IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.3805 of 2015

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M/s Omkar Agency, through its Proprietor Narayan Panda, son of Late Murlidhar Panda, resident of Krishna Market, Karbigahiya, P.S. Jakkanpur, District Patna (Bihar).

.... Petitioner

Versus

1. The Food Safety and Standadrs Authority of India, FDA Bhavan, Near Bal Bhavan, Kotla Road, New Delhi- 110002 through its Chairperson
2. Secretary, Ministry of Health and Family Welfare, Government of India, New Delhi

.... Respondents

With

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Civil Writ Jurisdiction Case No. 18244 of 2015

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M/s Prabhat Zarda Factory India Private Ltd., (a Company registered under Companies Act 1956) respresented by its Director, Rajesh Kumar Prasad Son of Late Sridhar Prasad, having Registered office at New Area, Sikandarpur, P.S. Muzaffarpur Town, District - Muzaffarpur, Bihar

.... Petitioner

Versus

1. The State of Bihar through the Chief Secretary, Government of Bihar, Patna
2. The Principal Secretary, Department of Health & Medical Education, Government of Bihar, Patna
3. The Commissioner of Food Safety, Pariwar Kalyan Bhawan, Government of Bihar, Patna

.... Respondents

With

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Civil Writ Jurisdiction Case No. 18282 of 2015

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Rajat Industries Pvt. Ltd., through its Zonal Manager Syed Zeyaul Islam, son of Syed Arif Reza, resident of Vivek Nursing Home, 4th Floor, G T Road, P.S. Golawari, District Kolkata, West Bengal.

.... Petitioner

Versus

1. The State of Bihar through the Chief Secretary, Government of Bihar, Patna.
2. The Principal Secretary, Department of Health & Medical Education, Government of Bihar, Patna.
3. The Commissioner of Food Safety, Pariwar Kalyan Bhawan, Government of Bihar, Patna.

.... Respondents

With

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Civil Writ Jurisdiction Case No. 18351 of 2015

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1. M/s Omkar Agency, through its Proprietor Narayan Panda, son of LKate Murlidhar Panda, resident of Krishna Market, Karbigahiya, P.S.- Jakkanpur, District- Patna (Bihar)
2. M/s. R K Products Company, (Unit III), Plot No. 126, SY No. 125 Part, I D A

Mallapur, RR, P.S. Nacharam, District Hyderabad through its authorized Signatory, Jitendra Kumar Chaurasia, son of Sri Megh Nath Chourasia, resident of Gali No. 2, Chandmari Road, P.S.- Kankarbagh, District- Patna (Bihar)

.... Petitioners

Versus

1. The State of Bihar through the Chief Secretary, Government of Bihar, Patna
2. The Commissioner of Food Safety, Patna, Bihar

.... Respondents

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Appearance :
(In all cases)
For the Petitioner(s) : Mr. Jitendra Singh, Senior Advocate
Mr. Prabhat Ranjan, Advocate
For the Respondent-UoI: Mr. S. D. Sanjay, A.S.G.
For the Respondent-State : Mr. Mr. P.N. Shahi, AAG-10
For FSSAI : Mr. Brisketu Sharan Pandey, Advocate

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CORAM: HONOURABLE THE ACTING CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

JUDGMENT AND ORDER

C.A.V.

(Per: HONOURABLE THE ACTING CHIEF JUSTICE)

Date: 19-07-2016

The present set of writ petitions involve common question of fact and raise common questions of law; hence, these writ petitions have been heard together by the consent of the parties for final disposal and are being disposed of by this common judgment and order.

2. The petitioners are manufacturers of *tobacco products, such as Pan Masala* and *Zarda*. The petitioners are aggrieved by the orders of the Commissioner of Food Safety, Patna, whereby the Commissioner, in exercise of powers, under Section 30(a) of the Food Safety and Standards Act, 2006, has prohibited the manufacture, storage, distribution or sale of *Zarda, Pan Masala and Gutkha*.

3. The petitioners contend that the Food Safety and

Standards Act, 2006, and the Regulation*s* made thereunder do not operate as a prohibition on Manufacture, Production, Marketing, Storage and other allied activities of the Scheduled *Tobacco products* within the meaning and definition of the Cigarettes and other *Tobacco products* (Prohibition of Advertisement and Regulation of Trade and Commerce Production, Supply and Distribution) Act, 2003 (hereinafter referred to as COTPA). It is the case of the petitioners that as the petitioners are dealing in the manufacturing, production and marketing of Scheduled *Tobacco products* within the meaning of Section 3 (p) of COTPA, they are not performing any Food Business and, hence, they are not Food Business Operators under the Food Safety and Standards Act, 2006. Consequently, they are not required to submit to the statutory requirements of the Food Safety and Standards Act, 2006, and the Regulation*s* made thereunder. It is also their case that the COTPA is a comprehensive law to provide for Regulation of Trade and Commerce and other allied activities including production in *tobacco products* and, as such, the petitioners, who are manufacturers of *tobacco products*, are regulated exclusively by the provisions of the COTPA. The petitioners further contend that the Central Government is levying and collecting Excise duty considering the products, in question, namely, *pan masala* and *Zarda as tobacco products*.

4. The petitioners have also challenged the *vires* of

Regulation 2.11.5 of the Food Safety and Standards (Food Products Standards Food Additives) Regulation, 2011, made by the Food Safety and Standards Authority of India, whereby *Pan Masala* (not *Zarda)* has been included as an item of food, the standards for the same has been prescribed and separate provisions for their packaging and labeling has been made. In this regard, it is contented that the Regulation*s* 2.11.5 of the Food Safety and Standards (Food Products Standards & Food Additives) Regulation, 2011, being in the form of a subordinate legislation, made by a statutory authority, namely, Food Safety and Standards Authority of India (FSSAI), under its rule-making power, is in direct and irreconcilable conflict with the substantive Central Act being COTPA enacted by the Parliament of India. It is also contended that the impugned Regulation*s* suffer from the vice of excessive delegation and travel beyond the scope of delegation as conferred by the parent Act, there is inherent lack of legislative competence as the impugned Regulation*s* is hit by the inhibition contained in Article 13 (2) of the Constitution of India prohibiting the State from making any law, which takes away or abridges the rights conferred under Part III of the Constitution of India and thereby renders any such law abridging Fundamental Rights, to the extent of contravention, *void*.

5. It has been further urged that by virtue of inclusion of *Pan Masala* as an item of Food under the Food Safety and

Standards (Food Products Standards & Food Additives) Regulation, 2011, the product has to conform to the other Regulation*s* made under the Food Safety and Standards Act. As per Regulation 2.3.4 of the Food Safety and Standards (Prohibition and Restriction on Sales) Regulation 2011, *Tobacco* and *Nicotine* shall not be used as ingredients in any Food Products. However, as per Section 7 (5) of COTPA, which is a substantive Central Act, the use of Tobacco or Nicotine is permissible in any *tobacco products*. Thus, *Pan Masala,* being a Scheduled Item at Serial No. 8 of the Schedule appended to COTPA, addition of Tobacco or Nicotine, by virtue of Section 7 (5) of the COTPA, is permissible. However, if *Pan Masala* is treated as an item of food, as has been done by the impugned Regulation 2.11.5, then, no Tobacco or Nicotine can be mixed in any *Pan Masala*.

6. It is, therefore, submitted that inclusion of *Pan Masala* under the Food Safety and Standards Act, 2006, leads to inherent inconsistency between two different Acts and render them entirely inconsistent and unworkable; hence, the impugned Regulation must yield in favour of the substantive Central Act, i.e., COTPA.

7. The petitioner further states that impugned Regulation*s* suffer from the vice of excessive delegation. It is contended that the Food Safety and Standards Act, 2006, was enacted, on 23.08.2006, to consolidate the laws relating to

Food and to establish the Food Safety and Standards Authority of India for laying down science based standards for article of Food and to regulate their manufacture, storage, distribution, sale and import, to ensure availability of safe and whole-some food for human consumption and for matters connected therewith and incidental thereto.

