MCR 3923/13

P. F. Goudar

(33)

IN THE HIGH COURT OF KARNATAKA, CIRCUIT BENCH, DHARWAD

ORDER SHEET PART-I

WP 78378-78380/2013 GM-Res

of 20

R.F.A./R.S.A./M.F.A./M.S.A./W.P./C.R.P./C.P.

Appellant Petitioner
GHODAWAT PAN MASALA PRODUCTS (I) - Vs - Respondent
STATE OF KARNATAKA

Advocate Appellant / Petitioner Date of Filing : 04/06/2013 Advocate for Respondent

PRASHANT ~~P GOWDAR~~

Office Notes	Orders of Court
Receipt No: 110558/2013 Court Fee : 300 THIS WP IS FILED PRAYING TO: A) DECLAR THAT THE FOOD SAFETY AND STANDARDS (PROHIBITION AND RESTRICTIONS ON SALES) REGULATIONS, 2011, MORE PARTICULARLY REGULATION 2.3.4 OF THE SAID REGULATIONS, VIDE ANNEXURE-B, ISSUED BY THE RESPONDENT NO.3 HEREIN, IS NOT APPLICABLE TO THE PRODUCTS SCHEDULED UNDER THE CIGARETTES AND OTHER TOBACCO PRODUCTS (PROHIBITION OF ADVERTISEMENT AND REGULATION OF TRADE AND COMMERCE, PRODUCTION, SUPPLY AND DISTRIBUTION) ACT 2003, AS FAR AS IT RELATES TO THE PETITIONERS ONLY. B) RESTAIN THE RESPONDENTS, THEIR RESPECTIVE OFFICERS, SERVANTS AND AGENTS FROM IN ANY MANNER WHATSOEVER PROCEEDING	

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W.P.No.78378-78380/2013 (GM-RES)

BSPJ:
25.06.2013

ORDER ON INTERIM PRAYER

Petitioner No.1 is a Company incorporated under the provisions of the Indian Companies Act, having its registered Office at Kolhapur in Maharashtra State. The petitioner is engaged in the trade and commerce of tobacco products, more particularly, panmasala, having its factories at Mankapur in Chikkodi Taluk of Belgaum District, in the State of Karnataka.

Similarly, petitioner No.2 which is a registered partnership firm and petitioner No.3 which is a Company incorporated under the provisions of the Indian Companies Act, are also carrying on similar business having their factories in Nippani and Soundalga villages respectively in Belgaum District.

2. In these writ petitions, petitioners are challenging the notification dated 30.5.2013 issued by the 2nd respondent-Food Safety Commissioner for Karnataka and

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Commissioner, Health and Family Welfare Ser
Bangalore, vide Annexure-A. They have also sought
writ of mandamus or any other appropriate writ decl
that the Food Safety and Standards (Prohibition
Restrictions on Sales) Regulations, 2011, (herein
referred to as "2011-Regulations" for short), particu
Regulation 2.3.4 of the 2011-Regulations is not applicab
the products scheduled under the Cigarettes and O
Tobacco Products (Prohibition of Advertisement
Regulation of Trade and Commerce, Production, Supply
Distribution) Act, 2003, (hereinafter referred to as
34/2003') in so far as it relates to the petitioners.

3. I have heard this matter for preliminary hea
and considered the arguments advanced regarding
interim relief sought.

4. Learned Senior Counsel Sri K.G. Raghavan,
argued the matter on behalf of the petitioners. Lear
Advocate General Sri Ravivarma Kumar, has appeared
argued the matter on behalf of the State and the
respondent-Food Safety Commissioner. Smt.Jayna Koth

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learned Counsel who has filed an application for impleading to implead the Cancer Patients Aid Association as one of the respondents, has addressed her arguments opposing the grant of any interim order.

5. On consideration of the contentions of the learned Senior Counsel for the petitioners and the learned Advocate General, I find that this is a matter which requires a detailed hearing. Therefore, I am inclined to issue Rule. Hence, issue Rule.

6. As regards grant of interim prayer, both parties have addressed detailed arguments. The order on the interim prayer is as under:

The interim prayer sought in the writ petitions is, stay of operation of the notification dated 30.5.2013 produced at Annexure-A and also for a restraint order restraining the respondents from implementing the notification Annexure-A, as also the 2011-Regulations, particularly Regulation 2.3.4 vide Annexure B.

