

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

CRIMINAL WRIT PETITION NO.543/2020

PETITIONERS :

1. Mohammad Yamin Naeem Mohammad,
Aged-about 32 years, Occu. driver
R/o Lalbara, Tq. Billari, Jimurabad,
Sambhal, Uttar Pradesh, India.
2. Mohammad Jamshed Sakir Mohammad,
aged-about 18 years, Occu.-cleaner
R/o Lalbara, Tq. Billari, Jimurabad,
Sambhal, Uttar Pradesh, India.
3. Mohammad Sarfaras Sharif Mohammad,
Aged-Major, Occu.-Business R/o Lalbara,
Tq. Billari, Jimurabad, Sambhal,
Uttar Pradesh, India.
4. Gulshan Kumar s/o Sohna Ram Aneja,
aged about 64 years proprietor of
Gagan Cargo, having its office at 140,
Rajendra Market, near Tis Hajari
Court, Delhi, India.

...VERSUS...

RESPONDENTS :

1. The State of Maharashtra, through
Police Station incharge, Police
Station (Thane) Jaulka, Dist. Washim.
2. The Commissioner of Food Safety
Food and Drugs Administration,
Maharashtra State, Survey No.341,
Bandra Kurla Complex, Bandra (East),
Mumbai 400 051.

3. The food & Safety Administration,
through Assistant Commissioner
and designated officer (Food),
Near Akashwani, Civil Lines, Akola.

Mr. M.G. Bhangde, Sr. Advocate with Shri Ajay Somani, Advocate for petitioners
Shri S.A. Ashirgade, Addl. PP for respondents

**CORAM : SUNIL B. SHUKRE AND
AVINASH G. GHAROTE JJ.**

Judgment reserved on : 03/12/2020
Judgment pronounced on : 09/01/2021

J U D G M E N T (PER : AVINASH G. GHAROTE, J.)

1. Rule. Rule is made returnable forthwith. Heard finally
with consent of the parties.

2. The present petition challenges the order dated
15/7/2020 (Annexure -8) issued by the respondent no.2, the Food
Safety Commissioner, Food and Drugs Administration, Maharashtra
State, passed under Section 30 (2) (a) of the Food Safety and
Standards Act, 2006 (hereinafter referred to as “the FSSA” for the
sake of brevity) to the extent it prohibits transport of banned
products such as tobacco, Pan Masala, etc. from one State to another

through the State of Maharashtra, as being unconstitutional and ultra vires, the powers of the said authority under the FSSA. The petition also seeks to quash F.I.R. No.358 of 2020 (Annexure-1) registered by the respondent no.1 for offences punishable under Section 26 (2) (i), 26 (2) (iv), 26 (3), 59 of the FSSA and Sections 188, 272, 273 and 328 of the I.P.C.

3. The admitted position on record is that the petitioner no.1 is the driver, petitioner no.2 is the cleaner and petitioner no.3 is the owner of the truck bearing registration No.UP-21-CN-2323, whereas the petitioner no.4 is the transporter. The petitioners undertook to transport four consignments booked by M/s. Vishnu Pan Products, Kakadkopar, Vapi-Dharampur Road, Valsad, Gujarat to Sumati Traders, Joda (Odisha) and Santosh Traders at Post Khalari, Angul, Odisha (Orissa). The consignments contained Vimal Pan Masala, Jarda and scented tobacco and were to be transported from Valsad in the State of Gujarat to Joda in the State of Orissa, under the cover of invoices, e-way bills and lorry receipts (collectively at Annexure-2).

4. It is necessary to mention at the outset that the sale and transport of Vimal Pan Masala, Jarda and scented tobacco is not prohibited either in the State of Gujarat or in the State of Orissa as per the submission made by the learned Senior Counsel Mr. Bhangde, which position is admitted by Mr. Ashirgade, learned Additional Public Prosecutor for the respondents.

5. When the truck carrying the goods, as stated above, was passing through village Jaulka, Tahsil Malegaon, District Washim, on 3/10/2020 at about 5:00 p.m., the vehicle was stopped by officials of the respondent no.3 and upon inspection finding that the same contained the above goods, which were prohibited in the State of Maharashtra, officials of the respondent no.3 detained the vehicle and seized the same, in respect of which a panchanama is said to have been prepared on 4/10/2020, copy of which is claimed to have not been supplied to the petitioners.

A representation was made on 5/10/2020 to the respondent no.1, requesting to release the truck and the goods on account of the fact that the same was being used only for the purpose of transiting from the State, without any response.

On 6/10/2020, the petitioners issued a legal notice to the respondent no.3 for releasing the goods in view of the order dated 4/9/2019 passed in Criminal Writ Petition No.793 of 2019 (page 42), wherein in similar circumstances the Court by an interim order, had stayed the effect and operation of the earlier notification dated 19/7/2019, issued by the respondent no.2 herein in so far as it related to imposing a ban on transport of vehicles, subject to transporters producing valid documents viz. transport permit, establishing transport of vehicles from territorial limits of State of Maharashtra, from one State to another for its inter-State transportation till the adjourned date, which was 3/10/2019. It is material to note that the prohibition in the notification dated 19/7/2019, is identically worded as that contained in the notification dated 15/7/2020. It is contended that despite this legal notice, the vehicle or the goods in question were not released, in light of the impugned order dated 15/7/2020, passed by respondent no.2, whereby ban/prohibition as imposed earlier under the order dated 19/7/2019 was extended for a further period of one year. In this background, the F.I.R. has been registered against the petitioners, vide F.I.R. No.358 of 2020, as indicate above.

6. Mr. M. G. Bhangde, learned Senior Counsel for the petitioners contends :

(a) that the order dated 15/7/2020, is without any jurisdiction in the respondent no.2 and therefore, is ultra vires, as the provisions of Section 30 (2) (a) of the FSSA do not confer any power upon the respondent no.2, to prohibit inter-State transportation of such goods.

(b) the language of Section 30 (2) (a) of the FSSA, empowers the respondent no.2, to perform various functions out of which, one of them is to prohibit in the interest of public health, the manufacture, storage, distribution or sale of any article of food, which however does not contain the power to prohibit inter-State transportation, as the functions exercisable under Section 30 (2) (a) of the FSSA are within the State and not outside and therefore the order dated 15/7/2019, is clearly without jurisdiction as it prohibits transport of the products inter-State, too.

(c) that in case it is held that the respondent no.2 has power under Section 30 (2) (a) of the FSSA to prohibit transportation of such products, the prohibition would be restricted to transportation within the State and not to any inter-State transport.

(d) under Entry – 42 in List-I of the VIIth Schedule of the Constitution, inter-State trade and commerce, is a subject which is within the domain and province of the Union of India, and as such cannot be prohibited by the State by enacting any law or by way of any notification or order.

(e) that Entry-26 in List-II (State List) empowers the State to enact laws for trade and commerce within the State, which is subject to the provisions of Entry-33 of List-III and therefore would not permit the State to enact any law, prohibiting inter-State transport.

(f) any law by the State prohibiting inter-State transport would also fall foul of the mandate of Article – 19 (1) (d) of the Constitution for which reliance is placed upon ***Hans Raj Bagrecha Vs. State of Bihar and others, 1971 (1) SCC 59***, (paras 2, 5, 16 to 18) to contend that the State of

Maharashtra would not have any power to legislate in respect of inter-State transport, in view of which the order dated 15/7/2020, so far as it construes prohibition of inter-State transport of the goods, would be ultra vires.

(g) in so far as F.I.R. No.358 of 2020 is concerned, the same cannot be sustained, as no offence can be said to have been made out under the provisions for which the same is lodged, on the ground that there is abject violation of the provisions of Sections 38, 42, 47 of the FSSA and so also Rule 2.4.2 of the Food Safety and Standards Rules, 2011.

(h) In this regard our attention is invited to Form -A under Regulation (2) of 2.3.1 of the Food Safety and Standards (Laboratory and Sample Analysis) Regulations, 2011, to contend that there is violation of the same, which according to him is apparent from the perusal of the report of the Analyst dated 25/11/2020 (Annexure – R-5/page 224).

(i) He places reliance upon :

(i) judgment of this Court in Criminal Application (APL) No.442/2020 (***Nilesh Narayan Sanghvi Vs. State of Maharashtra, Through Police Station Officer***) dated 9/9/2020, which goes on to hold that Section 328 of the I.P.C. would not be attracted in a case of transportation of contraband articles such as Gutkha, Pan Masala and scented tobacco.

