

In the High Court At Calcutta  
Constitutional Writ Jurisdiction  
Original Side

WP 1244 of 2014  
Sanjay Anjay Stores  
-Vs.-  
The Union of India & Ors.  
With  
WP 1001 of 2014  
Shree Narayan Agency  
-Vs.-  
The Union of India & Ors.

Before : The Hon'ble Justice Arijit Banerjee

For the petitioner : Mr. Asok Kumar Bhattacharyya, Adv.  
(In WP 1244 of 2014)

For the petitioner : Mr. Prabhat Ranjan Dwivedi, Adv.  
(In WP 1001 of 2014) Mr. Priyankar Saha, Adv.  
Mr. Amritam Mondal, Adv.

For the respondents : Mr. Amitesh Banerjee, Sr. Adv.  
Ms. Sreemoyee Mitra, Adv.

Heard On : 16.04.2015, 22.04.2015, 29.04.2015, 06.05.2015,  
10.06.2015, 17.06.2015, 16.07.2015, 30.07.2015,  
04.08.2015, 14.08.2015, 28.08.2015, 11.09.2015,  
24.09.2015, 26.11.2015, 09.12.2015, 11.02.2016,  
19.07.2016, 28.07.2016, 23.08.2016, 01.09.2016,  
08.11.2016, 15.11.2016, 24.11.2016, 15.12.2016

CAV On : 23.12.2016

Judgment On : 01.11.2017

Arijit Banerjee, J.:

(1) These two writ petitions involve common questions of law and facts and are taken up together for hearing and disposal.

(2) The primary prayer in these writ applications is for issuance of a declaratory writ to the effect that the petitioners are producers within the meaning of Sec. 3(k) of the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 (in short COTPA) and are outside the scope and applicability of the Food Safety and Standards Act, 2006 (in short FSSA) and Regulation 2.3.4 of the Food Safety and Standards (Prohibition and Restriction on Sales) Regulations, 2011 (in short FSS Regulations). The petitioners have also challenged a notification dated 29 September, 2014 issued by the Commissioner of Food Safety, West Bengal prohibiting Zarda, Khaini, and all tobacco products in the State of West Bengal in exercise of powers under Sec. 30(2)(a) of the FSSA read with Regulation 2.3.4 of the FSS Regulations.

**Contention of the writ petitioners:-**

(3) FSSA and FSS Regulations framed thereunder are applicable only to the food products as defined and standardized under the said Act and the Regulations. The said Act and the Regulations made thereunder have no applicability in respect of the trade and commerce, production, supply

and distribution of those products which have been defined as Tobacco products under Sec. 3(p) of the COTPA.

(4) COTPA is a comprehensive law and Special Act enacted by the Parliament to regulate the production, supply, distribution and sale of Tobacco products. Sec. 3(p) of the COPTA defines 'Tobacco products' as products as specified in the Schedule. The Schedule reads 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."*

(5) Since tobacco products are regulated exclusively by a comprehensive Special Central Enactment i.e. COTPA, the Commissioner of Food Safety has no jurisdiction to pass any order under the provisions of the FSSA in respect of tobacco products mentioned in the Schedule to COPTA.

(6) Section 2 of the COTPA declares that it is expedient in the public interest that the Union should take under its control the tobacco

industries. Hence, the State Government has no legislative competence in respect of the tobacco industry and the same rests exclusively with the Central Government in terms of Entry 52 of List I of Schedule 7 of the Constitution of India, which reads thus: "industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest."

Since the State Government has no legislative competence in respect of tobacco products, in view of Article 162 of the Constitution, the State Government is also denuded of its executive powers in respect of matters relating to tobacco products. Article 162 reads as follows:-

*"Extent of executive power of State.\_Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws:*

*Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof."*

(7) Regulation 2.3.4 of the FSS Regulations reads as follows:-

*"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”*

The aforesaid Regulation which is a piece of delegated legislation framed by the Food Safety and Standards Authority of India cannot be interpreted and given effect to in a manner so as to override the express provisions of COTPA which is a substantive Central Act and a Special Law in the field of tobacco products.