8. It is the case of the petitioners that a conjoint reading of the aims and objects and Section 97 (1) of the Food Safety and Standards Act, 2006, makes it clear that at no point of time, there was any intention of the legislature to repeal the COTPA. The Food Safety and Standards Authority of India was constituted only for the purposes of laying down science based standards for articles of food and other allied activities. The Food Safety and Standards Act, 2006, nowhere, while delegating the rule-making power, empowered the Food Safety and Standards Authority of India to make any Regulation, which, in effect, overrides or repeals any Substantive Central Act or plenary legislation. The inevitable result of the impugned Regulation by the Food Safety and Standards Authority of India is, virtually or impliedly repealing a plenary legislation, namely, COTPA by means of a delegated legislation, which was beyond the scope of the rule-making power of the authority concerned.

9. The petitioners also submit that by virtue of the impugned Regulation*s*, whereby *Pan Masala* has been brought under the scope and applicability of the Food Safety and

Standards Act, 2006, the product has to conform to the other Regulation*s* made under the Act. In exercise of powers conferred by Clause (k) of Sub-Section (2) of Section 92 read with Section 23 of the Food Safety and Standards Act, 2006, the Food Safety and Standards Authority of India has made the Food Safety and Standards (Packaging and Labelling) Regulation*s*, 2011. As per Regulation 2.4 of the Food Safety and Standards (Packaging and labelling) Regulation 2011, every package of *Pan Masala* and advertisement relating thereto shall carry the warning namely----"*Chewing of Pan Masala is injurious to health"*.

10. If *Pan Masala* is treated to be an Item of Food under the Food Safety and Standards Act, 2006, as has been done under the impugned Regulation*s*, then, in that event, as per the Packaging rules under the Food Safety Act, it has to only mention statutory warning, namely, *Chewing of Pan Masala is injurious to Health* and, furthermore, the advertisement of the product is also permissible subject to the aforesaid Statutory warning being mentioned in the Advertisement. To the contrary, the substantive Central Act, i.e., COTPA, provides altogether a different Packaging and Labelling Rules for *tobacco* and *tobacco products* in the name of the Cigerattes and other *Tobacco products* (Packaging and Labelling) Rules 2008, and prohibits the advertisement of the products altogether. Thus, if the impugned Regulation*s* is given

full effect, the consequence would be that advertisement of a *tobacco product* like *Pan Masala* would become legally permissible, whereas COTPA does not permit at all the advertisement of *tobacco products*.

11. The respondent, Union of India, opposing the claims of the petitioners, submits that the Supreme Court, in the case of ***Ankur Gutka vs Asthma Cure***, SLP 16308/2007, has been pleased to issue notice to the State Governments to show cause as to why prohibition order has not been issued in connection with *Pan Masala* containing Tobacco and *Gutka*; hence, the ban on *Gutka* has been imposed in terms of the directions of the Supreme Court. It has been further stated by the Union of India that the Supreme Court, in the case of ***Godawat Paan Masala vs State of Maharashtra***, reported in ***(2004) 7 SCC 68***, has held that *Gutka* is an item of food and since tobacco is used for human consumption, it becomes food within the meaning and definition of Section 3(j) of the Food Safety and Standards Act, 2006. The Union of India also contend that since the Food Safety and Standards Act, 2006, has an over-riding provisions in the form of Section 89, it will prevail over COTPA.

12. The State Government, while defending the order of the Food Safety Commissioner and adopting the arguments of the Union of India, has taken the plea that the Food Safety and Standards Act, 2006, being a later Act than that of COTPA

2003, would prevail over the latter.

13. We have heard Mr. Jitendra Singh, learned Senior Counsel, appearing for the petitioners, and Mr. P.N. Shahi, learned Additional Advocate General No. 10, appearing for the State-respondents. We have also heard Mr. S.D. Sanjay, learned Additional Solicitor General, appearing on behalf of Union of India.

SCOPE OF POWER UNDER SECTION 30 OF THE FOOD SAFETY AND STANDARDS ACT, 2006

14. Section 30 of the Food Safety and Standards Act, 2006 (hereinafter referred to as 'the Food Act') deals with the functions of Commissioner of Food Safety. Section 30(1) provides that 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. Section 30(2) provides that the Commissioner of Food Safety shall perform all or any of the following functions, namely,

> *'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'*

15. Let us, for the sake of argument, assume that

contentions of respondents are correct and Commissioner of Food Safety has the power to issue prohibitory orders under Section 30.

16. The question, which, now, arises, is : How and in what manner, the powers, under Section 30 of the Food Act, is required to be exercised?

17. Necessarily, when the preamble to the Act states that science based standardization would be adopted in laying down standards of food, the Commissioner, while exercising powers under Section 30, must be in possession of objective materials that the food, sought to be prohibited, does not conform to the standards as prescribed by the Regulation*s*. It is necessary, therefore, to analyze the various provisions of the Food Act to ascertain the standardization process.

18. Section 3(zl) of the Food Act defines "*prohibition order*" to mean an order issued under Section 33 of the Food Act. A reading of Section 33 would show that prohibition orders can be passed by Courts, when a food business operator is convicted for an offence under the Food Act. Section 33, under the title "Prohibition Orders", lays down the general rule regarding prohibition.

19. Going further, an exception is found in Section 34 of the Food Act, which provides for an emergency prohibition order. Section 34(1) provides that if the Designated Officer is satisfied that the health risk condition exists with respect to

any food business, he may, after a notice served on the food business operator (referred to in the Food Act as an "emergency prohibition notice"), apply to the Commissioner of Food Safety for imposing the prohibition. Section 34(2) further provides that if the Commissioner of Food Safety is satisfied, on the application of such an officer, that the health risk condition exists with respect to any food business, he shall, by an order, impose the prohibition.

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

21. With respect to a food product, since there may be numerous brands, it is equally necessary for the Designated Officer and also the Commissioner of Food Safety to specify, which particular brand is to be prohibited.

22. For instance, *Ghee* is a standardized product under the Food Act. Ghee will be injurious to health only if it does not conform to the regulatory standards, but ghee *per se* is not injurious to health. Hence, if a particular brand of ghee is found to be not conforming to standards, would it be proper to prohibit sale of all brands of *ghee*? In the same manner, if Food Regulation*s* define *Pan Masala,* it would mean *Pan Masala* is a standardized product. Therefore, a prohibitory order, with

respect to *Pan Masala,* can be passed only if the particular brand of *Pan Masala*, on examination, is found to be not conforming to the standards. It will not be permissible to ban all brands of *Pan Masala* by a blanket order.

23. Now, Section 34 also lays down the process of satisfaction required to be arrived at by the Designated Officer before submitting a report to the Commissioner of Food Safety, which, among others, includes the following;

a. The Designated Officer, before making a report to the Commissioner of Food Safety, is firstly required to serve an emergency prohibition notice upon the food business operator.

b. Secondly, the Designated Officer shall not apply for an emergency prohibition order unless, at least, one day before the date of the application, he has served notice on the food business operator of the business of his intention to apply for the order.

24. It will be seen that even in emergent circumstances, law provides that emergency prohibition notice be issued to the food business operator before making a prohibition order. In this regard, Section 34(5) provides that an emergency prohibition order shall cease to have effect if the Designated Officer issues a certificate to the effect that he is satisfied that the food business operator has taken sufficient measures for justifying the lifting of such order. It is in this context that the provisions of Section 30(2)(a) is required to be understood.

25. The procedure, as Section 34 sums up, is that when a prohibition order is made by the Commissioner of Food Safety, such an order shall be periodical in nature. If during the subsistence of emergency prohibition order, the Designated Officer submits a report that the food business operator has taken sufficient measures for justifying the lifting of prohibition order, the prohibition shall be lifted. In any case, as per the mandate of Section 30(2)(a), the prohibition cannot be continued beyond a period of 1 (one) year. A prohibition order cannot, therefore, be made a permanent order and/or be made to run for years together defeating thereby the legislative will, which warrants the executive to exercise its power under Section 30 of the Food Act in emergent circumstances. This aspect will become clearer as we proceed further.