(ii) Judgment in Criminal Writ Petition No.3607 of 2019 (***Anand Ramdhani Chaurasia and another Vs. The State of Maharashtra, through Public Prosecutor Office, Mumbai***) dated 13/9/2019.

(iii) ***Raju Laxman Pachapure Vs. The State of Karnataka and others, 2012 (2) FAC 378*** (paras 9.1 and 9.2).

(iv) ***Suresh Lohiya Vs. State of Maharashtra and another, (1996) 10 SCC 397.***

(v) ***Tej Bahadur Dube (Dead) by Lrs. Vs. Forest Range Officer F.S. (S.W.) Hyderabad, (2003) 3 SCC 122.***

(vi) ***Sri Jaganath Enterprises, Eluru Vasadhi Tripathi Rao Vs. The State of Andhra Pradesh, Through SHO, Pamur P.S.,*** (Criminal Petition No.5421 of 2019 with connected petitions) decided on 18/12/2019.

(vii) ***Godawat Pan Masala Products I.P Ltd. and another Vs. Union of India and others, (2004) 7 SCC 68.***

(viii) ***Joshya K.V. and others Vs. State of Kerala, Rep. by the Secretary to the Department of Health and Welfare,***

Government Secretariat, Thiruvananthapuram and others, (2013) 1 KLJ 428.

(ix) *M/s. Omkar Agency, through its Proprietor Vs. The Food Safety and Standards Authority of India and others, 2016 SCC OnLine Pat 9231.*

(x) *Sanjay Anjay Stores Vs. The Union of India & Ors., 2017 SCC OnLine Cal 16323.*

(xi) *Hans Raj Bagrecha Vs. State of Bihar and others, 1971 (1) SCC 59.*

(xii) *Sodhi Transport Co. and others Vs. State of U.P and others, (1986) 2 SCC 486.*

(xiii) *The Town Municipal Council Kalghatgi Vs. M/s. Urmilla Kothari (1977) 1 SCC 687.*

(xiv) *M/s. R.M. Jaiswal Wine Shop through its Partner Vs. State of Maharashtra Through Police Station Officer, Police Station Warora, Criminal Writ Petition No.232/2017, Bombay High Court, Nagpur Bench, Nagpur.*

(xv) *State of Assam Vs. Barak Upatyaka D.U. Karmachari Sanstha (2009) 5 SCC 694.*

(xvi) *Dhariwal Industries Ltd. and another Vs. State of Maharashtra and others, with connected petitions, 2013 (1) Mh.L.J. 461.*

(xvii) *Digambar s/o Rodji Wankhede Vs. State of Maharashtra and another, 2019 (5) Mh.L.J. 119.*

7. Mr. Bhangde, learned Senior Counsel thus submits that the order dated 15/7/2020 is unsustainable in law and therefore

needs to be declared as ultra vires and F.I.R. No.358/2020 at Annexure-1 also needs to be quashed and set aside.

8. Mr. Ashirgade, learned Additional Public Prosecutor for the respondents on the other hand contends :

(a) that Section 30 (2) (a) of the FSSA confers upon the respondent no.2, the power and authority to prohibit the manufacture, storage, distribution or sale of any article of food, in the interest of public health, which in the opinion of the respondent no.2 is detrimental to the interest of public health.

(b) the words, “distribution or sale” necessarily include in them the act of transportation of goods from one place to another and therefore, the respondent no.2 would have the power to prohibit the transport of such goods also.

(c) the power to prohibit transport of such goods is therefore inherently in-built, in the provisions of Section 30 (2) (a) of the FSSA.

(d) Section 94 of the FSSA empowers the State Government to make rules to carry out the functions and duties assigned to the State Commissioner of Food and Safety and

Section 94 (2) (a) of the FSSA, mandates that such rules may provide for the matters, as enumerated in clause (f) of Sub Section 2 of Section 30 of the FSSA, in view of which the order dated 15/7/2020 cannot be questioned.

(e) our attention is invited to :

(i) the order on interim relief passed in Writ Petition No.9865 of 2012 (*M/s. Vishnu Pouch Packaging Private Limited Vs. The State of Maharashtra and Ors.*) by the Principal Seat on 1/2/2013, in which the prayer for interim relief for release of the seized Gutkha was rejected (page 216 to 223).

(ii) the order on interim relief, passed in Writ Petition (Lodging) No.2266 of 2012 (*M/s. S. J.J. Exports Company Vs. Food Safety Commissioner and others*) dated 21/1/2013, whereby the interim relief for release of Gutkha was refused.

(iii) the order dated 3/11/2020, passed in Criminal Writ Petition No.281 of 2020 (*M/s. Dharampal Premchand Ltd. Through its General Manager Vs. State of Maharashtra and others*) by a Division Bench of this Court at Aurangabad, wherein the challenge to the order dated 20/7/2018 issued by the Commissioner under Food Safety and Standards Act, 2006 to prohibit

transportation of Gutkha and similar items under Section 30 (2) (a) of the FSSA was rejected, SLP (Civil) No.8432 of 2013, against which came to be dismissed on 1/3/2013.

(f) the provisions of Regulation 2.3.4 and 2.1.7 of the Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011, to contend that tobacco and nicotine are prohibited to be used in any food product.

(g) the Chemical Analyzer's reported dated 25/11/2020 at page 224 clearly indicates that the seized product contained nicotine and therefore the offence is clearly made out.

(h) reliance is placed upon the judgment of the Bombay High Court in the case of *Dhariwal Industries Ltd. and another Vs. State of Maharashtra and others, 2013(1) Mh.L.J. 461*, holding that the Commissioner was acting well within his powers to ensure that manufacturer, distributors and sellers of Gutkha/Pan Masala shall not be allowed to contravene the statutory provisions such as Regulations 2.3.4 and 3.1.7.

(i) that the judgment in Criminal Writ Petition No.3607 of 2019 (*Anand Ramdhani Chaurasia and others Vs. The State of Maharashtra through Public Prosecutor Office, Mumbai and others*)

dated 13/9/2019, reliance upon which has been placed by Mr. Bhangde, learned Senior Counsel for the petitioner, has been stayed by the Hon'ble Apex Court in S.L.P (CRI) (Diary No.8224 of 2020) on 31/8/2020.

(j) the provisions of Regulation 2.1.2 of the Food Safety and Standards (Licensing and Registration of Food Businesses) Regulations, 2011 read with Form-B clearly indicate that a “transporter of food is required to obtain a licence under Section 31 (1) of the FSSA and since the petitioners do not possess such licence, the offence against them has been rightly registered.

(k) Reliance is further placed upon :-

(i) Order dated 20/9/2018, passed by the Hon'ble Apex Court in Criminal Appeal No.1195 of 2018 (*The State of Maharashtra and another Vs. Sayyed Hassan Sayyed Subhan and Ors.*)

(ii) Order on interim relief dated 7/9/2012 passed in Writ Petition (L) No.2278 of 2012 (*M/s Shivam Agency through its Sole Proprietor Vs. State of Maharashtra through Ministry of Health & Ors.*).

(iii) Order dated 16/10/2018 passed in Criminal Application No.4968 of 2016 (***Zahir Ibrahim Panja and others Vs. The State of Maharashtra and another***) dismissing the application for quashing the F.I.R. under Sections 273, 188, 328, 34 of I.P.C., and Sections 30 (2) (A), 26 (2) (iv), 27 (1), 3 (1) (zz) (v) and 59 of the FSSA.

9. As pointed out above from the submissions of the learned Counsels for both sides and from the averments as made in para 2 of the reply dated 19/11/2020, of the respondent no.2 it is not disputed that the Gutkha and Pan Masala were being transported from Gujarat to Orissa via jurisdiction of the respondent no.1 in the State of Maharashtra, and we propose to consider the matter in light of the above factually admitted position.

10. For the sake of ready reference, Entry-42 List-I, Entry-26 List-II and Entry-33 List-III of the same Schedule to the Constitution and certain provisions of the FSSA, being material are reproduced below:-

“Relevant entries in the seventh Schedule to the Constitution of India.

List I -Entry 42- Inter-State trade and commerce

List II- Entry 26- Trade and commerce within the State subject to the provisions of entry 33 of List III.