(8) Sec. 97 of the FSSA read with Schedule II thereof would show that COTPA was not repealed or annulled by the FSSA. Hence, the Regulations made under FSSA cannot be construed in a manner which will override COTPA. There cannot be repeal of a special substantive Central Act by implication on account of coming into force of a later Act of general nature especially when the later Act contains a list of earlier statutes which it intends to repeal. Further, no substantive Central Act cannot be repealed or overridden by a piece of subordinate/delegated legislation and in case of inconsistency between a Regulation made under the rule making power or a delegated legislation and a substantive Central Act, the former must yield to the later. Hence, Regulation 2.3.4 of the FSS Regulations cannot in any way operate in those areas which are otherwise occupied by COTPA.

(9) Simultaneous reference to Sec. 30(2)(a) of the FSSA and Regulation 2.3.4 of the FSS Regulations is misconceived and self-contradictory since the said two provisions are applicable in two different situations. Under Sec. 30(2)(a) of the FSSA the Commissioner of Food Safety may prohibit in the interest of public health, the manufacturing storage, distribution or sale of any article of food either in the whole of the State or in 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. The measure contemplated in exercise of power under Sec. 30(2)(a) is of a protem nature. On the other hand, Regulation 2.3.4 of the FSS Regulations altogether prohibits the use of tobacco or nicotine as an ingredient in any food product. Therefore, by operation of law, any food product with tobacco or nicotine as an ingredient is prohibited and no notification by the Food Safety Commissioner under Sec. 30 of the FSSA, that too on year to year basis, is required. Further, Sec. 30(2)(a) of the FSSA does not confer an independent source of power to legislate or to take a policy decision on the Commissioner of Food Safety.

(10) The very wordings of Regulation 2.3.4 makes it clear that what is prohibited is the use of tobacco or nicotine as an ingredient in any food

product and it is not that tobacco or nicotine *per se* is prohibited under the said regulation.

(11) As soon as tobacco or nicotine is used in any item, it loses the character of a food product and partakes the character of a tobacco product and thus goes out of the purview of the FSSA and comes to be regulated by the provisions of COTPA which are more stringent in nature.

(12) Trade and commerce in tobacco products is regulated by a substantive Central Act i.e. COTPA and therefore, it cannot be treated as a trade which is *res extra commercium* and as such cannot be prohibited completely. This view has been endorsed by the Hon'ble Apex Court in the case of **Godawat Paan Masala I.P. Ltd.-vs.-Union of India, (2004) 7 SCC 68**, wherein it has been held that trade in tobacco products is not *res extra commercium* and any attempt to prohibit the trade of tobacco products would amount to infringement of fundamental rights guaranteed under Art. 19(1)(g) of the Constitution of India and would thus be unconstitutional and unenforceable.

(13) If the respondent's interpretation of Regulation 2.3.4 is accepted, then it would amount to overriding and repeal of a substantive Central Act by a delegated legislation specially when the parent Act delegating the rule making power did not repeal COTPA. Further, COTPA is a Special

Act for a particular purpose and FSSA is a General Act. A Special Act cannot be repealed by implication or overridden by a General Act merely because the General Act came subsequent in point of time. The celebrated principle of '*generalia specilibus non derogant*' is well-established.

(14) The Central Government is levying and collecting excise duty on the production of tobacco products under the Central Excise Act, 1944. The excise duty is being levied not on the basis of actual production but on the basis of production capacity/deemed production of a particular manufacturing unit. There cannot be a situation where such production is being permitted under two substantive Central Acts. If tobacco is treated to be a food product and is to be regulated under FSSA Act then, all the restrictions and prohibitions imposed under COTPA like prohibition on advertisement, prohibition on sale to minors, prohibition on consumption in public places, etc. shall be rendered redundant. Similarly, the packaging, labeling Rules as provided under COTPA requiring statutory warning on 85 per cent of the packing area would also be rendered nugatory.

(15) The Ministry of Health and Welfare, Government of India by its office memorandum dated 13 February, 2012 has clarified that anything



containing tobacco is covered under COTPA. The aforesaid clarification has been mentioned in the notification/circular dated 22 February, 2012 issued by the Ministry of Finance, Government of India. The Food Safety and Standards Authority of India by a communication dated 10 October, 2012 has also clarified that zarda, khaini etc. are pure tobacco products and are not covered under the FSSA.