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

27. In ***Olga Tellis* v. *Bombay Municipal Corporation***, reported in ***(1985) 3 SCC 545,*** a Constitution Bench of Supreme Court had the occasion to deal with the provisions of Section 314 of the Bombay Municipal Corporation Act, 1888. It was held by the Supreme Court that Section 314 confers on the Commissioner the discretion to cause an encroachment to be removed with or without notice. That discretion has to be exercised in a reasonable manner so as to

comply with the constitutional mandate that the procedure, accompanying the performance of a public act, must be fair and reasonable. The Court must lean in favour of this interpretation, because it helps sustain the validity of the law. It was further held, in **Olga Tellis** (supra), that it must further be presumed that, while vesting the Commissioner with the power to act without notice, the Legislature intended that the power should be exercised sparingly and, in cases of urgency, which brook no delay. In all other cases, no departure from the *audi alteram partem* rule could be presumed to have been intended. On the provisions of Section 314, the Supreme Court held, in **Olga Tellis** (supra), that it is so designed as to exclude the principles of natural justice by way of exception and not as a general rule. There are situations, which demand the exclusion of the rules of natural justice by reason of diverse factors like time, place, the apprehended danger and so on. The ordinary rule, which regulates all procedure, is that persons, who are likely to be affected by the proposed action, must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively depending upon the facts of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the Legislature only in circumstances, which warrant it. Such circumstances must be shown to exist, when so required, the

burden being upon those, who affirm their existence.

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

para 44"… (the said section) confers on the Commissioner the discretion to cause an encroachment to be removed with or without notice. That discretion has to be exercised in a reasonable manner so as to comply with the constitutional mandate that the procedure accompanying the performance of a public act must be fair and reasonable. (The Court) must lean in favour of this interpretation because it helps sustain the validity of the law."

para 45…"It must further be presumed that, while vesting in the Commissioner the power to act without notice, the Legislature intended that the power should be exercised sparingly and in cases of urgency which brook no delay. In all other cases, no departure from the audi alteram partem rule ('Hear the other side') could be presumed to have been intended. Section 314 is so designed as to exclude the principles of natural justice by way of exception and not as a general rule. There are situations which demand the exclusion of the rules of natural justice by reason of diverse factors like time, place the apprehended danger and so on. The ordinary rule which regulates all procedure is that persons who are likely to be affected by the proposed action must be afforded an opportunity of

being heard as to why that action should not be taken. The hearing may be given individually or collectively, depending upon the facts of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the Legislature only in circumstances which warrant it. Such circumstances must be shown to exist, when so required, the burden being upon those who affirm their existence."

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

30. In the case of **Godawat *Pan Masala* vs Union of India,** reported in **(2004) 7 SCC 68,** the Supreme Court repelled the contention put forward by the State of Maharashtra that the impugned notifications being a legislative act, there was no question of complying with the principles of natural justice. The Supreme Court, in **Godawat *Pan Masala***

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

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

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

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

c. where the exercise of conditional legislation would depend upon satisfaction of the delegate on objective facts placed by one class of persons seeking benefit of such an exercise with a view to deprive the rival class of persons, who, otherwise, might have

already got statutory benefits under the Act and who are likely to lose the existing benefit, because of exercise of such a power by the delegate.

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

33. In view of the above reasoning, the following facts emerge with respect to the issuance of prohibition orders under Section 30(a) of the Food Act: -

a. Before passing of the order, there must be emergent circumstances based on objective materials that in the interest of public health, the manufacture, storage, distribution or sale of any article of food, either in the whole of the State or any area or part thereof, be prohibited;

b. The tenure of the prohibitory order has to be temporay in nature and must not exceed 1 (one) year in its entirety; now, any extension of the prohibitory order would amount to virtually and effectively

making a legislation by executive fiat;

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

d. Since the prohibition is with reference to a food business operator, the prohibition must indicate the name of food business operator and also the brand name, if any, under which the food business is carried out.

34. Now, applying the law, as deduced above, in the present facts and circumstances, we do not find how and in what manner the Commissioner of Food Safety came to the conclusion that *Pan Masala*, within the meaning of Food Regulation*s*, is injurious to health. The reasoning for prohibition, as recorded in the impugned notifications, proceeds as follows;

> *AND WHEREAS, Gutkha and Panmasala are articles of food in which tobacco and nicotine are widely used as ingredients now-a-days,*
>
> *AND WHEREAS, it is expedient to prohibit Gutkha and Panmasala in the State of Bihar, being food products in which tobacco and nicotine are widely used as ingredients*

35. Contrary to what has been mentioned in the notification, *Gutkha* is not an article of food within the scope of

Food Act and its Regulation*s*. The Regulation*s* neither define *Gutkha* nor is there any scientific definition of *Gutkha*. Since there has been no standardization of *Gutkha*, the Commissioner of Food Safety is not competent to issue any prohibitory orders with respect to *Gutkha*.

36. Situated thus, it becomes crystal clear that there is no proper application of mind by the Commissioner of Food Safety while making the impugned notification.

37. So far as *Pan Masala* is concerned, it is, indeed, mentioned as an article of food under Regulation 2.11.5 of Food Safety and Standards (Food Products Standards and Food Additives) Regulation*s*, 2011; but the impugned notification does not disclose any reasons to show which *Pan Masala* has been tested in laboratory and *tobacco* has been found therein. There may be numbers of *Pan Masala* products in the market, but the question is : whether all of them contain tobacco? At least, the notification does not speak so. The notification does not even whisper about the objective materials analysed by the Commissioner of Food Safety before passing the order containing the impugned notification; rather, the notification seeks to prohibit, in a blanket manner, all brands of *Pan Masala* without even caring to pin point, by brand name, as to which particular brand of *Pan Masala* violates the regulatory norms of Food Act or whether all the *Pan Masala* contains *tobacco* or not*.*

38. Coupled with the above, the Designated Officer,

while exercising powers under Section 34, must satisfy himself that health *risk* condition exists with respect to any food business. In this regard, a reference may be made to the Section 3(zm), which defines "*risk*", in relation to any article of food, to mean the probability of an adverse effect on the health of consumers of such food and the severity of that effect consequential to a food hazard must surface from the materials on record. Section 3 (*zn*) defines "*risk analysis*", in relation to any article of food, as meaning a process consisting of three components, i.e., risk assessment, risk management and risk communication. Further, Section 3 (*zo*) defines "risk assessment" to mean a scientifically based process consisting of the following steps: (*i*) hazard identification, (*ii*) hazard characterisation, (*iii*) exposure assessment, and (*iv*) risk characterization.

39. In view of the exhaustive definition of '*risk'* and its peripheral expressions, the Designated Officer ought to have made a risk assessment before recommending prohibition. Since *Pan Masala* has been mentioned as food product in the Regulation*s*, it was imperative for the Commissioner to ascertain, firstly, whether any *risk* assessment had been made by the Designated Officer, which, admittedly, has not been done in the present case.

40. Secondly, there is no reference to any emergent circumstances, which led to the passing of the prohibitory

orders under Section 30(a).

41. Thirdly, no right of hearing was ever given to any of the Food business operators before passing the prohibition orders.

42. Fourthly, the maximum prohibitory period is 1 (one) year as clearly mentioned in Section 30(a), which has exceeded long back. However, the Commissioner of Food Safety has been issuing notifications from time to time exceeding the period of 1 (one) year, which amounts to an act of legislation, a power not vested in the Commissioner of Food Safety.

43. With regard to the above, the observations of the Supreme Court, in the case of **Godawat *Pan Masala*** (supra), are also found to be relevant. It may be pointed out here that even though, in **Godawat *Pan Masala*** (supra), the Supreme Court was dealing with Prevention of Food Adulteration Act and the Rules made thereunder, yet the *ratio* on legislative competence and scope of delegated power may be profitably applied here. It was held, in **Godawat *Pan Masala*** (supra), that the State Food (Health) Authority has no power to prohibit the manufacture for sale, storage, sale or distribution of any article, whether used as an article or adjunct thereto or not used as food. Such a power can only arise as a result of wider policy decision and emanate from parliamentary legislation or, at least, by exercise of the powers by the Central Government

by framing rules under Section 23 of the Act.

44. Even after legislation of the Food Act, the power conferred by Section 30 on the Commissioner, Food Safety, cannot be used on a permanent basis as is being done in the present case; or else, it would amount to doing of an act or prohibiting an act by resorting to executive fiat and not by legislative act.

45. Considered thus, it becomes clear that the provisions of Section 30(a) of Food Act is referable to Section 7(iv) of the Prevention of Food Adulteration Act, 1954 (since repealed) and, hence, the powers are transitory in nature and intended to deal with emergent circumstances for a short period, while such emergency lasts.