List III- Entry 33- Trade and commerce in, and the production, supply and distribution of,—

(a) -----

(b) foodstuffs, including edible oilseeds and oils.”

It would be useful to refer to some of the relevant provisions of the Food Safety and Standards Act, 2006 :

“3 (e) “Commissioner of Food Safety” means the Commissioner of Food Safety appointed under section 30;

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

3 (o) “food business operator” in relation to food business means a person by whom the business is carried on or owned and is responsible for ensuring the compliance of this Act, rules and regulations made thereunder.”

11. For the purposes of the present petition, it is not necessary for us to consider, whether the goods in question, fall within the definition of 'food' as defined in Section 3(j) or whether the petitioners are doing 'food business' as defined in Section 3(n) or whether the petitioners are falling within the expression 'food business operator as defined in Section 3(o) of the FSSA, as these issues have already been considered and decided by a co-ordinate Bench of this Court in the case of *Dhariwal Industries Limited* (supra), upon which reliance has been placed by Mr. Ashirgade, learned Additional Public Prosecutor. In *Dhariwal Industries Limited* (supra) while considering the definition of 'food', as occurring in Section 3(j) of the FSSA, in the context of Gutkha and Pan Masala, it was held as under :

“Similarly gutka containing tobacco may be chewed for some time and then thrown out. Even if it does not enter into the digestive system, it would be covered by the definition of “food” which is in the widest possible terms. The definition of “food” under section 2(v) of the PFA Act was narrower than the definition of food under Food Safety Act, still the Supreme Court in Ghodawat case held that pan masala and gutka were “food” within the meaning of PFA Act.”

While considering the validity of the order dated 19/7/2012 passed by the Commissioner of Food Safety imposing a ban on Gutkha and Pan Masala in exercise of the powers u/s 30(2) (s) of FSSA, the Court held as under :

“The Food Safety Commissioner, State of Maharashtra was, thus, acting well within his powers to ensure that manufacturers, distributors and sellers of gutka and pan masala shall not be allowed to contravene the statutory provisions contained in 2011 Regulations, such as Regulation 2.3.4, 3.1.7 and 2.11.5. We, therefore, do not find any substance in the petitioners' submission that the impugned order dated 19 July 2012 was beyond the authority of the Food Safety Commissioner of the State of Maharashtra.”

While considering the issue as to which legislation occupies the field, it was held as under :

“30A. Having examined the scheme of PFA Act, 1954, Cigarettes Act, 2003 and the Food Safety Act, 2006 and 2011 Regulations framed thereunder, which were laid before Parliament and not modified and having regard to the fact that Food Safety Act, 2006 is a later Act and a comprehensive legislation on food safety and contains a non-obstante clause in section 89 thereof, we are of the prima facie view that in the field of safety and standards of

food (which includes gutka, pan masala and supari) the Food Safety Act, 2006 occupies the entire field.”

As regards the contention whether there was any violation of Article 19(1)(g) read with Article 19(6) 32, the Court held as under :

“39. We are unable to appreciate the above contentions because the Supreme Court had no occasion to consider the provisions of the Food Safety Act, 2006 and the Regulations subsequently made by the Food Authority of India in the year 2011 in exercise of the powers under sections 16 and 92 of the Food Safety Act, 2006. The impugned Regulations have been made by the Food Authority of India after consultation with the Central Government, after previous publication and the Regulations have been laid before each House of Parliament but no modification of the regulations has been made by the Parliament. We are, therefore, of the prima facie view that the Regulations have to be treated not merely as having force of law, but also as a part of the Food Safety Act, 2006 itself.

40. As regards the petitioners' contention that since chewing tobacco with 100% tobacco is not banned, total ban on gutka having 6 to 7% tobacco is unreasonable, learned counsel for the respondents and in particular learned Advocate General have pointed out on facts that in case of chewing tobacco, the taste is bitter and, therefore, people ordinarily do not take chewing tobacco on a large

scale, unlike gutka where the petitioners and other manufacturers add sweetening additives to make tobacco palatable. It is because of this sweetening additives which contain magnesium carbonate and other ingredients injurious to health that a large number of school children, college students and adults get addicted to gutka and pan masala.

41. As regards law on the subject, the following principle laid down by the Constitution Bench of the Supreme Court in *Sakhawat Ali v. State of Orissa*, AIR 1955 SC 166 (para10) is a complete answer:-

“The simple answer to this contention is that legislation enacted for the achievement of a particular object or purpose need not be all embracing. It is for the Legislature to determine what categories it would embrace within the scope of legislation and merely because certain categories which would stand on the same footing as those which are covered by the legislation are left out would not render legislation which has been enacted in any manner discriminatory and violative of the fundamental right guaranteed by Article 14 of the Constitution.”

The Statutory Regulations of 2011 made by the Food Authority of India in consultation with the Central Government and after prior publication, which are not modified or nullified by Parliament which have to be treated as a part of the Act, cannot, therefore, be faulted for banning use of tobacco, nicotine or magnesium carbonate in manufacture of gutka on the ground that chewing or consumption of tobacco with cent percent tobacco is not banned.

42. We also find considerable substance in the submission of the learned Advocate General that the State has the power to prohibit trades which are injurious to health and welfare of the public. A reasonable restriction as

contemplated under Article 19(1)(g) read with clause (6) may require prohibition if it is in the public interest. In *Cooverjee B. Bharucha v. Excise Commissioner and the Chief Commissioner, Ajmer and others*, AIR 1954 SC 220 (Para 7), the Supreme Court made the following observations:-

“(7) Article 19(1)(g) of the Constitution guarantees that all citizens have the right to practise any profession or to carry on any occupation or trade or business, and Cl.(6) of the article authorises legislation which imposes reasonable restrictions on this right in the interests of the general public. It was not disputed that in order to determine the reasonableness of the restriction regard must be had to the nature of the business and the conditions prevailing in that trade. It is obvious that these factors must differ from trade to trade and no hard and fast rules concerning all trades can be laid down. It can also not be denied that the State has the power to prohibit trades which are illegal or immoral or injurious to the health and welfare of the public.

Laws prohibiting trades in noxious or dangerous goods or trafficking in women cannot be held to be illegal as enacting a prohibition and not a mere regulation. The nature of the business is, therefore, an important element in deciding the reasonableness of the restrictions. The right of every citizen to pursue any lawful trade or business is obviously subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, order and morals of the community. Some occupations by the noise made in their pursuit, some by the odours they engender, and some by the dangers accompanying them, require regulations as to the locality in which they may be conducted. Some, by the dangerous character of the articles used, manufactured or sold, require also special qualifications in the parties permitted to use, manufacture or sell them.

.....

This is in this position an assumption of a fact which does not exist, that when the liquors are taken in excess the injuries are confined to the party offending. The injury, it is true, first falls upon him in his health, which the habit undermines, in his morals, which it weakens, and in the self-absement which it creates. But as it leads to neglect of business and waste of property and general demoralisation, it affects those who are immediately connected with and dependent upon him. By the general concurrence of opinion of every civilized and Chirstan community, there are few sources of crime and misery to society equal to the dram shop, where intoxicating liquors, in small quantities, to be drunk at the time are sold indiscriminately to all parties applying.

.....

The police power of the State is fully competent to regulate the business- to mitigate its evils or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the State or or a citizen of the United States. As it is a business attended with danger to the community, it may, as already said, be entirely prohibited or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rest in the discretion of the governing authority. That authority may vest in such officers as it may deem proper the power of passing upon applications for permission to carry it on, and to issue licences for that purpose. It is a matter of legislative will only.”

These observations have our entire concurrence and they completely negative the contention raised on behalf of the petitioner.”

43. We find considerable substance in the submission of the learned Advocate General as well as the learned

Additional Solicitor General that the width of prohibition depends on the facts and circumstances of the trade. Complete prohibition is justified because less drastic course is not practical. When 98% of the samples of gutka and pan masala were found having injurious ingredients, it is not possible for the State Government to post inspectors outside each school to prevent sale of pan masala and gutka to school children or to inspect and test each batch of pan masala to find out whether it forms part of 98% or the remaining 2%.