The main contentions urged by Sri K.G. Ragha that, the petitioners are manufacturers of Panmasa Panmasala containing tobacco and gutka, which conta to 8% tobacco and 80% supari/areca nut. They employed thousands of employees directly or indirect that apart several shop owners, retailers and distributo depending on this business. All of a sudden respondents have issued the impugned notifi prohibiting the petitioners and similarly placed persons manufacturing, storing, selling or distributing gutka panmasala containing tobacco and nicotine resulti serious loss, prejudice and hardship to the petitioners.

It is his submission that, the impugned notificati without jurisdiction as it is only the Food Authority, o State or the Central Government who have power to is such notification in terms of Section 26(2)(iv) of the F Safety and Standards Act, 2006 and the Commissione Food Safety who has issued the impugned notification has such power or authority. In this connection, he invites attention of the Court to Section 30(2)(a) of the Food Sa

and Standards Act, 2006, to contend that the Commissioner of Food Safety has power to impose restrictions and prohibitions for a temporary period only during some emergency and not to impose a permanent ban or prohibition as is sought to be done by the impugned notification.

His next contention is, that Act 34/2003 being a special enactment, regulates the trade, commerce, production, supply and distribution of panmasala containing tobacco known as Gutka, which is a comprehensive law on tobacco and therefore, the 2nd respondent Commissioner was not empowered to pass any orders or notification which were in conflict with the provisions of Act.34/2003. He submits that, if the Food Safety Commissioner is empowered to pass such orders then the provisions of Act.34/2003 would become redundant and superfluous. In this regard, learned Senior Counsel invites the attention of the Court to Section 3(p) of the Act, which defines the term "tobacco products" to mean products specified in the Schedule wherein panmasala or any chewing material having tobacco as one of its ingredients (by

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whatever name called), and gutka are mentioned at Sl.Nos and 9 respectively. He therefore contends that, Act.34/20 being a special legislation comprehensively deals wi tobacco products, their prohibition of advertisemer regulation of trade and commerce, production, supply ar distribution, therefore, the Commissioner was not right ar justified in issuing the impugned notification invoking th provisions of the Food Safety and Standards Act, 2006.

It is his next contention that, the impugned notificatio attempts to nullify the law laid down in the judgment of th Apex Court in the case of **Godavat Pan Masala Produc Pvt.Ltd. Industries vs. Union of India, 2004(7) SCC.6** He also contends that the activity in question was not bad the beginning and was indeed permitted and duly license Huge amount of tax was already collected including crores rupees in terms of Central Excise. Therefore, before issu such a ban an opportunity of being heard ought to have be given, atleast the goods which had been manufactured were required to be disposed ought to have been saved. also contends that the raw materials in the godown ought

have been allowed to be used and exhausted and if only a prior notice fixing a future deadline had been issued, petitioners would have made attempts to minimize the serious loss in their business and for no fault on their part, they are now suddenly asked to shut down the entire activities, which has hit them in an unpresidented way.

Learned Senior Counsel for the petitioners further refers to similar rule which was enacted under the Prevention of Food Adulteration Act, 1954, Rule-44 which was akin to Regulation 2.3.4 of the '2011 Regulations' and the same having been questioned before this Court, an interim order was granted on 4.09.200[illegible] in WP.12886/2007. Attention of the Court is invited to the interim order of this court produced at Annexure-G in this connection. He further points out that this matter is now withdrawn by the Apex Court for being heard there.

7. Learned Advocate General has strongly refuted the contention urged by Sri Raghavan. He contends that the judgment of the Supreme Court reported in **2004 (7) SCC 68** was rendered on 2.08.2004, whereas, the Food Safety

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Act 34/2006 has been enacted on 23.8.2006. The regulatio
known as Food Safety and Standards (Prohibition an
Restrictions of Sales) Regulation, 2011, has come into force
with effect from 5.8.2011. According to him the Food Safet
and Standards Act, 2006, is a later legislation and as per
Section 89 it provides over-riding effect over all other food
related laws and hence, Act.34/2003 cannot be pressed into
service to test the action of the Commissioner in issuing the
impugned notification. He has placed before the Court, a
letter written by the Special Secretary, Ministry of Health and
Family Welfare, New Delhi, on 21.11.2012 addressed to the
Chief Secretaries of all States, informing them that as per
the object of the Food Safety and Standards Act, 2006, it is
the duty of the authorities to ensure safe and wholesome
food to the people. While bringing to the notice of the Chief
Secretary the action of the Mizoram Government under the
regulations framed during the year 2011, particularly,
Regulation 2.3.4, in banning the sale of gutka, panmasala,
zarda and other chewable products havng tobacco and
nicotine, it was highlighted in the letter that as per the
Global Adult Tobacco Survey (GATS), 2010, smokeless

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tobacco/chewing forms are the most prevalent forms with 206 million Indians using it. As such, consequent burden of mortality and morbidity due to use of smokeless tobacco is also very high in India; Available evidence suggested that the use of chewing tobacco is associated with oral cancer and India shares maximum burden of oral cancer in the world.