46. Explaining the attributes of arbitrariness, the Supreme Court, in ***Suman Gupta v. State of J & K,*** reported in **(1983) 4 SCC 339** held that the exercise of all administrative power, vested in public authority, must be structured within a system of controls informed by both relevance and reason — relevance, in relation to the object which it seeks to serve, and reason, in regard to the manner in which it attempts to do so. Wherever the exercise of such power affects individual rights, there can be no greater assurance protecting its valid exercise than its governance by these twin tests.

47. Elaborating further the concept of arbitrariness,

the Supreme Court, in ***Suman Gupta*** (supra), observed that there is no doubt that in the realm of administrative power the element of discretion may properly find place, where the statute or the nature of the power intends so. But there is a well recognised distinction between an administrative power to be exercised within defined limits in the reasonable discretion of designated authority and the vesting of an absolute and uncontrolled power in such authority. One is power controlled by law countenanced by the Constitution, the other falls outside the Constitution altogether.

48. The relevant observations appearing, in ***Suman Gupta*** (supra), read as under :

> *"6…….We think it beyond dispute that the exercise of all administrative power vested in public authority must be structured within a system of controls informed by both relevance and reason — relevance in relation to the object which it seeks to serve, and reason in regard to the manner in which it attempts to do so. Wherever the exercise of such power affects individual rights, there can be no greater assurance protecting its valid exercise than its governance by these twin tests. A stream of case law radiating from the now well known decision in this Court in Maneka Gandhi v. Union of India has laid down in clear terms that Article 14 of the Constitution is violated by powers and procedures which in themselves result in unfairness and arbitrariness. It must be remembered that our*

entire constitutional system is founded in the rule of law, and in any system so designed it is impossible to conceive of legitimate power which is arbitrary in character and travels beyond the bounds of reason. ……. We do not doubt that in the realm of administrative power the element of discretion may properly find place, where the statute or the nature of the power intends so. But there is a well recognised distinction between an administrative power to be exercised within defined limits in the reasonable discretion of designated authority and the vesting of an absolute and uncontrolled power in such authority. One is power controlled by law countenanced by the Constitution, the other falls outside the Constitution altogether."

49. Thus, it will be seen that even if it is assumed that *Pan Masala* falls within the purview of the Food Act, there have been several breaches of procedural fairness, as pointed out above and, on these counts alone, the impugned notification is found to be arbitrary and is liable to be quashed to the extent that it prohibits the manufacture, storage, distribution or sale of *zarda, Pan Masala*.

WHETHER THE PROVISIONS OF COTPA ARE IN CONFLICT WITH THE FOOD ACT AND THE REGULATION*S* AND, IF SO, WHICH ONE WILL PREVAIL: -

TRADING IN TOACCO: -

50. It has been argued by the learned Senior Counsel for the petitioner that COTPA is a comprehensive Act dealing with the sale and distribution of *tobacco* and *tobacco products;* hence, Food Regulation*s*, which restrains the sale of *tobacco products,* are in direct conflict with COTPA.

51. There is, thus, a conflict between a principal Statute and a delegated legislation and, in these circumstances, it is the Statute, which will prevail and not the Regulation*s*.

52. On the other hand, learned Counsel for the respondents submits that neither the COTPA occupies the field covered by the Food Act nor does the Food Act encroach upon the COTPA. Neither the COTPA is complete code on the subject of *tobacco products* nor are the provisions of Food Act in conflict with any of those of the former. The two statutes are not repugnant to each other in any manner. The field, covered by the COTPA and declaration therein in terms of Entry 52 of the Union List, is not the same as covered by Food Act.

53. It would be, first, necessary to determine whether a trade in *tobacco* is permissible in India.

54. Article 19 (g) of the Constitution of India provides that all citizens shall have the right to practise any profession or carry on any occupation, trade or business. However, nothing in sub-clause (*g*) of Article 19 shall affect the operation of any existing law in so far as it imposes, or prevent the State

from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

55. Dealing with the issue of *res extra commercium vis-à-vis tobacco,* the Supreme Court, in the case of **Godawat *Pan Masala*** (supra), considered the question whether the consumption of *Pan Masala* or *Gutkha* (containing tobacco), or for that matter, *tobacco* itself, is considered so inherently or viciously dangerous to health and, if so, is there any legislative policy to totally ban its use in the country? The Supreme Court held that in the face of Act 34 of 2003 (COTPA), the answer must be in the **negative**. The Supreme Court further observed that it is difficult to accept the contention that the substance, banned by the impugned notification, is treated as *res extra commercium* and held that in the first place, the gamut of legislation, enacted in this country, which deals with *tobacco* does not suggest that Parliament has ever treated *tobacco* 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. Section 14(*ix*) of the Central Sales Tax Act, 1956, 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 sale to minors.

56. The Supreme Court, in **Godawat *Pan Masala*** (supra), further observed that that in the Tariff Schedule of the Central Sales Tax Act, 1956, 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.

57. The case of **Godawat Pan Masala** (supra) sets at rest the fact that trade, in *tobacco*, is permissible subject to restrictions imposed under COTPA. By virtue of the various provisions of COTPA, the sale, production and distribution of *tobacco products* have been regulated, but not prohibited in its

entirety.

OCCUPIED FIELD: -

58. It has been contented by the petitioners that COTPA is a comprehensive law dealing with *tobacco products* and, hence, any other law, which hinders the implementation of COTPA, has to be treated as *ultra vires*.

59. The concept of occupied field applies to two different laws enacted in different points of time and governing the same subject-matter.

60. Learned Counsel for the respondents, on the other hand, submits that the provisions of Food Act will prevail over COTPA in view of the following rules of interpretation :

a. A latter act shall prevail over an earlier Act. In the present case, the Food Act was enacted in 2006, while COTPA enacted in 2003;

b. If any Act contains a non-obstante clause giving overriding effect to its provisions, then, that Act will prevail. In this case, there is a non-obstante clause in the Food Act, 2006. Section 89 of the Food Act stipulates that the provisions of the Food 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. Thus, as per the mandate of Section 89 of the Food Act, the said Act has overriding effect on all other legislations including COTPA.

c. A latter Act, even if it is a general Act, can prevail over special Act in the case of

repugnancy of laws provided that there is no express provision to the contrary in the earlier Special Act.

d. The Supreme Court in **Allahabad Bank vs Canara Bank**, (**AIR 2000 SC 1535)**, **Ajay Kumar Banerjee vs. Umed Singh**, (**AIR 1984 SC 1130)** and **S. Prakash vs. K.M.Kurian**, (**AIR 1999 SC 2094)**, support the propositions that where there is conflict between two Central Acts, the endeavour of Court should be to harmonize the two enactments seemingly in conflict. In the case of a direct conflict (repugnancy) between two special statutes, both being special laws, the following rules apply:

(i) The later Act will prevail over the earlier Act

(ii) if there is a provision in one of the Acts giving overriding effect then that Act will prevail.

(iii) A later Act, even if it is a general Act can prevail over an earlier special Act, in the case of a repugnancy if there is no express provision to the contrary in the earlier special Act.

61. In the case of ***Deep Chand v. State of U.P., (AIR 1959 SC 648)***, the Supreme Court held that repugnancy between two statutes may be ascertained on the basis of the following three principles:

(1) Whether there is direct conflict between the two provisions;

(2) Whether Parliament intended to lay down an

exhaustive code in respect of the subject-matter replacing the Act of the State Legislature; and

(3) Whether the law made by Parliament and the law made by the State Legislature occupy the same field.

62. One aspect of the matter, which needs to be mentioned here, is that issues relating to repugnancy, ordinarily, arise with reference to Article 254 of the Constitution, when there is in existence a State law on the same subject, there is also in existence a central legislation. In the present case, the dispute is between a Central legislation and a Regulation of another Central legislation.

63. In the case of ***Reserve Bank of India* v. *Peerless General Finance and Investment Co. Ltd.,*** reported in ***(1987) 1 SCC 424,*** the Supreme Court observed that interpretation must depend on the text and the context. They form the basis of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best, which makes the textual interpretation match the contextual. A statute is best interpreted, when it is known why it was enacted. With this knowledge, the statute must be read, first, as a whole and, then, section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections,

clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses, the Act, as a whole, must be looked at and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be so construed that every word has a place and everything is in its place.

