bench of the Calcutta High Court way back in 1864 in the case of **R v Jotee Ghorae** [**1 Sutherland Cr, 7**], wherein it was observed as under:

"The words "or other thing" must, in my opinion, be referred to the preceding words, and be taken to mean "unwholesome or other thing," and not other thing simply, as the Sessions Judge would construe it, for otherwise we should be involved in endless inconsistencies, and the

offering of a loaf of wholesome bread might become the foundation of a criminal prosecution."

Tobacco and Tobacco related products have already been shown to be "unsafe food" under Section 2(zz) of the FSSAI Act as it falls within the net of the expression "*deleterious substance*" the ordinary, plain meaning of which was noticed as "*unwholesome or physically harmful*". The Division Bench in **J. Anbazhagan's case**, has taken judicial notice of the harmful and irreversible effects of tobacco products on the human body. Therefore, there is no difficulty in concluding that that tobacco will fall within the net of the expression "*unwholesome or other thing*" as construed by the Division bench in the Calcutta case.

That takes us to the next requirement ie., the causing of hurt (as defined in Section 319 IPC) or intention to commit or facilitate the commission of an offence. It is important to note that the word "offence" as defined in Section 328 must take its meaning from its definition in Section 40 of the IPC. Section 40 of the IPC specifically

provides that for the purposes of Section 328 IPC the word "offence"

denotes a thing punishable under this Code, or under any special or local law ad hereinafter defined. In other words, the word "offence" occurring in Section 328 IPC is not confined to offences under the Code and may extend to offences under a special law as well. As already noticed, Section 59 of the FSSAI Act penalizes the manufacture, sale, storage, distribution and import of unsafe food. Thus an intention to commit or facilitate the commission of an offence under Section 59 of the FSSAI Act will be covered by Section 328 of the IPC if the other requirements are satisfied i.e., that the accused had caused the complainant or any other person to take the unwholesome/deleterious substance.

30. In view of the above discussion, this Court is of the considered view that there are *prima facie* materials available to continue the investigation against the petitioner for an offence under Section 273 & 323 of IPC, and this Court is not inclined to interfere with the investigation at this stage.

31. Insofar as the offences under Section 52 & 59 of the

Food Safety and Standards Act, 2006 is concerned, it is true that it provides for a different procedure to prosecute, for those offences, by a designated authority and the judgments cited by the learned Senior Counsel supports the said contention. There is a special statute which lays down the procedure for prosecuting an offence under the said Act. The offences under this Act cannot be investigated by the respondent Police and the respondent Police shall drop these offences in the course of investigation and leave it to the appropriate authority to take action in accordance with the Food Safety and Standards Act, 2006.

32. Insofar as the contentions raised regarding the offences under the Cigarette and Tobacco Products Act, 2003 is concerned, the said Act has been brought into force to regulate/restrict use of Tobacco and Tobacco products. Section 13 of the said Act, gives power, even to the Police not below the rank of a Sub Inspector, to enter, search and seize Tobacco products. Ultimately, the product seized can be used for prosecuting an offender under this Act or any other law. Whether the petitioner and other accused persons are going to be prosecuted under this Act, and if so under what provision, is something to be decided only after the completion of the investigation. For the present, it is true that the allegations made in the FIR does not attract Section 7(1) of the Act.

However, it is left open to the respondent Police to take a decision in this regard, at the time of filing of the Final Report.

33. When the Court considers a quash petition under Section 482 of Cr.P.C., and more particularly when it involves an FIR, the scope is very limited to interfere with the investigation. The Court is not expected to conduct a mini investigation and whatever allegations are made in the FIR, should be taken as it is. This is more so in cases where it concerns the welfare of public and health of the public, at large. In this case, 3500 kilos of the banned substance has been seized, and therefore this Court must be very slow in interfering with the investigation. This Court should not put spokes in the investigation and should necessarily allow the respondent police to complete the investigation. Only on the completion of the investigation, a clear picture will emerge and the purpose for which such a huge consignment was brought in, will stand established.

34. This Court is not inclined to interfere with the investigation at this stage and this Court does not find any ground to

quash the FIR.

In the result, this Criminal Original Petition is dismissed.

Consequently, connected miscellaneous petition is closed.

07.08.2019

Index : Yes
Internet: Yes
Speaking Order/Non Speaking order

KP



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To

1.The Inspector of Police,
Paramathi Police Station,
P.Velur Taluk,
Namakkal District.

2.S.Malarvizhi,
Sub- Inspector of Police,
Paramathi Police Station,
P.Velur Taluk,
Namakkal District.

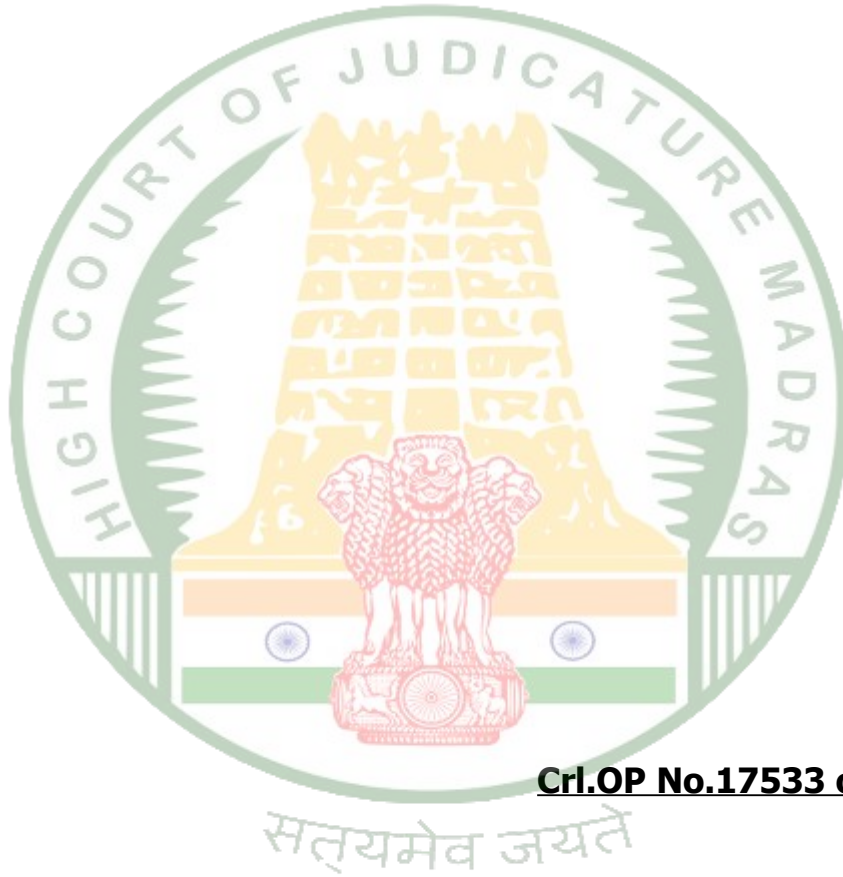
3.The Public Prosecutor,
High Court, Madras.



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N. ANAND VENKATESH,, J.

KP

**Crl.OP No.17533 of 2019**

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Delivered on: 07.08.2019