44. In a catena of decisions, the Supreme Court has held that the Court should take into account not only the material on record but should also take judicial notice of circumstances including the widespread illiteracy and practicability of enforcement measures. In *Pyarali K. Tejani v. Mahadeo Ramchandra Dange and others*, AIR 1974 SC 228, a Constitution Bench of the Supreme Court dealt with the contravention of the provisions of Prevention of Food Adulteration Act, 1954 in relation to supari. After holding that supari was covered by the definition of food under section 2(v) of the PFA Act, the Supreme Court made the following pertinent observations in paras 14 and 15:-

“14. Even on cyclamates, the toxic degree is not too clear. There is considerable controversy both in the United States and the United Kingdom about a total ban on cyclamates but there is a growing volume of opinion that its use has caused bladder tumour when massive doses are fed on rats. In India also scientific opinion is sharply divided on the harmful consequences of cyclamates. However, in the United States and the United Kingdom in Japan and other countries there is a ban on this substance and the Indian official view seems to be that without more information on the mechanism of bladder cancer induction in rats by the cyclamate-saccharin mixture we have to follow the example of the United States. No risks can be taken where millions of people and their lives are involved and cancer being a sure killer does not admit of bio-chemical gamble or medical speculation, particularly when the Indian people, by and large, are less health-conscious

and informed than Americans and Britons.

15. Such being the facts, it is not the judicial function to enter the thicket of research controversy or scientific dispute where Parliament has entrusted the Central Government with the power, and therefore the duty, of protecting public health against potential hazards and the Central Government, after consultation with a high-powered technical body, has prohibited the use of saccharin and cyclimates. The fact that for a long these substances were allowed is no argument against the reasonableness of their later ban; for human knowledge advances and what was regarded as innocuous once is later discovered to be deleterious. In no view can the discretion of the government, exercised after listening to the technical counselling of the Central Committee, be castigated as arbitrary and capricious or as unreasonable. So long as the exercise of power is not smeared by bad faith, influenced by extraneous considerations, uninformed by relevant factors, and is within the limits of reasonableness it becomes out of bounds for judicial re-evaluation. Where expertise of a complex nature is expected of the State in framing rules, the exercise of that power not demonstrated as arbitrary must be presumed to be valid as a reasonable restriction on the fundamental right of the citizen and judicial review must halt at the frontiers. The court cannot reweigh and substitute its notion of expedient solution. Constitutionality not chemistry, abuse not error, is our concern and the executive has not transgressed limits at all here. Within the wide judge-proof areas of policy and judgment open to the government, if they make mistakes, correction is not in court but elsewhere. That is the comity of constitutional jurisdictions in our jurisprudence. We cannot evolve a judicial policy on medical issues or food additives and should refuse to invalidate Rules 44(g) and 47 on the mystic maybes and happy

hopefuls held up before us by the appellant.”
(emphasis supplied)

45. In *Srinivas Enterprises v. Union of India*, (1980) 4 SCC 507, a Constitution Bench of the Supreme Court was dealing with the challenge to the Prize Chits and Money Circulation Schemes (Banning) Act, 1978. While upholding the constitutional validity of the Act, the Supreme Court also dealt with the contention that some of the prize chits schemes were innocuous and they were not required to be banned. The Supreme Court repelled that contention in the following words:

“12. The twin requirements of Article 19(6) are: (a) the reasonableness of the restriction upon the fundamental right to trade, and (b) the measure of the reasonableness being the compelling need to promote the interest of the general public. Public interest, of course, there is. But the controversy rages round the compulsive necessity to extinguish the prize chit enterprises altogether as distinguished from handcuffing them with severe conditions geared to protection of public interest.....

13. We may not be taken to mean that every prize chit promoter is a bloodsucker. Indeed, Shri Venugopal persuasively presented the case of his client to make us feel that responsible business was being done by the petitioner. Maybe. But when a general evil is sought to be suppressed, some martyrs may have to suffer for the legislature cannot easily make meticulous exceptions and has to proceed on broad categorisations, not singular individualisations.”
(emphasis supplied)

In respect of the competence of the Food Safety Authority to pass the order in the teeth of Article 301 to 304 of the Constitution, it was held as under :

“The impugned statutory order dated 19 July 2012 does not create economic barriers and/or pockets the barriers would have been created by permitting manufacture, etc. of gutka and pan masala within the State of Maharashtra and restricting import of gutka and pan masala from other States into the State of Maharashtra. On the contrary, the statutory order imposes prohibition on manufacture, storage, distribution and sale of gutka and pan masala irrespective of the fact whether they are manufactured within or outside the State of Maharashtra.

54. The Supreme Court has thus, clearly held that Articles 301 to 304 are enacted to remove economic barriers on the free flow of trade, commerce and intercourse within the territory of India. Hence, the said provisions can be invoked only when a State Legislation or the exercise of State Government creates economic barriers which impede the free flow of trade and commerce and intercourse. When the State authority has passed a statutory order which requires the subordinate authorities to implement the statutory regulations made by the Food Authority of India and when the Food Safety Commissioner in exercise of the powers conferred upon him by Parliament issues an order which has the effect of directing his subordinates to implement statutory regulations made by the Food Authority of India in exercise of powers conferred by the Parliament in the same enactment, (which Regulations were laid before each House of Parliament and no modification was made by Parliament)

and as a result the petitioners manufacturing pan masala or gutka in violation of the said statutory regulations are prohibited from manufacturing, storing, distributing or selling gutka or pan masala within the State of Maharashtra, it cannot be said that any restriction is imposed on the free flow of trade, commerce and intercourse within the territory of India, which is not authorised by Parliament.”

We are in complete agreement with what has been stated by the learned Division Bench of this Court in ***Dhariwal Industries Limited*** (supra), and even though the Court was considering the question of grant of interim relief and we are aware that an interim order which does not finally and conclusively decide an issue cannot be a precedent [***State of Assam / Barak Upatyaka D.U. Karmachari Sanstha (2009) 5 SCC 694***] however, what has been stated in ***Dhariwal Industries Limited*** (supra) while refusing interim relief, delineates the position of law extant and applicable, in the arena, as the Court has exposted and considered the position of law, in answering the questions as raised before it on the touchstones of the provisions and the precedents as applicable. We are in complete agreement with the enunciation and exposition of the legal position as stated in ***Dhariwal Industries Limited*** (supra). The

judgment in *Godawat Pan Masala Products / UOI, (2004) 7 SCC 68* relied upon by Mr. Bhangde, learned Senior Counsel for the petitioners, has also been duly considered therein.

12. Though Mr. Bhangde, learned Senior Counsel for the petitioners did not point out that the above common order dated 15/9/2012, has been carried to the Hon'ble Apex Court, however, the same has been done by M/s. MSS Food Processors by way of SLP (C) No.028716/2012, (who was the petitioner in W.P. No.8800/2012 before the High Court which was decided by the common order dated 15/9/2012), which has been admitted on 14/2/2017 and tagged with petitions raising similar issues. It does not however appear that any stay to the order dated 15/9/2012, has been granted as the official website of the Apex Court, does not depict so.

That apart, when Mr. Bhangde, learned Senior Counsel, expressly contends that there has been violation of the provisions of FSSA and the regulations framed thereunder, then such a plea can only be considered upon an admission, that FSSA and the regulations framed thereunder apply to such products and to the present matter. However, in spite of the above, saying that we fully

agree with the reasoning given by the Court in *Dhariwal Industries Limited* (supra) is not enough. We also have to consider the matter on its own merits and to give our own reasons as to why the decision which we will be rendering is correct, by analyzing and applying the law, as we understand it to be, to the facts of the present case, which we now proceed to do.

13. In the present matter, admittedly, it is the case specific of both the parties that the goods in question were only being transported from one State to another and were detained during transit in the State of Maharashtra. The consideration is limited to the question as to whether the respondent no.2, had the authority to prohibit inter-State transport of such goods under the powers as conferred upon him by virtue of Section 30 (2) (a) of the FSSA, as the answer to all other questions raised depends upon the fate of this question.

14. Though the FSSA is a Central Statute, however, under the powers as conferred under Section 30 (1) of the FSSA the State Government is empowered to appoint the Commissioner of Food

Safety for the State. The purpose of such an appointment is for the efficient implementation of food safety and standards and other requirements laid down under the FSSA and the regulations made thereunder.

15. Section 30 (2) of the FSSA empowers the Commissioner of Food Safety, so appointed under Section 30(1) for the State, to perform any or all of the functions as are enumerated in clause (a) to (f) therein. We are here concerned with clause (a) of Section 30 (2). This clause (a) empowers the Commissioner of Food Safety to 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 part thereof, for a period, not exceeding one year.