64. Now, the preamble to the COTPA, among others, provides the following;

> *And whereas, it is considered expedient to enact a comprehensive law on tobacco in the public interest and to protect the public health;*
>
> *And whereas, it is expedient to prohibit the consumption of cigarettes and other tobacco products which are injurious to health with a view to achieving improvement of public health in general as enjoined by Article 47 of the Constitution;*
>
> *And whereas, it is expedient to prohibit the advertisement of, and to provide for* Regulation *of trade and commerce, production, supply and distribution of, cigarettes and other tobacco products and for matters connected therewith or incidental thereto;"*

65. Again, Section 2 of the COTPA contains a

declaration that it is expedient in the public interest that the Union should take under its control the industry of *tobacco* and *tobacco products.*

66. The Preamble to COTPA coupled with Section 2 leaves us with no manner of doubt that COTPA is a comprehensive law dealing with the prohibition of advertisement and Regulation of trade and commerce, production, supply and distribution of *tobacco* and *tobacco products*.

67. Section 3(p) defines *tobacco products* meaning the products defined in the Schedule to the Act. The products are as follows;

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

68. The proviso to Section 7 of COTPA provides that in cigarettes and *tobacco products*, nicotine and tar contents shall not exceed the maximum permissible quantity thereof as may

be prescribed by the rules made under the COTPA.

69. Thus, it is permissible to include nicotine and tar in *tobacco products*. It may be pointed out here that even after the enactment of Food Act, in the year 2006, an amendment was introduced in Section 7, whereby the sentence "such specified warning including a pictorial warning as may be prescribed" was introduced. Meaning thereby that the parliament neither intended nor has repealed by implication of the provisions contained in COTPA.

70. Section 11 of the COTPA provides that for purposes of testing the nicotine and tar contents in cigarettes and any other *tobacco products,* the Central Government shall, by notification in the Official Gazette, grant recognition to such testing laboratory as that Government may deem necessary.

71. In exercise of powers conferred by Section 31 of COTPA, the Central Government has made the following Rules:

a. Cigarettes and Other *Tobacco products* (Display of Board by Educational Institutions) Rules, 2009. This Rule came into force 19.01.2010.

b. Cigarettes and Other *Tobacco products* (Packaging and Labelling) Amendment Rules, 2012. This Rules came into force on the 1st day of April, 2013.

c. Cigarettes and Other *Tobacco products* (Packaging and Labelling) Rules, 2008

d. Cigarettes and Other *Tobacco products* (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Rules, 2004.

e. Cigarettes and other *Tobacco products* (Packaging

and Labelling) Amendment Rules, 2014.

72. It is seen that much after the enactment of Food Act 2006, Rules are being made by the Central Government under the COTPA Act. The Food Regulation*s*, impugned in this case, were made in the year 2011. Hence, the question of former legislation having been impliedly repealed by the latter legislation pales into insignificance.

73. On the question of "repeal of special and local statutes by general statutes", ***Sutherland on Statutory Construction*** (Vol. 1 3rd edn., p. 486) states as follows;

> *"The enactment of a general law broad enough in its scope and application to cover the field of operation of a special or local statute will generally not repeal a statute which limits its operation to a particular phase of the subject covered by the general law, or to a particular locality within the jurisdictional scope of the general statute. An implied repeal of prior statutes will be restricted to statutes of the same general nature since the legislature is presumed to have known of the existence of prior special or particular legislation, and to have contemplated only a general treatment of the subject matter by the general enactment. Therefore, whether the later general statute does not propose an irreconcilable conflict, the prior special statute will be construed as remaining in effect as a qualification of or exception to the general law."*

74. Now, reading the scope of COTPA in the light of the Food Act, it becomes transparent that the preamble to the Food Act provides that it is an Act to consolidate the laws relating to food and to establish the Food Safety and Standards Authority of India for laying down science based standards for articles of food and to regulate their manufacture, storage, distribution, sale and import, to ensure availability of safe and wholesome food for human consumption and for matters connected therewith or incidental thereto.

75. Again, Section 2 provides that it is the food industry, which has been taken control by the Union.

76. Now, there is a presumption that at the time, when the Food Act was enacted, the legislature must have known about the existence of COTPA. Such presumption is further strengthened by the fact that as late as in the year 2014, i.e., much later than the enactment of Food Act, the Central Government made Cigarettes and other *Tobacco products* (Packaging and Labelling) Amendment Rules, 2014. The way the Union Government took control over the *tobacco industry*, the Union Government by Food Act took control over food industry.

77. The question, now, is whether *tobacco* is food. For a moment, even if it is assumed that *tobacco* is food within the meaning of Food Act, then, as the preamble to the Food Act, warrants, there must be a science based standards for *tobacco*

and to regulate their manufacture, storage, distribution, sale and import, to ensure availability of safe and wholesome tobacco for human consumption. If the standards can be possibly laid down, *tobacco* can be termed as food or else, the answer has to be in negative.

78. A reference to the fact that *tobacco* is not food is found in the case of ***ITC Ltd. v. Agricultural Produce Market Committee,*** reported in ***(2002) 9 SCC 232,*** wherein the Supreme Court has, with reference to levy of taxes and the expression *industry*, observed, in no uncertain words, that *tobacco* is, admittedly, not a foodstuff.

79. The fact that *tobacco* is not food is further strengthened by the fact that Food Safety and Standards (Food Products Standards and Food Additives) Regulation*s*, 2011, does not define *tobacco*, because no standards can be possibly laid down for *tobacco*.

80. Hence, it is found that COTPA is exclusive law, which deals with *tobacco* and *tobacco products;* whereas the Food Act is exclusive law, which deals with foods other than *tobacco*.

IMPLIED REPEAL: -

81. The question, now, is : whether by subsequent enactment of Food Act, the COTPA has been impliedly repealed?

82. As has been pointed out, the basic object behind

the enactment of Food Act was to consolidate various laws governing the food. The Food Act, with its enactment, repealed various other laws governing food as provided in Section 97 of the Act. Schedule 2 to the Act corresponding to Section 97 provides the list of laws, which have been repealed by Food Act. The Schedule contains the following laws;

1. The Prevention of Food Adulteration Act, 1954 (37 of 1954)
2. The Fruit Products Order, 1955
3. The Meat Food Products Order, 1973
4. The Vegetable Oil Products (Control) Order, 1947
5. The Edible Oils Packaging (Regulation) Order, 1998
6. The Solvent Extracted Oil, De oiled Meal and Edible Flour (Control) Order, 1967
7. The Milk and Milk Products Order, 1992
8. Any other order issued under the Essential Commodities Act, 1955 (10 of 1955) relating to food.

83. It will be seen that the Food Act essentially repealed the Principal statute, that is, Prevention of Food Adulteration Act, 1954, and various other Orders made under the Essential Commodities Act, 1955. A bare perusal of the list of laws would show that the expression *food* is meant to be *food,* which is, generally, consumed by people and if health standards are not maintained, those may be injurious to health. The question of implied repeal would have arisen if

after the enactment of Food Act, there had been in force a law on food, which was not incorporated in the repealing provision. For instance, The Vegetable Oil Products (Control) Order, 1947, was an Order made under the Essential Commodities Act, 1955. Assuming, now, that the legislature, while enacting the Food Act, did not specifically repeal the Vegetable Oil Products (Control) Order, 1947. Assuming further that the standards for vegetable oil products under the Food Act and the standards prescribed under the Vegetable Oil Products (Control) Order, 1947, were materially different and irreconcilable. It is in such a context that the question of implied repeal would have arisen and by the doctrine of Interpretation of Statutes, relating to implied repeal, the Vegetable Oil Products (Control) Order, 1947, being in direct conflict with Food Act, would have to yielded to the standards prescribed by the Food Act, because the Food Act seeks to consolidate all the laws relating to food and, hence, the Food Act, being a later legislation, impliedly repeals the Vegetable Oil Products (Control) Order, 1947, even if the repealing provisions have not specifically mentioned the Vegetable Oil Products (Control) Order, 1947.

84. The doctrine of implied repeal cannot be applied in the present case, because COTPA applies to *tobacco industries*, whereas the Food Act applies to *food industry*.

85. Again, the conflict is not between the two statutes; rather, the conflict is between COTPA, a central

legislation, and a Regulation in the form of Food Safety and Standards (Food Products Standards and Food Additives) Regulation*s*, 2011. Hence, the question is if there is a conflict between a Central law and a Regulation made under Central law, which would prevail.