(16) Apart from the decision of the Hon'ble Apex Court in **Godawat Paan Masala I.P Ltd. (supra)**, learned Counsel relied on following decisions:

(i) **Kavalappara Kottarathil Kochunni alias Moopil Nayar-vs.-State of Madras, AIR 1959 SC 725; Gulam Abbas-vs.-State of Uttar Pradesh, (1982) 1 SCC 71; SMD Kiran Pasha-vs.-Government of Andhra Pradesh, (1990) 1 SCC 328.** Learned Counsel relied on these three decisions for the proposition that declaratory writs can be issued to prevent negation or abridgement of fundamental rights as guaranteed under the Constitution of India as also to ascertain the true scope and applicability of statutory provisions and to prevent misapplication of any law.

(ii) **ITC Ltd.-vs.-Agricultural Produce Market Committee, (2002) 9 SCC 232.** Learned Counsel relied on this decision in support of his submission that tobacco is not a food stuff.

(iii) **S. Samuel, M.D. Harrisons Malayalam-vs.-Union of India, (2004) 1 SCC 256.** Learned Counsel relied on this decision to explain the meaning of the word 'food'. He submitted that food in the general sense of the term is that which is chewed or drunk for nourishment and repair of the body.

(iv) **Kerala Samsthana Chethu Thozhilali Union-vs.-State of Kerala, AIR 2006 SC 3480.** This decision was relied upon for the following propositions:-

(a)By way of delegated legislation one cannot go beyond the scope of the parent statute or the Rule making power.

(b) By way of delegated legislation, substantive Central Acts cannot be repealed.

(c)There cannot be any abridgement of fundamental rights by way of subordinate/delegated legislation.

(v) **State of Rajasthan-vs.-Basant Nahata, (2005) 12 SCC 77.** This case was relied upon for the proposition that delegation cannot extend to repealing or altering essential particulars of a law which is already in force in the area in question. To alter the essential character of a statute or to challenge it in material particulars is to legislate and the

power to legislate cannot be delegated by a legislation which is not unfettered.

(vi) **The UP State Electricity Board-vs.-Hari Shankar Jain, (1978) 4 SCC 16.** Learned Counsel relied on this decision for the proposition that a later general Act should yield to an earlier special Act on the principles of *generalia specilibus non derogant*. The reason for this is that in passing a special Act, Parliament devotes its entire consideration to a particular subject. When a general Act is subsequently passed, it is logical to presume that Parliament has not repealed or modified the former special Act unless it appears that the special Act again received consideration from Parliament.

(vii) **Narinder S. Chadha-vs.-Municipal Corporation Of Greater Mumbai, (2014) 15 SCC 689.** Learned Counsel relied on this proposition in support of the following submissions.

(a) Regulation does not mean prohibition.

(b) Where law is clear on any issue it is the equity which has to follow the law and not the other.

(c) Trade in tobacco products can be regulated only to the extent provided under COTPA and not beyond.

(17) Appearing for the writ petitioner in WP 1244 of 2014, Mr. Bhattacharyya, learned Counsel submitted that the product in question does not contain Gutka or Pan Masala. It is chewing tobacco. It is not a food product. It can come only under the purview of COTPA and not under the Food Safety Act. COTPA is a special enactment which will prevail over the Food Safety Act. In general, he adopted the submissions of Mr. Dwivedi.

(18) He emphasized that chewing-tobacco is not an article of food and hence, the Commissioner of Food Safety could not issue the impugned notification under the Food Safety Act prohibiting the sale of chewing-tobacco. Although the notification has lapsed by efflux of time, it is a question of principle that the petitioner requests this court to decide.

(19) Mr. Bhattacharyya further submitted that chewing-tobacco comes under Chapter 24 of the Central Excise Tariff Act, 1985. Excise duty is collected on chewing tobacco. The view of the Excise Authorities that it is tobacco is binding on other statutory authorities. The State Government also collects revenue by way of VAT on chewing tobacco.

(20) Learned Counsel referred to a letter dated 10 October, 2012 written by the D.D (Enf-II) of the Food Safety and Standards Authority of India wherein it has been clarified that tobacco products and tobacco is not

covered under the FSS Act. Tobacco as an ingredient in food is a prohibited item under FSS Regulations, 2011.

(21) Learned Counsel also referred to Sec. 97 of the FSS Act and the Second Schedule thereto and pointed out that the enactments which have been repealed by the FSS Act do not include COTPA.