16. Though the contention of Mr Bhangde, learned Senior Counsel for the petitioners that the word 'transportation' is not used in Section 30(2)(a) of the FSSA, appears on the face of it to be correct, however, the act of distribution as indicated by use of the word 'distribution', as used in Section 30(2)(a) of the FSSA cannot be complete without transportation and therefore the word

‘transportation’ will have to be held to be included in the word ‘distribution’ as occurring in Section 30 (2)(a) of the FSSA, as distribution would include transportation of the goods from one place to another. Therefore, contention of Mr. Bhangde, learned Senior Counsel for the petitioners, therefore will have to be rejected.

17. The next contention of Mr. Bhangde, learned Senior Counsel for the petitioners, that Section 30(1) and Section 30(2) (a) of the FSSA, does not empower the Commissioner of Food Safety to prohibit inter-State transport, is required to be looked into in light of the language used in the said provisions. He places heavy reliance upon :

(a) ***Hans Raj Bagrecha Vs. State of Bihar and others*, 1971 (1)**

SCC 59 which holds thus :

“18. The power of the State Legislature is restricted to legislate in respect of intra-State transactions of sale and purchase and to matters ancillary or incidental thereto: it has no power to legislate for levy of tax on sales and purchase in the course of inter-State transactions. The power conferred by Section 42 authorising the imposition of restriction on transport or movement of goods may only be exercised in respect of transactions which facilitate levy, collection and recovery of tax on transactions of intra-State

sale or purchase. When Rule 31-B seeks to prohibit transport of goods to any place outside the State of Bihar unless a certificate is obtained from the appropriate authority, it seeks to prohibit transport of goods pursuant to transactions which may not even be to the nature of sale or purchase transactions; in any case it restricts transport pursuant to transactions which are in the course of inter-State trade and commerce. The operation of the rule is not restricted only to transactions in the course of intra-State trade and commerce. The rule authorises restrictions on inter-State transactions and is on that account unauthorised. For the same reasons the notification issued on December 26, 1967, must be regarded as also unauthorised.”

(b) Further reliance is placed on ***Sodhi Transport Co.*** (supra) in which challenge was posed to the provisions of Sections 28 and 28-B of the U.P. Sales Tax Act, 1948 and Rule 87 of the U.P. Sales Tax Rules 1948 (as introduced in 1974) whereby provisions were made for the establishment of check posts and barriers and requirement of a transit pass for transit of goods through the State, making it mandatory to produce the transit pass at the point of exit from the State, failure to do which invited a presumption that the goods were sold in the State, thereby making it liable to sales tax. While

rebutting the contention that this resulted in enacting a law preventing inter-State transport, the Apex Court held that the provisions were enacted to ensure that a person who had brought the goods inside the State and who had made a declaration that the goods were brought into the State for the purposes of carrying them outside the State, should actually take them outside the State and thus did not constitute a prohibition for free inter-State transport.

(c) Reliance is also placed upon *The Town Municipal Council, Kalghatgi* (supra) in which while construing the expression “any article or animal brought into the municipal limits for the purpose of immediate exportation” as occurring in Section 124 of the Karnataka Municipalities Act, 1964 (hereinafter referred to as “the Act”) read with Rule 26 of the Karnataka Municipalities Taxation Rules, 1965, it was held that they imply processes of “importing into” and “exporting from” the municipal limits of goods or animals and are indicative of an element of repose and rest of the goods within the municipal limits and the expressions “brought into” and “immediate exportation” do not comprehend within their sweep the continuous process of transit of goods, by vehicles which merely use the State Highways passing through the areas which lie within

the municipal limits and that in the case under consideration, the iron ore was carried in the trucks of the respondent which merely passed through the areas which lie within the municipal limits and was not unloaded and reloaded at any place within the municipal area and as such, the important element of repose and rest which the words “brought into the municipal limits for the purpose of immediate exportation” imply was absent.

There cannot be any quarrel with the proposition that the State would not have a right to levy any tax on the goods which are merely transiting through the State and are not being offloaded for sale in the State, which in substance, would mean a right for use of the roads within the State for the purposes of inter-State transportation. As stated above, the power of the State Government under Section 30(1) of the FSSA to appoint the Commissioner of Food Safety is for the State, which would indicate the geographical area of the State.

18. The expression ‘**for the State**’ as occurring in Section 30 (1) and ‘**either in the whole of the State or any area or part thereof**’ as occurring in section 30(2)(a) of the FSSA, further fortifies the

position that the powers of the Commissioner of Food Safety are State-centric and not beyond. Had it not been so, it was open for the Parliament to say so and to confer such power upon the Food Safety Authority under Section 16 of the FSSA or to create a separate authority for that purpose, having power to exercise such jurisdiction throughout the Country.

19. It is thus apparent that the domain or jurisdiction of the Commissioner of Food Safety is within the State and any prohibition as to manufacture, storage, distribution or sale, imposed by the Commissioner of Food Safety by exercise of his powers under Section 30(2)(a) of the FSSA has to be operative within the State or such lesser area as may be notified.

20. Article 246 (2) & (3) of the Constitution empowers the legislature of any State to make laws for the State or any part thereof, subject to clause (1) and (2) of Article 246. Entry-42 in List I – Union List of the seventh Schedule [Article 246(1)] relates to Inter - State trade and commerce. Entry-26 in List II – State List of the seventh Schedule [Article 246(2)] relates to trade and commerce

within the State, subject to the provision of Entry-33 of List III. Entry-33(b) of List III – concurrent list of the seventh Schedule [Article 246(3)] relates to trade and commerce in, and the production, supply and distribution of foodstuffs.

21. The contention of Mr. Bhangde, learned Senior Counsel for the petitioners that by virtue of the impugned order, dated 15/7/2020, the State has usurped the power of the Union by making a law prohibiting inter-State trade and commerce, which is solely within the domain of the Union, is not correct. This is so for the reason, that the FSSA is a Central Statute enacted by the Parliament and by virtue of Section 30(1) of the FSSA, certain powers have been delegated to the State and it is under these powers, that the Commissioner for Food Safety has been appointed to perform functions as listed in Section 30(2) (a) to (f) of the FSSA. Thus, any Notification issued by the Commissioner of Food Safety, is directly relatable to the exercise of the powers under the FSSA and is not an independent power exercised by the State by enacting / passing any law/legislation in respect of the subjects in Entry-26 List II or Entry- 33 List III of the seventh schedule to the constitution.

22. We have already stated that the domain or jurisdiction of the Commissioner of Food Safety is within the State and thus the impugned order dated 15/7/2020 will have to be read as not creating or imposing any ban on any inter-State transport of goods. This would however not mean that the Authorities, empowered to enforce the prohibition as contained in the Order dated 15/7/2020, would in any way, be restrained from ensuring that the prohibition as imposed, is enforced. In this context, it would not be out of place to mention here, that the order dated 15/7/2020, records that since 2012, the manufacturing, production and transportation of the prohibited food articles, in the State was literally nil, even then the prohibited food articles were found available in small shops, godowns, distributors, suppliers, wholesalers, retailers across the market in the entire State. In spite of continuous action being taken, still such supply and distribution continues, which is under the guise of inter-State transport. In the last year the department had taken action on 1118 vehicles, who were transporting prohibited food articles under the guise of inter-State transport. It is axiomatic that such vehicles under the guise of inter-State transport dump the goods in the State of Maharashtra, where they are prohibited, which

are then sold in the black market. It is a further matter of common knowledge, that in spite of the prohibition imposed, tobacco, Gutkha and tobacco-laced Pan Masala are easily available in the market and one of the source for such availability, is obviously dumping of such goods/material under the guise of inter-State transport.