MEANING OF REGULATION: -

86. In the case of ***U.P. Power Corpn. Ltd. v. NTPC Ltd.,*** reported in ***(2009) 6 SCC 235***, it was observed that there cannot be any doubt whatsoever that the word "Regulation", in some quarters, is considered to be an unruly horse. The Supreme Court, ***U.P. Power Corpn. Ltd.*** (supra), made a reference to the case of ***Bank of New South Wales* v. *Commonwealth (1948) 76 CLR 1,*** wherein it was observed that the word "*control*" is an unfortunate word of such wide and ambiguous import that it has been taken to mean something weaker than "*restraint*", something equivalent to "Regulation". But, indisputably, the regulatory provisions are required to be applied having regard to the nature, textual context and situational context of each statute and case concerned.

87. In **K. Ramanathan v. State of T.N.,** reported in **(1985) 2 SCC 116,** the Supreme Court, with reference to the word "Regulation", has held as follows;

> "*18. The word* 'Regulation*' cannot have any rigid or inflexible meaning as to exclude 'prohibition'. The word 'regulate' is difficult to define as having any precise meaning. It is a word of broad*

import, having a broad meaning, and is very comprehensive in scope. There is a diversity of opinion as to its meaning and its application to a particular state of facts, some courts giving to the term a somewhat restricted, and others giving to it a liberal, construction. The different shades of meaning are brought out in Corpus Juris Secundum, Vol. 76 at p. 611:

' "Regulate" is variously defined as meaning to adjust; to adjust, order, or govern by rule, method, or established mode; to adjust or control by rule, method, or established mode, or governing principles or laws; to govern; to govern by rule; to govern by, or subject to, certain rules or restrictions; to govern or direct according to rule; to control, govern, or direct by rule or Regulation*s.*

88. "*Regulate*" is also defined as meaning to direct; to direct by rule or restriction; to direct or manage according to certain standards, laws, or rules; to rule; to conduct; to fix or establish; to restrain; to restrict.'

89. In **Ramanathan** (supra), the Supreme Court was dealing with the scope of prohibitory orders, which may be made under the Essential Commodities Act, 1955, and held that Section 3 (1) of the Essential Commodities Act provided for making orders of prohibition. Hence, any Regulation, made

under the Essential Commodities Act, 1955, prohibiting certain act, could be a valid prohibition.

90. However, a Constitutional Bench, in the case of ***Himat Lal K. Shah v. Commr. of Police,*** reported in ***(1973) 1 SCC 227,*** while referring to the cases of ***Toronto* v. *Virgo 1898 SC 88***, ***Ontario* v. *Canada 196 AC 348*** and ***Birmingham and Midland Motor Omnibus Co. Ltd.* v. *Worcestershire County Council (1967) 1 WLR 409***, held that the power to "*regulate*" does not, normally, include a power to prohibit. A power to regulate implies the continued existence of that which is to be regulated. The case of ***Himat Lal*** (supra) was with reference to the Bombay Police Act and the Rules framed thereunder. The Supreme Court held that the Rules framed, under the Bombay Police Act to the extent that it prohibits popular assemblies, is void as it infringes Article 19(1)(*b*) of the Constitution.

91. The *ratio* of ***Himat Lal Shah*** (supra) was approved in the ***Narinder S. Chadha v. Municipal Corpn. of Greater Mumbai,*** reported in ***(2014) 15 SCC 689,*** wherein the Supreme Court, while dealing with a Municipal notification, which prohibited smoking, held as follows;

> ***"25.*** *From a reading of* ***Himat Lal case (supra)****, it is clear that the word "regulate" would not include the power to prohibit. Further, Section 144 of the Code of Criminal Procedure provides a power to grant only temporary orders which cannot last*

> *beyond 2 months from the making thereof (see Section 144(6) of the Code of Criminal Procedure).”*

92. In the light of the meaning of the word *regulate*, the provisions in the Food Act relating to Regulation*s* may, now, be read.

93. Section 92 lays down the general guidelines on the powers of the Regulatory authority to make Regulation*s* and it provides as follows;

> **“92. Power of Food Authority to make Regulation*s***.—(1) The Food Authority may, with the previous approval of the Central Government and after previous publication, by notification, **make Regulation*s* consistent with this Act** and the rules made thereunder to carry out the provisions of this Act.”
>
> (Emphasis is added)

94. Alongside Section 92, Section 16 lays down the duties and function of Food Authority as follows:

> **“16. Duties and functions of Food Authority**.—(1) It shall be the duty of the Food Authority to regulate and monitor the manufacture, processing, distribution, sale and import of food so as to ensure safe and wholesome food.”

95. On bare perusal of the provisions of Section 92 and Section 16, it would be apparent that power to frame

Regulation*s* does not include the power to prohibit the sale of a product. It is in this context the Regulation 2.3.4 of Food Safety and Standards (Prohibition and Restriction on Sales) Regulation*s*, 2011, are required to be taken note of. Regulation 2.3.4 provides as follows;

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

96. The source of power to make such Regulation*s* have been stated as follows;

> "*Whereas in exercise of the powers conferred by clause (l) of subsection (2) of section 92 read with section 26 of Food Safety and Standards Act, 2006 (34 of 2006) the Food Safety and Standards Authority of India proposes to make Food Safety and Standards* Regulation*s in so far as they relates to Food Safety and Standards (Prohibition and Restrictions on sales)* Regulation*s, 2011."*

97. Now, Section 26 refers to responsibilities of food business operators. Section 2(o) defines "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 Regulation*s* made thereunder.

98. Thus, the expression *food business operator* is used in relation to *food business*. The Food Act also defines

food business under Section 2 (n) to mean 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*.

99. Now, Section 31(1) of the Act provides that no person shall commence or carry on any *food business* except under a license.

100. The net result is that a *food business operator* has to obtain a licence from the Designated Officer as provided under Section 31 of the Act and, consequently, the Food Safety and Standards (Prohibition and Restriction on Sales) Regulation*s*, 2011, will apply to those *food business operators*, who are statutorily bound to obtain licence under Section 31 of the Act as food business operators.

101. The Food Act, nowhere, provides that *tobacco business operators* are required to obtain licences under the Food Act.

102. A reading of Section 16, 17, 18, 19, 26, 31 and Section 92, nowhere, provides that Regulatory authority has the power to prohibit. This is precisely the reason why Section 3 (*zl*) defines "*prohibition order*" as an order issued under Section 33 of this Act. Section 33 of the Food Act shows that prohibitory order can be passed only by Court and, that too, for

prohibiting *food business operators* under the Food Act. *Tobacco*, being not a food within the meaning of Food Act, there can be no business operator under the Food Act and, consequently, no prohibition order, even under Section 33, can be passed.

103. There is challenge to Regulation 2.3.4 of the Food Safety and Standards (Prohibition and Restriction on Sales) Regulation*s*, 2011. The said Regulation*s* mandates that *tobacco* and *nicotine* shall not be used as ingredients in any food product. The Regulation*s* have been framed in exercise of powers conferred by Section 92 of the Food Act. In exercise of power conferred by Section 92 of the Food Act, the Food Authority may, with the previous approval of the Central Government and after previous communication, vide notification, make notification, consistent with the Food Act and the Rules made thereunder, to carry out the provisions of the Act.

104. Sub-Section (2) of Section 92 of the Food Act enables a Food Authority to make Regulation*s* providing for, *inter alia,* limits of quantities of contaminants, toxic substance and heavy metals, etc. under Section 20 of the Food Act. Section 20 of the Food Act, in most unambiguous terms, prescribes that no article of food shall contain any contaminant, naturally occurring toxic substance or toxins or hormones or heavy metals in excess of such quantities as may be specified

by the Regulation*s*.

105. It is apparently in exercise of the power under Section 92 of the Food Act that Regulation 2.3.4 of the Food Safety and Standards (Prohibition and Restriction on Sales) Regulation*s*, 2011, prescribes that *tobacco* and *nicotine* shall not be used as ingredients in any *food products*. This prescription, in our view, cannot be said to be regulating manufacture of *tobacco* or *nicotine*; rather, it amounts to regulating standard of food within the meaning of the Food Act. The said Regulation 2.3.4 prohibits use of *tobacco* and *nicotine* in food products and, therefore, the said Regulation cannot be said to be in conflict with any provisions of COTPA. The said provisions, under the Food Safety and Standards (Prohibition and Restriction on Sales) Regulation*s*, 2011, appear to be in tune with the general principle of food safety as laid down in Chapter III of the Food Act.