(22) Mr. Bhattacharyya relied the an Apex Court decision in the case of Godawat Pan Masala Products I.P. Ltd.-vs.-Union of India (supra), and in particular referred to paragraphs 77.5 and 77.6 of the reported judgment which read as follows:-

*“77.5. The state Food (Health) Authority has no power to prohibit the manufacture for sale, storage, sale or distribution of any article, whether used as an article or adjunct thereto or not used as food. Such a power can only arise as a result of wider policy decision and emanate from Parliamentary legislation or, at least, by exercise of the powers by the Central Government by framing rules under [Section 23](#) of the Act;*

*77.6. The provisions of the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and [Distribution](#)) Act, 2003 are directly in conflict with the provisions of [Section 7\(iv\)](#) of the Prevention of Food Adulteration Act, 1954. The former Act is a special Act intended to deal with tobacco and tobacco products particularly, while the latter enactment is a general enactment. Thus, the Act 34 of 2003 being a special Act, and of later origin, overrides the*

*provisions of Section 7(iv) of the Prevention of Food Adulteration Act, 1954 with regard to the power to prohibit the sale or manufacture of tobacco products which are listed in the Schedule to the Act 34 of 2003."*

(23) Mr. Bhattachayya also relied on an unreported judgment dated 19 July, 2016 delivered by a Division Bench of the Patna High Court in Civil Writ Jurisdiction Case No. 3805 of 2015. He also relied on an unreported judgment dated 20 December, 2012 delivered by a Learned Single Judge of the Kerala High Court in *Joshy K.V. and Anr.-vs.-State of Kerala and Ors.*

**Contention of the respondents:-**

(24) Learned Additional Advocate General assisted by Mr. Amitesh Banerjee, Learned Senior Advocate, appearing for the State contended that tobacco products, including but not limited to chewing tobacco, snuff, paan masala or any chewing product containing tobacco and gutka as manufactured and sold by the petitioners are intended for human consumption and hence fall within the meaning of 'food' as defined in Sec. 3(1)(j) of the FSS Act. Tobacco products have not been specifically excluded from the ambit of the FSS Act.

(25) Learned Counsel further submitted that Sec. 89 of the FSS Act provides that the said Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. In other words, it has overriding effect. Hence, the product manufactured, stored, distributed and sold by the petitioners, which is admittedly for human consumption, come within the purview of the FSS Act and not under COTPA.

(26) Learned Counsel then referred to Sec. 30(2)(a) of the FSS Act and Regulation 2.3.4 of the FSS Regulations, 2011 which have been referred to above while noting the submissions of the petitioners.

(27) Referring to the judgment in **Godawat Pan Masala (supra)**, learned Counsel submitted that the Apex Court in that case specifically disagreed with the contention that pan masala or gutka does not amount to food within the meaning of Sec. 2(v) of the Prevention of Food Adulteration Act, 1954 although the definition of food was a lot more restricted compared to the definition of food under the FSS Act. The said judgment also dealt with the powers of the State Food Health Authority and not with the power of the Commissioner of Food Safety under the FSS

Act. Reliance was placed on paragraph 67 of the said judgment which read as follows:-

*“67. We are, therefore, unable to agree with the contention that pan masala or gutka does not amount to "food" within the meaning of definition in [Section 2\(v\)](#) of the Act. However, we do not rest our decision solely on this issue.”*

(28) Learned Counsel then relied on an unreported judgment dated 15 September, 2012 delivered by a Division Bench of the High Court of Bombay in the case of M/s Dhariwal Industries Ltd.-vs.-State of Maharashtra (Writ Petition No. 1631 of 2012) which held that the definition of food in the FSS Act is wide enough to include tobacco products and also that the Parliament does not require manufacturers like the petitioners to wait for any declaration to be made by the Food Safety or the Central or the State Government to declare any food as injurious to health or unsafe. It is the statutory duty of the manufacturers like the petitioners to ensure that they do not manufacture any article of food that is unsafe. The Division Bench rejected the prayer of the manufacturer for stay of implementation of the order issued by the Food Safety Commissioner prohibiting the manufacturing, storage, distribution or sale of tobacco products.