23. The case in hand is one such example. The place of origin of the goods, is Kakadkoper, Vapi-Dharampur Road, Valsad in the State of Gujarat. The destinations are (a) Joda and (b) Post Khalari, District Angul, both in Odisha (Orissa). The place where the truck was detained is village Jaulka, Tahsil Malegaon, District Washim. The straight and perhaps the easiest route from the place of origin to the place of destination, would be through National Highway No. 8, from Valsad to Surat and thereafter through National Highway No. 6, via Maharashtra, Chhattisgarh to Bargarh, in Odisha and then down to Angul via National Highway No. 42. The route could also be, considering the prohibition in Maharashtra, so planned as to totally avoid the State altogether, which would be to Madhya Pradesh and Chhattisgarh. However, the fact that the truck was found in Malegaon, District Washim, which is not even on

the National Highway No. 6, would naturally raise a presumption that the goods may have been destined to be offloaded some place in Maharashtra, though the destination on paper be otherwise. Though inter-State transport would be permissible, the State Authorities would be within their rights, to seize the goods, which are prohibited within the State, so as to ensure that they are not offloaded in the State under the guise of inter-State transport, with a view to enforce the prohibition within the State and curb black marketing of such goods within the State. Nothing prevents the transporters to plan a route, which avoids the State where the goods are prohibited. An alternate route, at the most, may increase the cost of transportation, but would save them from the clutches of prohibition. Thus, we do not find any illegality in the seizure of the vehicles, carrying the prohibited goods, which was way off the easiest route of transport.

24. We are not in agreement with *Sanjay Anjay Stores* (supra) upon which reliance has been placed by Mr. Bhangde, learned Senior Counsel for the petitioners, which holds that tobacco and tobacco products do not fall within the definition of 'food', as

occurring in Section 3(j) of the FSSA, as the same gives a restrictive meaning to the word 'food', which is not permissible in light of the wider and comprehensive meaning given to the word in the definition. Section 3(j) of the FSSA, defines 'food' as under :

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

Provided that the Central Government may declare, by notification in the Official Gazette, any other article as food for the purposes of this Act having regards to its use, nature, substance or quality;

(y) “ingredient” means any substance, including a food additive used in the manufacture or preparation of food and present in the final product, possibly in a modified form;

(zk) “primary food” means an article of food, being a produce of agriculture or horticulture or animal husbandry and dairying or aquaculture in its natural form, resulting from the growing, raising, cultivation, picking, harvesting, collection or catching in the hands of a person other than a farmer or fisherman.”

The above definitions, clearly indicate that the provisions of the FSSA, do not intend to put any restrictive definition on the word 'food', rather it is otherwise, as indicated by use of the expressions 'means any substance', 'containing such ingredients', and widest possible scope and ambit has been given to the word. It is also material to note that the definition of 'food', does not in any manner make it dependent upon its nutritional value nor that such substance can be consumed or digested in the stomach. No such position is reflected from a plain reading of the word 'food' as defined in Section 3(j). This is clearly fortified from the fact that even chewing gum, has been included in the definition of the word 'food'. It is axiomatic, that chewing gum is not ingested but is only chewed for the juices/ flavor it is laced with and then thrown out. Same is the case with tobacco and tobacco products, including Pan Masala, which are used for the juices they

generate, in conjunction with saliva in the mouth, when chewed, which juices are ingested and the residue, thrown out. Thus no distinction could have been made in ***Sanjay Anjay Stores*** (supra) on the basis of nutritional value or ingestion, as the same is absent in Section 3(j) of the FSSA itself. ***Sri Jaganath Enterprises*** (supra), which also takes a view that tobacco and tobacco products are not included in the definition of the word 'food', as defined in Section 3(j) of the FSSA and that COPTA holds the field, placing reliance upon ***Sanjay Anjay Stores*** (supra) is of no assistance to the petitioners, for the reasons stated above. In so far as applicability of COPTA is considered, the issue is being discussed hereinafter.

25. Mr. Bhangde learned Senior Counsel for the petitioners has also relied upon ***Omkar Agency*** (supra) which is also based upon the finding that tobacco is not "food", as defined in Section 3(j) of the FSSA and it is the Cigarettes and other Tobacco products (Prohibition of Advertisement and Regulation of Trade and Commerce Production, Supply and Distribution) Act, 2003 ('COPTA' hereinafter) which holds the field. It is material to note that the premise in ***Omkar Agency*** (supra) that for the exercise of the powers

under Section 30(2)(a) of the FSSA, the report of the Designated Officer appointed under Section 36 of the FSSA is mandatory, is not borne out by the language of Section 30 of the FSSA. Section 30 of the FSSA nowhere stipulates that the powers under Section 30(2) (a) to (f) can be exercised by the Food Safety Commissioner, only upon receipt of a report by the Designated Officer appointed under Section 36 of the FSSA and not otherwise. To appreciate this position, it is necessary to look into the functions to be performed by a Designated Officer. Section 36 of the FSSA, reads thus :

“36. Designated Officer - The Commissioner of Food Safety shall, by order, appoint the Designated Officer, who shall not be below the rank of a Sub-Divisional Officer, to be in-charge of food safety administration in such area as may be specified by regulations.

(2) There shall be a Designated Officer for each district.

(3) The functions to be performed by the Designated Officer shall be as follows, namely :—

(a) to issue or cancel licence of food business operators;

(b) to prohibit the sale of any article of food which is in contravention of the provisions of this Act and rules and regulations made thereunder;

(c) to receive report and samples of article of foods from Food Safety Officer under his jurisdiction and get them analysed;

(d) to make recommendations to the Commissioner of Food Safety for sanction to launch prosecutions in case of contraventions punishable with imprisonment;

(e) to sanction or launch prosecutions in cases of contraventions punishable with fine;

(f) to maintain record of all inspections made by Food Safety Officers and action taken by them in the performance of their duties;

(g) to get investigated any complaint which may be made in writing in respect of any contravention of the provisions of this Act and the rules and regulations made thereunder;

(h) to investigate any complaint which may be made in writing against the Food Safety Officer;

(i) to perform such other duties as may be entrusted by the Commissioner of Food Safety.”

26. Apart from Section 36(3) (a) to (i), the Designated Officer, also exercises powers under Section 31(3) and (4), Sections 32, 33(4) and 34 of the FSSA. These powers however are independent of the powers to be exercised by the Commissioner of Food Safety as appointed under Section 30(1) of the FSSA who exercises powers under Section 30(2) (a) to (f). For the sake of

ready reference, provisions of Section 30 of the FSSA are reproduced as under :

“30. Commissioner of Food Safety of the State. -

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

(2) The Commissioner of Food Safety shall perform all or any of the following functions, namely:—

(a) prohibit in the interest of public health, the manufacture, storage, distribution or sale of any article of food, either in the whole of the State or any area or part thereof for such period, not exceeding one year, as may be specified in the order notified in this behalf in the Official Gazette;

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

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

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

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

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

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

27. It would thus be apparent that the powers to be exercised by the Commissioner of Food Safety under Section 30(2) (a) of the FSSA are not dependent upon the Designated Officer, submitting any report to him, but are capable of being exercised independently. This is so for the reason that a 'Designated officer', appointed under Section 36 of the FSSA is for a District as is apparent from a plain reading of Section 36(2) of the FSSA, and exercises powers under Section 31(3) and (4), Sections 32, 33(4) and 34 of the FSSA within the territorial limits of the District for which such Designated Officer is appointed and not beyond, whereas the powers exercisable under Section 30(2)(a) of the FSSA

by the Commissioner of Food Safety are for the entire State. It is also axiomatic that any report as to any health risk, as defined in Section 3 (zm) of the FSSA as contemplated by Section 34 (1) of the FSSA by the Designated Officer, would be restricted to the District for which such Officer is appointed and not for the entire State. It would be further material to note that the impugned order dated 15/7/2020, nowhere indicates that the same has been passed, based upon any report by the Designated Officer. On the contrary, the order, is based upon various research and medical reports, scientific studies conducted both within and outside the Country, as a perusal of the same would indicate.

28. Thus, the judgment in ***Omkar Agency*** (supra), which takes into consideration the provisions of Sections 3 (zm), 24 and 36 of the FSSA, for putting fetters upon the powers of the Commissioner for Food Safety under Section 30 (2) (a) of the FSSA, is not according to us, within the four corners of the law as applicable. That apart, though not pointed out, ***Omkar Agency*** (supra) has already been challenged before the Hon'ble Apex Court in SLP (C) No.032155 of 2016, filed on 5/9/2016, and has been

tagged with SLP (C) No.30090 of 2016 and other matters pending before the Hon'ble Apex Court, wherein the provisions of the FSSA are under consideration.