106. A question has arisen as to whether *Pan Masala* is a food or not and it has been strenuously argued, on behalf of the petitioners, that *Pan Masala* or *Gutkha* is not a food item and, therefore, the Food Commissioner did not have the jurisdiction to impose prohibition as has been done by the impugned order. The words *Pan Masala,* occurring at Regulation 2.11.5 of the Food Safety & Standards (Food Products Standards & Food Additives) Regulation*s*, 2011, has been described as follows :

"2.11.5 Pan Masala means the food generally taken as such or in conjunction with Pan, it may contain;—

Betelnut, lime, coconut, catechu, saffron, cardamom, dry fruits, mulethi, sabnermusa, other aromatic herbs and spices, sugar, glycerine, glucose, permitted natural colours, menthol and non prohibited flavours.

It shall be free from added coaltar colouring matter and any other ingredient injurious to health.

It shall also conform to the following standards namely:—

Total ash	*Not more than 8.0 per cent by weight (on dry basis)*
Ash insoluble in dilute HCl acid	*Not more than 0.5 per cent by weight (on dry basis)"*

107. A bare reading of description of *Pan Masala,* as given in Regulation 2.11.5, makes it clear that there is no ingredient of *tobacco* in *Pan Masala* as occurring in the Food Safety & Standards (Food Products Standards & Food Additives) Regulation*s*, 2011.

108. *Pan Masala* occurres in the schedule to COTPA as 8th item, which reads as follows :

"Pan masala or any chewing material

having tobacco as one of its ingredients (by whatever name called).”

109. For *Pan Masala* to be a scheduled item under COTPA, it must have *tobacco* as one of its ingredients (by whatever name called).

110. There is apparent distinction between *pan masala* occurring at Regulation 2.11.5 of the Food Safety & Standards (Food Products Standards & Food Additives) Regulation*s*, 2011, and the one occurring at 8th item of the schedule to COTPA. Whereas, the latter must have *tobacco* as one of its ingredients, the former must not have. Said differently, the moment *tobacco* is added to *Pan Masala,* as occurring at Regulation 2.11.5 of the Food Safety & Standards (Food Products Standards & Food Additives) Regulation*s*, 2011, it will take the colour of *Pan Masala under COTPA.*

111. In the above background, if we examine Regulation 2.3.4 of the Food Safety and Standards (Prohibition and Restriction on Sales) Regulation*s*, 2011, it is easily noticeable that what is Regulated, under these Regulation*s*, is *food* without *tobacco* and it, therefore, prohibits mixing *tobacco* with a food item. The Regulation 2.3.4 cannot, in our considered view, be said to be *ultra vires*.

112. It is noteworthy that the Constitution Bench (five Judges) of the Supreme Court, in ***ITC Ltd. Vs. Agricultural Produce Market Committee and Others***, reported in

(2002) 9 SCC 232, observed that tobacco is, admittedly, not a food stuff.

113. In ***Babaji Kondaji Garad v. Nasik Merchants Coop. Bank Ltd.,*** reported in ***(1984) 2 SCC 50,*** it was held that if there is any conflict between a statute and the subordinate legislation, it does not require elaborate reasoning to firmly state that the statute prevails over subordinate legislation and the bye-law if not in conformity with the statute in order to give effect to the statutory provisions, the rule or bye-law has to be ignored. The statutory provision has precedence and must be complied with. However, we do not find any such conflict.

114. The question, which, now, arises, is : whether it is permissible in the present case, for the court to give effect to both the enactments as far as possible? The question arises, because *tobacco* is, undoubtedly, injurious to health and leads to disastrous consequences, even death. In these circumstances, keeping in mind human ingenuity, tomorrow a situation may arise, where *tobacco*, the use of which is regulated by COTPA, is used in a substance, say some fluid products, which has been standardized under the Food Act and Food Safety and Standards (Prohibition and Restriction on Sales) Regulation*s*, 2011. Can it still be said that *tobacco,* being governed by the COTPA, the Food Authorities would not be in a position to prohibit the sale of such product even for a

temporary period.

115. The answer has to be in negative from the perspective of COTPA. This is precisely the reason that COTPA has also provided a schedule, which contains a list of notified *tobacco products*. Hence, *tobacco* can be used only in the manufacture and preparation of the *tobacco products* mentioned in the Schedule. Section 30 of the COTPA provides that the Central Government, after giving notification in the Official Gazette, not less than three months' notice of its intention so to do, may, by like notification, add any other *tobacco product* in respect of which it is of opinion that advertisements are to be prohibited and its production, supply and distribution is required to be regulated under this Act and, thereupon, the Schedule shall, in its application to such products, be deemed to be amended accordingly.

116. The schedule to COTPA has, therefore, to be read as an entity of *tobacco product,* which are permitted to be sold and manufactured. Central Legislation, having allowed manufacture and production of *tobacco* and *tobacco product* on the permission so granted by COTPA, cannot be hindered by a Regulation*s* of another Central Legislation, more particularly, Food Authority. In view of the evident conflict, the Regulation has to yield to those *tobacco products*, which have been mentioned in the Schedule to the COTPA.

117. We may pause here to point out that the extent

of executive powers of the Central Government and State Government has been prescribed by Article 73 and 162 of the Constitution respectively. The executive powers of the Centre/State extends to all the matters with respect to which the Central/State Legislature has power to make laws; but there are two important fetters, among others, on exercise of such executive powers. First, the exercise of executive powers is subject to provisions of the Constitution and, secondly, the exercise of executive power cannot be stretched to the extent of infringing fundamental rights.

118. Explaining the concept of the extent of executive powers, the Supreme Court held, in ***Dr. D.C. Wadhwa & Ors. v. State of Bihar (AIR 1987 SC 579)***, that the executive cannot take away the functions of the legislature. The relevant observations, made in this regard, read as under:

> ***...The law making function is entrusted by the Constitution to the legislature consisting of the representatives of the people and if the executive were permitted to continue the provisions of an ordinance in force by adopting the methodology of re-promulgation without submitting it to the voice of legislature, it would be nothing short of usurpations by the executive of the law making function of the legislature. The executive cannot by taking resort to an emergency power exercising by it only when the legislature is not in session, take over the law making function of the legislature. That would be clearly subverting***

> ***the democratic process which lies at the core of our Constitutional Scheme, for then the people would be governed not by the laws made by the legislature as provided in the Constitution, but, by the laws made by the executive.*** *The government cannot bypass the legislature and without enacting the provisions of the Ordinance into Act of legislature, re-promulgate the Ordinance as soon as the legislature is prorogued....*
>
> *...It is settled law that a constitutional authority cannot do indirectly what it is not permitted to do directly. If there is a constitutional provision inhibiting the constitutional authority from doing an act, such provision cannot be allowed to be defeated by adopting of any subterfuge. That would be clearly a fraud on the Constitution....*
>
> **(Emphasis is supplied)**

119. So far as the operational effectiveness of executive action is concerned, the Supreme Court, in the case of ***Ram Jawaya Kapur v. State of Punjab (AIR 1955 SC 549***), while dealing with an argument of violation of fundamental rights, observed that ordinarily, the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away.

120. Elucidating further, the Supreme Court, in ***Ram Jawaya Kapur*** (supra), observes that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another and that

Executive can, indeed, exercise the powers of departmental or subordinate legislation, when such powers are delegated to it by the Legislature.

121. The Supreme Court, however, without mincing any words, held, in **Ram Jawaya Kapur (**Supra), that specific legislation may, indeed, be necessary if the Government requires certain powers in addition to what they possess under ordinary law in order to carry on the particular trade or business. Thus, when it is necessary to encroach upon **private rights** in order to enable the Government to carry on their business, a specific legislation, sanctioning such a course, would have to be passed.

122. The Supreme Court, in ***Ram Jawaya Kapur*** (supra), cautioned that if, by the notifications and acts of the executive Government, the fundamental rights, if any, of the petitioners have been violated, then, such executive actions have to be termed as unconstitutional.