(29) Learned Counsel also relied on a decision a decision of the Hon'ble Apex Court in the case of **Pyarali K. Tejani-vs.-Mahadeo Ramchandra Dange**, AIR 1974 SC 228, and in particular reliance was placed on paragraph 10 of the reported judgment which reads as follows:-

*"10. We now proceed to consider the bold bid made by the appellant to convince the Court that supari is not an article of food and, as such, the admixture of any sweetener cannot attract the penal provisions at all. He who runs and reads the definition in S. 2(v) of the Act will answer back that supari is food. The lexicographic learning, pharmacopic erudition, the ancient medical literature and extracts of encyclopaedias pressed before us with great industry are worthy of a more substantial submission. Indeed, learned counsel treated us to an extensive study to make out that supari was not a food but a drug. He explained the botany of betelnut, drew our attention to Dr. Nandkarni's Indian Materia Medica, invited us to the great Susruta's reference to this aromatic stimulant in a valiant endeavour to persuade us to hold that supari was more medicinal than edible. We are here concerned with a law regulating adulteration of food which affects the common people in their millions and their health. We are dealing with a commodity which is consumed by the ordinary man in houses, hotels, marriage parties and even routinely. In the field of legal interpretation, dictionary scholarship and precedent-based connotations cannot become a universal guide or semantic tyrant, oblivious of the social context, subject of legislation and object of the law. The meaning of common words relating to common articles consumed by the common people, available commonly and contained in a statute intended to protect the community generally, must be gathered from the common sense understanding of the*

*word. The Act-defines 'food' very widely as covering any article used as food and every component which enters into it, and even flavouring matter and condiments. It is commonplace knowledge that the word "food" is a very general term and applies to all that is eaten by man for nourishment and takes in subsidiaries. Is supari eaten with relish by man for taste and nourishment? It is. And so it is food. Without tarrying further on this unusual argument we hold that supari is food within the meaning of s. 2(v) of the Act."*

(30) Relying on the aforesaid decisions, learned Counsel prayed for dismissal of the writ petition.

**Court's View:-**

(31) I have given my anxious consideration to the rival contentions of the parties. The petitioners carry on the business of manufacture and/or sale of tobacco products including chewing tobacco/scented chewing tobacco/zarda. They have approached this court by way of the present writ applications being aggrieved by a notification dated 29 September, 2014, the operative portion whereof reads as follows:-

*"NOW, THEREFORE, in pursuance of regulation 2.3.4 of the Food Safety and Standards (Prohibition and Restrictions on Sales) Regulations, 2011, and in continuation to Notification No. 45/HF/CFS/1M-6/2012 (Pt) date 4<sup>th</sup> April, 2014, the manufacture, storage, sale or distribution of food products where tobacco and nicotine has been used as ingredients including processed/flavoured/scented chewing tobacco/nicotine whether going by the name or form of gutkha, zarda, khaini, panmasala or, by whatsoever name it is available in the market, is hereby prohibited for a*

*period upto 30<sup>th</sup> April, 2015 in the State of West Bengal, in the interest of Public Health."*

(32) Although the validity of the said notification lapsed by efflux of time during the pendency of the writ applications, the petitioners invited the decision of this Court on a broader issue i.e. whether or not the Commissioner of Food Safety, West Bengal, has the authority to issue similar notifications prohibiting manufacture, storage, sale or distribution of processed/flavoured/scented chewing tobacco/nicotine whether going by the name of gutkha, zarda, khaini, panmasala or by whatever name.

(33) The petitioners contended that products like processed/flavoured/scented chewing tobacco/nicotine whether in the form of gutkha, zarda, khaini or panmasala or similar products (in short referred to as the 'said products') are not 'food items' and hence, do not come within the purview of the FSSA. Hence, the FSS Regulations have no manner of application to such products and the Commissioner of Food Safety, West Bengal, has no power or authority to issue any notification similar to the notification under challenge in these writ applications.

(34) The respondents contended that the definition of 'food' in the FSSA is very wide and includes the said products. Hence, the Commissioner of Food Safety has authority to issue notifications prohibiting manufacture,

storage, sale or distribution of the said products in the public interest.

'Food' has been defined in the FSSA as follows:-

*"3(i) '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 food, 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 purpose of this Act having regard to its use, nature, substance or quality;"*

(35) Secs. 26(1) and (2) of the FSSA read as follows:-

*"S. 26. Responsibilities of the food business operator.\_(1) Every good business operator shall ensure that the articles of food safety the requirements of this Act and the rules and regulations made thereunder at all stages of production, processing, import, distribution and sale within the businesses under his control.*

*(2) No food business operator shall himself or by any person on his behalf manufacture, store, sell or distribute any article of food-*

*(i) Which is unsafe; or*

*(ii) Which is misbranded or sub-standard or contains extraneous matter; or*

*(iii) For which a licence is required, except in accordance with the conditions of the licence; or*

*(iv) Which is for the time being prohibited by the Food Authority or the Central Government or the State Government in the interest of public health; or  
(v) In contravention of any other provision of this Act or of any rule or regulation made thereunder. ”*

(36) Sec. 92 of the FSSA empowers the Food Authority, with the approval of the Central Government, to make regulations by notification consistent with the Act and the Regulations made thereunder to carry out the provisions of the Act. In exercise of such power the authority has framed FSSA Regulations, 2011, Regulation 2.3.4 whereof has been extracted above.