29. Reliance upon ***Suresh Lohiya*** (supra) by Mr. Bhangde, learned Senior Counsel for the petitioners is also of no assistance to the petitioners. In ***Suresh Lohiya*** (supra) the Court while considering the word 'forest produce', in the Forest Act, 1927, held that a forest produce (bamboo) which is changed into a commercially new and distinct article ceases to be a forest produce and also held that the Court cannot read something which is not in the provision. In the instant matter, as already discussed, the definition of 'Food', as occurring in Section 3(j) of the FSSA, is not a restrictive one but is of wide amplitude, and itself takes into its compass, tobacco and tobacco products, and therefore the Court is not reading something which is not there in the definition. Similar proposition is also found in ***Tej Bahadur Dube*** (supra) where relying upon ***Suresh Lohiya*** (supra), it was held that sandalwood pieces obtained after conversion of original sandalwood to certain shapes meant for being used as handles, were held not to require transit permit, which was

required for transportation of sandalwood.

30. A lot has been said about COPTA, holding the field as against the FSSA. In this regard, it is material to note, that COPTA was enacted on 18/5/2003, in which Section 3 (p) defines “tobacco products” to mean the products specified in the schedule. The schedule at Serial No.8, specifies Pan Masala or any chewing material having tobacco as one of its ingredients (by whatever named called) and at Serial No.8 specifies Gutkha. To understand basic difference between the provisions of COPTA and FSSA, it is necessary to consider what is contemplated by Sections 5, 6 and 7 of COPTA, which for ready reference are reproduced as under :-

“5. Prohibition of advertisement of cigarettes and other tobacco products.–

(1) No person engaged in, or purported to be engaged in the production, supply or distribution of cigarettes or any other tobacco products shall advertise and no person having control over a medium shall cause to be advertised cigarettes or any other tobacco products through that medium and no person shall take part in any advertisement which directly or indirectly suggests or promotes the use or consumption of cigarettes or any other tobacco products.

(2) No person, for any direct or indirect pecuniary benefit, shall–

(a) display, cause to display, or permit or authorise to display any advertisement of cigarettes or any other tobacco product; or

(b) sell or cause to sell, or permit or authorise to sell a film or video tape containing advertisement of cigarettes or any other tobacco product; or

(c) distribute, cause to distribute, or permit or authorise to distribute to the public any leaflet, hand-bill or document which is or which contains an advertisement of cigarettes or any other tobacco product; or

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

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

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

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

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

(a) cigarettes or any other tobacco product; or

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

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.

7. Restrictions on trade and commerce in, and production, supply and distribution of cigarettes and other tobacco products.—

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

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

(3) No person shall import cigarettes or any other tobacco products for distribution or supply for a valuable consideration or for sale in India unless every package of

cigarettes or any other tobacco products so imported by him bears thereon, or on its label, the specified warning.

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

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

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

It would thus be apparent that Section 5 deals with prohibition of advertisement of cigarettes and other tobacco products; Section 6 deals with prohibition on sale to person below the age of 18 years and in particular area; Section 7 deals with restrictions on trade and commerce in, production, supply and distribution of cigarettes and other products, unless every package bears the specified warning; Section 8 provides the manner in which specified warning shall be made; Section 9 provides the language of

the warning; Section 10 provides size of letters and figures of the warning; Section 11 provides the testing laboratory for nicotine and tar contents; Section 13 provides for the power to seize, whereas Section 14 provides for confiscation; Section 15 speaks of an option to pay cost in lieu of confiscation; Section 17 provides for adjudication; Section 18 provides for an opportunity based upon the principles of natural justice; Section 18 provides for an appeal. The other provisions provide for punishment and forfeiture. What is material to be noted is that COPTA has not been given any overriding effect upon any other law, holding the field or which may be enacted. The regulatory mechanism in COPTA is restricted to ensuring that the sale, storage, distribution, of cigarettes and other tobacco products is not without the warning label and is to persons above the restricted age and to discourage the use of tobacco. COPTA does not deal with the long term effects of smoking and consumption of tobacco and other products on the health of citizens.

31. As against this, the FSSA is a more comprehensive Act, dealing with the larger issue of Safety and Standards of Food in the country and in view of Regulation 2.3.4, prohibiting use of tobacco

and nicotine as ingredients in any food products in the Food Safety and Standards (Prohibition and Restrictions On Sales) Regulations, 2011; by including Pan Masala in Regulation 2.11.5, Anti-caking agents in Regulation 3.1.7 in the Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011, has included tobacco and tobacco products, including Gutkha and Pan Masala within the definition of food as enumerated in Section 3 (j) of the FSSA.

32. In fact, in *Raju Laxman Pachapure* (supra) itself, relied upon by Mr. Bhangde, learned Senior Counsel for the petitioners, the Court, while considering the provisions of the Prevention of Food Adulteration Act, 1954, the harbinger of the FSSA, in juxtaposition with those of COPTA, placing reliance upon the judgment in *Godawat Pan Masala* (supra) noticed the difference between the two enactments, as under :

“25. It is true the Apex Court in *Godawat Pan Masala's* case held that mere traces of magnesium carbonate formed during consumption of product along with lime cannot be banned, but in the instant case anticaking agent viz.,

magnesium carbonate is not found during consumption but the analytical report discloses that magnesium carbonate is contained in the very sample which, in our considered opinion may be either externally added or present in the raw materials. Whatsoever the case may be, the report discloses that there is usage of anticaking agent *viz.*, magnesium carbonate in the food article in question namely gutka. That apart Supreme Court in the very same decision held that the provisions of PFA Rules framed and directions issued thereunder cannot be said as not applicable merely because licence is contemplated for manufacture of gutka under the Cigarettes and other Tobacco Products (Prohibition of Trade and Commerce, Production, Supply and Distribution) Act, 2003. The PFA Act was legislated for the prevention of adulteration of food whereas Cigarettes and other Tobacco Products (Prohibition of Trade and Commerce, Production, Supply and Distribution) Act, 2003 is intended to prohibit advertising and to regulate the trade and as such there is no conflict between the legislative objects between the two enactments.”

(emphasis supplied)

33. Section 89 of the FSSA being material is reproduced as under : -

“89. Overriding effect of this Act over all other food related laws.- The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in

any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.”

(emphasis supplied)

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 COPTA. ***Joshy K.V; Omkar Agency and Sanjay Anjay Stores*** (supra), which take a contrary view, according to us, do not lay down the correct law.

34. ***R.M. Jaiswal Wine Shop*** (supra) relied upon by Mr. Bhangde, learned Senior Counsel for the petitioners was a matter under Maharashtra Country Liquor Rules, 1973 and did not deal with an issue of inter-State transport and is therefore of no assistance to the petitioners. The judgment of the Full Bench in ***Digambar Rodji Wankhede*** (supra), upon which reliance is placed by Mr. Bhangde, learned Senior Counsel for the petitioners, was on a

reference as to the question whether mere non-mention of a particular provision of an order or order issued under Section 3 of the Essential Commodities Act, 1955, was in itself sufficient to quash and set aside and FIR registered for the offence punishable under Section 7 read with Section 3 of the said Act, so as to stop further investigation into the matter, which had been answered in the negative and it was held that the State would be entitled to demonstrate before a Court that in order issued under Section 3 of the Essential Commodities Act, 1955, indeed exists and that there was a contravention of clauses thereof, leading to offence under Section 7 of the Essential Commodities Act, 1955, is also of no assistance to the case of the petitioners, as the same is on a different footing altogether.

35. That takes us to the next contention of Mr. Bhangde, learned Senior Counsel for the petitioners, that there has been violation of the provisions of Sections 38, 42 & 47 of the FSSA and Rule 2.4.2 of the Rules of 2011. Section 38 of the FSSA relates to the powers of the Food Safety Officer, as appointed under Section 37 of the FSSA. These powers inter-alia, also provide for the sampling and

seizure of the food article and sending the same for analysis. The stress laid is upon clause (c) of sub-section (1) of Section 38 of the FSSA, that the food article upon seizure and sampling has to be kept in the safe custody of the “Food Business Operator” and therefore it was necessary for the goods in question to be given into the custody of the petitioners. The contention is as fallacious as it can be, for the reason that neither of the petitioners fall within the definition of “Food Business Operator” as defined in Section 3(o) of the FSSA. Admittedly, the petitioner nos. 1 & 2 are the Driver and Cleaner respectively of the truck, petitioner no. 3 is the owner and the petitioner no. 4 is the transporter. The very fact that the pleas which would be available only to a “Food Business Operator”, under the provisions of the FSSA and regulations framed thereunder are being raised by the petitioners, who by any stretch of imagination, cannot be termed as food business operators, indicates something sinister in the matter. It is material to note that “Food Business Operator” is not coming forth to allege that the custody of the goods be given to it, rather the persons undertaking transport of the goods are raising this plea, which clearly is not tenable at the behest of the petitioners.