123. The case law, most appropriate to the above aspect of the Constitutional limitations, imposed on the exercise of the executive power, can be found in ***D. Bhuvan Mohan Patnaik v. State of AP,*** **(AIR 1974 SC 2092),** wherein some prisoners had challenged the installation of live electric wire on the top of jail wall as being violative of personal liberty enshrined in Article 21 of the Constitution. The Supreme Court, having questioned the legal authority justifying such

installation of live wires, rejected the argument that installing of the live high-voltage wire, on the walls of jail, was solely for the purpose of preventing the escape of prisoners and was, therefore, a reasonable restriction on the fundamental rights of the prisoners.

124. Observed the Supreme Court, in ***D. Bhuvan Mohan Patnaik v. State of AP AIR 1974 SC 2092*** (supra), that if the petitioners succeed in establishing that the particular measure, taken by the jail authorities, violated any of the fundamental rights available to them under the Constitution, the justification of the measure must be sought in some 'law' within the meaning of Article 13(3)(a) of the Constitution. The Supreme Court also observed, in **D. Bhuvan Mohan Patnaik** (Supra), that the installation of the live high-voltage wire lacks statutory basis and seemed to have been devised on the strength of departmental instructions, though such instructions were neither 'law' within the meaning of Article 13(3)(a) nor do these instructions constitute *"procedure established by law*" within the meaning of Article 21 of the Constitution. Therefore, if the petitioners are right in their contention that the mechanism, in question, constitutes an infringement of any of the fundamental rights available to them, they would be entitled to the relief sought for by them that the mechanism shall be dismantled.

125. The State, in ***D. Bhuvan Mohan Patnaik***

(Supra), which had acted on executive instructions in installing live high-voltage wire on the walls of the jail, could not justify installation of this mechanism on the basis of a 'law' or 'procedure established by law' inasmuch as the executive instructions, which had been acted upon, were held by the Supreme Court to be not a 'law' within the meaning of Article 13(3)(a) nor could these instructions, according to the Supreme Court, fall within the expression, "procedure established by law', as envisaged by Article 21. The relevant observations, appearing in this regard, in ***D Bhuban Patnaik*** (supra), read as follows;

> *14.* ***But before examining the petitioners' contention, it is necessary to make a clarification.*** *Learned counsel for the respondents harped on the reasonableness of the step taken by the jail authorities in installing the high-voltage live-wire on the jail walls. He contended that the mechanism was installed solely for the purpose of preventing the escape of prisoners and was therefore a reasonable restriction on the fundamental rights of the prisoners. This, in our opinion, is a wrong approach to the issue under consideration.* ***If the petitioners succeed in establishing that the particular measure taken by the jail authorities violates any of the fundamental rights available to them under the Constitution, the justification of the measure must be sought in some "law", within the meaning of Article13(3)(a) of the Constitution. The installation of the high***

voltage wires lacks a statutory basis and seems to have been devised on the strength of departmental instructions. Such instructions are neither "law" within the meaning of Article 13(3)(a) nor are they "procedure established by law" within the meaning of Article 21 of the Constitution. Therefore, if the petitioners are right in their contention that the mechanism constitutes an infringement of any of the fundamental rights available to them, they would be entitled to the relief sought by them that the mechanism to be dismantled. *The State has not justified the installation of the mechanism on the basis of a law or procedure established by law.*

(Emphasis is supplied)

126. Moreover, a Constitution Bench of the Supreme Court, in the case of ***State of M.P. v. Thakur Bharat Singh (AIR 1967 SC1170)***, has held that the executive action cannot infringe rights of a citizen without lawful authority.

127. Again, in the case of ***Bishambhar Dayal Chandra Mohan v. State of UP, (1982) 1 SCC 39,*** it has been held that though the executive powers of the State are co-extensive with the legislative powers of the State, no executive action can interfere with the rights of the citizens unless backed by an existing statutory provision.

128. It will not be out of place to mention here that the executive powers of the State are to fill up the gaps and not to act as an independent law making agency inasmuch as

the function of enacting law, under our Constitution, lies with the Legislature and the Executive has to implement the policies/laws made by the Legislature and if the State is permitted to take recourse to its executive powers to make laws, then, we would be governed by the laws not made by the Legislature, but by the Executive.

129. Bearing in mind the scope of executive power *vis-à-vis* legislative mandate, when one looks into the provisions of Article 19 (1) (g) of Constitution of India, the Central Government can, indeed, prohibit the trading in *tobacco* in larger public interest. However, no such law has been placed before us from which even a slightest of inference can be drawn that trading in *tobacco* has been prohibited in its entirety. In these circumstances, putting fetters, by an executive action, into the exercise of fundamental rights of a person as guaranteed under Article 19 (1) (g), can be not only an act of arbitrariness but also *ultra vires* the Food Act read with COTPA.

130. Now, the power of the Commissioner of Food Safety to pass prohibitory order is derived from the standards laid down in the Regulation. In the impugned order, dated 06.11.2015, communicated vide Memo No. FSC/22/2012/268, the Commissioner of Food Safety has, vide Serial No. 11, derived his source of power from Regulation 2.3.4 of Food Safety and Standards (Prohibition and Restriction on Sales)

Regulation*s*, 2011. This power, in the Regulation to prohibit, is not consistent with the powers conferred by Section 16 and Section 92 of the Food Act; hence, the power to prohibit, exercised by the Commissioner of Food Act, is equally found to be faulty.

131. Learned Counsel for the respondents rely on the order, dated 03.04.2013, passed by the Supreme Court, in SLP 16308/2007, to justify the impugned notification, dated 06.11.2015.

132. With regard to the above, it may be pointed out that by the order, dated 03.04.2013, the Supreme Court has issued show cause notices to Chief Secretaries of all the States to file their affidavits in response to the letter No. D.O. No. P.16012/12/11-Part-I, dated 27.08.2012, issued by Ministry of Health, Government of India. The direction from the Supreme Court is to file affidavits on the issue of total compliance of ban imposed on manufacturing and sale of *Gutkha* and *Pan Masala*. As admitted by the learned Counsel for the respondents, the matter is still pending. However, in ***Health for Millions v. Union of India,*** reported in ***(2014) 14 SCC 496,*** the Supreme Court, while dealing with the interim orders passed by the Bombay High Court, has observed that as a sequel to setting aside of the interim order passed by the High Court, the Central Government and the Governments of all the States shall be bound to rigorously implement the provisions of the

2003 Act and the 2004 Rules as amended from time to time. This direction given by the Supreme Court, in the case of **Health for Millions** (supra), is still in force and is later than the order, dated 03.04.2013, passed in SLP 16308/2007.

CONCLUSIONS AND RELIEFS:-

133. Coming to the orders, dated 07.11.2014 and 06.11.2015, issued by the Commissioner of Food Safety, which are under challenge in the present batch of writ petitions, whereby manufacture, storage, distribution or sale of certain type of *tobacco* and *areca nut*, which is either flavoured, scented or mixed, whether going by name or form of *Pan Masala*, flavoured/scented tobacco, *zarda,* etc. has been prohibited, it is easily noticeable that substantially, the said order prohibits sale of such items, which are scheduled items under the COTPA.

134. Whereas we do not find any illegality in the provisions, as contained in Regulation 2.3.4 of the Food Safety and Standards (Prohibition & Restrictions on Sales) Regulations, 2011, in the background of the aforesaid discussions, the impugned order, purportedly passed and issued under the provisions of Food Act, cannot be sustained.

135. COTPA, being a parent legislation, is the comprehensive law, which deals with the sale, manufacture and production of *tobacco* and *tobacco products* notified in the Schedule of the COTPA.

136. Regulation 2.3.4 of Food Safety and Standards (Prohibition and Restriction on Sales) Regulations, 2011, which prohibits use of *tobacco* and *nicotine* with respect to Scheduled *tobacco* and *tobacco products* under COTPA, must yield to the COTPA.

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

138. In the result and for the foregoing reasons, the impugned Notification, dated 06.11.2015, which is still in force, contained in Memo No. FSC/22/2012/268, issued by the Commissioner of Food Safety, Government of Bihar, is hereby set aside and quashed.

(I. A. Ansari, ACJ)

Chakradhari Sharan Singh, J : I agree.

(Chakradhari Sharan Singh, J)

Pawan/-

AFR/NAFR	AFR
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