(37) The applicability of FSSA and the Rules and Regulations framed thereunder to the said products would depend on the answers to two questions. Firstly, whether the said products are 'food' within the meaning of FSSA? If the answer is in the negative then the writ application must succeed without going into any further question. Even if it be held, that the said products are 'food' within the meaning of FSSA, the question would arise as to whether the FSSA would apply to such products or whether the COTPA would apply for regulating the manufacture/storage/distribution/sale of such products?

(38) Although the definition of 'food' in FSSA is very wide and apparently includes any product that can be consumed by human beings, tobacco products, in my opinion, cannot be understood to be covered by the definition. Food as we have always understood means edibles including liquid food that is drunk rather than eaten, which has nutritional value. Food is a source of energy to human beings and indeed to all living creatures, to sustain life. Food cannot be meant to include stimulant like zarda or other tobacco products which temporarily stimulate the human body without infusing any nutrient. Such tobacco products appear to provide stimulant which is more psychological in my opinion rather than real. People who are used to taking such tobacco products experience a sudden surge of energy which is more psychological than real. Nobody in his right senses would say that cigarette or other tobacco products are food.

The preamble to the FSSA reads as follows:-

*"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."*

(39) If it is assumed that tobacco is food within the meaning of FSSA then there must be a science based standard for tobacco to regulate manufacture, storage, distribution, sale and import of tobacco products to ensure availability of safe and wholesome tobacco for human consumption. Unless such standards can be laid down, tobacco cannot be termed as food. Obviously such standards cannot be laid down. Consumption of tobacco and tobacco products are universally acknowledged as injurious to human health and that is why COTPA has been promulgated to regulate trade and commerce in tobacco and tobacco products. Such products cannot, in my opinion, be considered as food by any stretch of imagination.

(40) In *ITC Ltd.-vs.-Agricultural Produce Market Committee (supra)*, in the context of levy of taxes, the Apex Court observed that tobacco is not a food stuff.

Hence, in my opinion, in spite of the expansive definition of 'food' in Section 3(j) of FSSA, tobacco and tobacco products cannot be said to be within the purview of the said Act.

(41) Even if for the sake of argument I were to hold that the said products come within the definition of food as provided in the FSSA, I

would still hold that the Commissioner of Food Safety has no jurisdiction to issue notifications like the one under challenge in the present writ applications, for the following reasons.

(42) FSSA is a regulatory statute. It empowers the authority to regulate the manufacture, storage, distribution, sale and import of food products for human consumption. Such regulatory power does not authorize the authorities to prohibit the manufacture, etc. of tobacco or tobacco products even if the same can be called 'food'. Trade in tobacco is not impermissible in India. In **Godawat Pan Masala (supra)** the Apex Court held that tobacco or tobacco products are not *res extra commercium*. If consumption of tobacco or products containing tobacco or nicotine was considered to be so inherently dangerous for human health, the Parliament could have banned altogether trade and commerce in tobacco and tobacco products even in the face of Art. 19 (1)(g) of the Constitution of India. But the Parliament did not do so. It has instead chosen to regulate rather than prohibit trade and commerce in tobacco and tobacco products by promulgating COTPA. Hence, on the strength of a delegated legislation in the form of FSS Regulations framed under the FSSA, the authorities cannot seek to prohibit trade and commerce in the said products. That would be an exercise of a power that they do not have.



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

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

(45) I am not for a moment suggesting that consumption of tobacco or tobacco products is not injurious to public health. However, I am of the firm opinion that the Commissioner of Food Safety or any other authority

does not have the power or jurisdiction under the FSS Regulations or the FSSA to prohibit the trade and commerce in the said products. Restriction may be imposed on the trade and commerce of the said products only to the extent permitted under the COTPA.

(46) The next question is whether the regulatory provisions of the FSSA would apply to the said products or the said products would be governed by the regulatory provisions of COTPA.