36. The report of the Food Analyst, dated 25/11/2020, has been placed on record by the respondents and it certifies that, on an Analysis of the samples send to him, the same contained magnesium carbonate (Mg Ca CO₃) and nicotine, which are prohibited as per the impugned order dated 15/7/2020 and also as per Regulation 2.3.4 of the Food Safety and Standards (Prohibition and Restrictions on Sales) Regulations, 2011. The contention that the analysis report, is not in form VII-A of the Food Safety and Standards (Laboratory and Sample Analysis) Regulations, 2011 or is lacking in any detail / particular or that the procedure as laid down in Sections 42 & 47 of the FSSA and Rule 2.4.2 of the FSS Rules, 2011 have not been followed and therefore the FIR needs to be quashed, is too premature at this stage. A plea of violation of procedure, will have to be tested on the anvil of the documents and evidence, which could be done only at the stage of trial and not at the present stage, as the charge-sheet in the instant matter is yet to be filed. It is axiomatic to state that, this Court while considering a plea for quashing of an FIR raised in a petition under Article 226 read with section 482 Cr.P.C. is not entitled to go into the merits of the matter, but has only to be satisfied that, on a plain reading of the FIR, no case could be made

out for registration of the offences which are alleged. Quashing an FIR would not be permissible where an in depth probe is required. The matter then has to be left to be taken up by the Appropriate Courts, after the entire investigation is complete and the charge-sheet is filed.

37. Mr. Bhangde, learned Senior Counsel also attacks the charging of the petitioners of offences under the Indian Penal Code, namely, those under Sections 188, 272, 273 and 328 of the I.P.C. In respect of his contention that the petitioners could not have been charged with by an offence under Section 328 of I.P.C. he contends that the ingredients thereof as are required to be fulfilled by the requirements as spelt out from the language of Section 328 of I.P.C. have not been made out. To buttress his submission he has relied upon *Anand Ramdhani Chaurasia* (supra) and *Nilesh Narayan Sanghvai* (supra). *Anand Ramdhani Chaurasia* (supra) was a case for quashing the offence under Section 328 of I.P.C., wherein, on the facts of the case, it was held that since the FIR did not disclose the ingredients of Section 328 of I.P.C., the same was quashed. It is, however, worthwhile to note, though not disclosed by Mr. Bhangde,

learned Senior Counsel appearing for the petitioners, but as contended by Shri Ashirgade, learned Additional Public Prosecutor, that the judgment in ***Anand Ramdhani Chaurasia*** (supra), was stayed by the Apex Court in S.L.P. (Cri) No.004101/2020, which was filed on 28/2/2020 and registered on 1/9/2020, by an order dated 31/8/2020. In ***Nilesh Narayan Sanghvai*** (supra) the issue involved, was that, though the contraband articles such as Gutkha, Pan Masala, scented tobacco were found in the vehicle of the applicant, the offence under Section 328 of I.P.C. was not attracted, and the FIR registered for the said offence was sought to be quashed under Section 482 Cr.P.C. The Court relying upon the judgment in the case of ***Anand Ramdhani Chaurasia*** (supra), held that mere transportation, without any further action, on an apprehension that the contraband goods would be sold in the market and would be bought and consumed by a person, was too far fetched a consequence of an act of “administering”, or “causing to be taken” and mere transportation could not be construed as an attempt to commit an offence under Section 328 of I.P.C. and had quashed the FIR in respect of the offence under Section 328 of I.P.C. alone. The Court in ***Nilesh Narayan Sanghvai*** (supra), which was decided on 9/9/2020, it clearly appears,

was not informed that the judgment in *Anand Ramdhani Chaurasia* (supra), which was being relied upon, stood stayed by an order dated 31/8/2020, by the hon'ble Apex Court. It is needless to state here that when a Counsel places reliance upon a judgment of the High Court, it is the solemn and obligatory duty of the Counsel, to the Court, to inform the position as to whether the judgment was carried to the Apex Court, and if so, the fate of the same, as on the date of deciding of the matter by the High Court. It is not permissible for a Counsel, to merely place reliance upon a judgment in support of his case and to leave it to the Court, to make efforts to ascertain whether any challenge was laid to it, before the Apex Court and to ascertain the fate of such a challenge. The Counsel would be failing in his duty both as a Counsel and as an officer of the Court, if he does so, as by citing the judgment, he is calling upon the Court, to not only to assume its correctness, but is also inviting the Court to place reliance upon what has been stated therein and render judgment in consonance thereof, that too on a premise that the same had attained finality, in absence of any further challenge.

38. That there is an order as contemplated by Section 188 of

I.P.C. cannot be controverted in light of the impugned order dated 15/7/2020. The Chemical Analyser's report indicates the presence of magnesium carbonate and nicotine in the seized goods (Section 272 of I.P.C.), both of which are prohibited and are also indicative causes of cancer. The word 'noxious', means harmful (Webster), harmful to health, injurious, unwholesome, corruptive (Blacks law dictionary) or repugnant to human use. It cannot be disputed that both magnesium carbonate and nicotine are harmful to human health (see : hazardous properties and toxicity of both) (Section 273 of I.P.C.). The only question is whether the goods were sold, offered or exposed for sale, as food (Section 273 of I.P.C.) or were administered with an intent to cause hurt (Section 328 of I.P.C.). Obviously, due to the various studies made, the advertisements as issued by the Government, the films shown in Cinema halls, regarding the harmful effects of tobacco and tobacco products, it no longer can be said that any person, would now be oblivious as to the harmful effects of tobacco and tobacco products. In spite of knowing about the harmful effects, if a person transports such products, from one place to another, could it be said that such person, was unaware that the same was not for sale ? The word 'sale', would be applicable to a manufacturer, distributor, dealer, retailer or

the shop-keeper, each of whom, performs the activity of sale, well knowing that such sale would be for human consumption. Instead of using the easier and shortest route from the point of origin to the point of destination, the use of a circuitous route, would entitle the authorities to draw an adverse inference, that the goods were intended for sale within the State, through which they were being transported and the case was not that of an inter-State transport. Too technical a meaning to the language of the relevant sections, may not be called for, considering the changing situation. The law is not static, but is a live concept, keeping in pace with the changes in the society as well as evolving technology. To fetter the law, to its literal sense or meaning, would not be apt, rather, such an approach would sound its death knell. The Courts must also be alive to such changes and apply the law, accordingly.

39. As already observed by us earlier, we find that the matter is at a very nascent stage and a case for quashing the FIR, has not been made out. The matter needs further in depth probe, which is not permissible in our writ jurisdiction of under the powers as conferred upon us by virtue of Section 482 Cr. P.C.

40. The petition is therefore partly allowed in the following terms :

(A) The impugned order dated 15/7/2020, is held to be within the competence and jurisdiction of the Food Safety Commissioner under the powers as conferred upon him, by the provisions of Section 30(2)(a) of the Food Safety and Standards Act, 2006.

(B) The impugned order dated 15/7/2020, is held to be operative and effective for the purpose of prohibiting transport of the goods prohibited, within the State of Maharashtra and not to any inter-State transport of such goods.

(C) This would however not mean that the Authorities, empowered to enforce the prohibition as contained in the order dated 15/7/2020, would in any way, be restrained from ensuring that the prohibition as imposed is enforced, and for this purpose would be entitled to use all powers as conferred upon them under the Food Safety and Standards Act, 2006 and the Rules, Regulations made thereunder and the Notifications issued in exercise of the powers conferred upon the Authorities, appointed under it.

(D) Though inter-State transport would be permissible, the State Authorities would be within their rights, to seize the goods,

which are prohibited within the State, so as to ensure that they are not offloaded in the State under the guise of inter-State transport, with a view to enforce the prohibition within the State and curb black marketing of such goods within the State.

(E) The prayer for quashing FIR No.358/2020, is hereby rejected.

Rule is made absolute in the aforesaid terms. Considering the circumstances, there shall be no order as to costs.

(AVINASH G. GHAROTE, J.)

(SUNIL B. SHUKRE, J.)

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