(47) On this issue there are two conflicting decisions of a Division Bench of the Bombay High Court and a Division Bench of the Patna High Court. In the case of **M/s Dhariwal Industries Ltd. (supra)** a Division Bench of the Bombay High Court by its order dated 15 September, 2012 refused the prayer for stay of operation of a similar notification issued by the Food Safety Commissioner, Maharashtra. The Division Bench observed that in view of the wide definition of food in FSSA, gutkha and panmasala are also food and hence the Food Safety Commissioner had authority to issue the notification in public interest.

However, a Division Bench of the Patna High Court in the case of **M/s Omkar Agency-vs.-The Food Safety and Standards Authority of India** (Civil Writ Jurisdiction Case No. 3805 of 2015) by its judgment and

order dated 19 July, 2016 held that similar notifications issued by the Food Safety Commissioner were unsustainable for the lack of authority and accordingly quashed such notifications since such notification prohibited sale of items which are scheduled items under the COTPA. The Patna High Court held that COTPA being a special enactment, it prevails over FSSA which is a general enactment and regulation of manufacture/storage/distribution/sale of products covered under COTPA must be by issuance of orders under the provisions of COTPA.

(48) The decision of the Bombay High Court which was the corner stone of the arguments of the respondents was an interim order. I have not been apprised as to what the final decision in that case was if the same has been finally decided. In any event, I am in agreement with the view expressed in the decision of the Patna High Court rather than the view expressed in the interim order of the Bombay High Court.

(49) COTPA is a 2003 enactment. The object of the Act is to prohibit advertisement of, and to provide for regulation of trade and commerce in, and production, supply and distribution of, cigarette and other tobacco products and for matters connected therewith or incidental thereto. The preamble to the COTPA reads as follows:-

*“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. BE it enacted by Parliament in the Fifty-fourth year of the Republic of India as follows:-”*

(50) Sec. 3 of COTPA is the definition Section. Sec. 3(p) defines ‘tobacco products’ as products specified in the schedule to the Act, which has been set out above. The said schedule includes chewing tobacco, pan masala or any chewing material having tobacco as one of its ingredients (by whatever name called) and gutkha. In other words, the said schedule includes the said products. COTPA is a comprehensive legislation to regulate trade and commerce in tobacco products. FSSA, no doubt is a subsequent legislation. Sec. 97(1) of FSSA provides that the statues specified in the Second Schedule to the said Act shall stand repealed. The Second Schedule does not include COTPA. Hence, COTPA remains an effective piece of legislation in its own field, not being

touched by FSSA. I agree with the submission of learned Counsel for the petitioners that COTPA cannot be said to have been impliedly repealed by FSSA. No such case has also been urged on behalf of the respondents.

(51) Once I hold that COTPA is in full operation, I am also impelled to hold that the provisions of COTPA would override the provisions of FSSA. It is too well-established that a general provision should yield to a special provision. This is based upon the reasoning that in passing a special Act Parliament devotes its entire consideration to a particular subject. When a general Act is subsequently passed, it is logical to presume that Parliament has not repealed or modified the former special Act unless anything to the contrary appears from the subsequent general Act. If an authority is required for this proposition, one may refer to the case of **The UP State Electricity Board-vs.-Hari Shankar Jain (supra)**.

(52) The FSS Regulations is a delegated piece of legislation. The same cannot in any manner operate beyond the scope of the parent statute i.e. the FSSA. I am of the considered opinion that the trade and commerce in tobacco products including the said products can be regulated only to the extent permitted by COTPA. Even if the said products come within the very wide definition of 'food' as provided in the FSSA it is impermissible

that two central legislations shall operate in the same field and will regulate the trade and commerce in the same products. The Parliament was conscious not to touch the COTPA while promulgating the FSSA and hence, the FSS Regulations, in my opinion, did not empower the Commissioner of Food Safety, West Bengal to issue the notification that has been challenged in the present writ applications. The Commissioner of Food Safety does not have the authority or jurisdiction to issue such notifications in respect of the said products.

(53) In view of the aforesaid WP No. 1244 of 2014 and WP No. 1001 of 2014 are allowed to the extent indicated above and accordingly disposed of, without, however, any order as to costs.

(54) Urgent certified photocopy of this judgment and order, if applied for, be given to the parties upon compliance of necessary formalities.

(Arijit Banerjee, J.)