8. In this background, the Chief Secretaries of the States and Union Territories including the Chief Secretary of the State of Karnataka, were asked to consider and examine issuing necessary orders as had been done by the Government of Mizoram. Reference is also made by the learned Advocate General to the reminder sent by the Union Government informing the State that 28 States had already banned production of panmasala and gutka and therefore, there was need for taking necessary action in he matter. He has also made reference to the case pending before the Supreme Court and the direction issued to the State of Karnataka to file its reply, wherein the Apex Court has directed the Secretaries of the Health Department of all the

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States and 5 union territories to file their affidavits or issue of total compliance of the ban imposed on manufac and sale of Gutkha and panmasala with tobacco an nicotine.

It is his submission that the Government of Karnat had constituted a high level committee with the C Secretary as its chairman. On 21.05.2013, the High Le Committee chaired by the Chief Secretary took note of entire relevant materials including the ban on gutka impo by 25 States and 5 Union Territories and also the opin expressed by the Principal Secretary, Government Karnataka, stating that, if the manufacture and sale panmasala and Gutka is banned in the State, it will not affe the interest of the arecanut growers, as the manufacturers Gutka and Panmasala had been importing low pric arecanut from foreign countries as learnt by him. Th Committee found that, it was necessary and advisable impose ban on panmasala and gutka containing tobac and/r nicotine. He takes me through the statement Objects and Reasons of the Food Safety and Standards Ac

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and the provisions contained in Section 3(1)(j), 3(1)(n), 3(1)(o), 3(1)(k), and Sections 26 and 30 of the Food Safety and Standards Act to contend that, the main object of the enactment is to bring about a single statute relating to food and provide for a systemic and scientific development of food processing industries and to fix the responsibility on food business operators to ensure that food process, manufacture, import or distribution is in compliance of the domestic food laws and also to give more emphasis on self-compliance through food safety amendment systems.

His submission is that the ban is imposed as per the regulations and the impugned notification is only by way of implementation of the ban contained in the regulation and indeed there was no need for separate notification to issue such a ban. He also points out that the regulations have come into effect in the year 2011 imposing such a ban, therefore, question of adhering to the principles of natural justice will not arise. He also points out that as the draft rules had been published and objections had been invited before framing the regulations, there was compliance of

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principles of natural justice before issuing the notificatio
and hence there was no need for issuing any other pri
notice to the petitioners before issuing the impugne
notification.

9. Smt Jayna Kothari, learned Counsel appearin
for the impleading applicant, the Cancer Patients A
Association, has contended that the notification is valid as
aims to achieve the objects underlying articles 21 and 47 o
the Constitution of India, to ban the sale of gutka/panmasal
containing tobacco and nicotine, which are prohibited unde
Regulation 2.3.4 in the interest of public health. She ha
highlighted the evil effects of the smokeless tobacco o
chewing tobacco. Drawing the attention of the court to
Global Adult Tobacco Survey conducted by the World Health
Organization in the year 2009-2010, which reveals that more
than 35% of the adult population uses tobacco in some form
or the other and of it 21% users use smokeless or chewing
tobacco exclusively. According to her, as per the said report
it is estimated that around 206 million persons, i.e. about a
quarter of the entire population of India at the age of 15

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years and more consume smokeless tobacco on regular basis. She has also pointed out that children and teenagers have also been addicted to the product.

Reference is made by her to a report prepared by the National Institute of Health and Family Welfare regarding evils and dangers of consuming gutka wherein it is observed that, on an average commercially sold gutka contained 3095 chemicals out of which 28 were known carcinogens which has the potentiality of causing around seven types of cancer, apart from other deceases. She has brought to the notice of the Court the judgment of the Supreme Court in the case of **U.P. State Electricity Board and another Vs. Hari Shankar Jain and others, reported in AIR 1979 S.C. 65,** particularly, the observations made in paragraph 4A to emphasis that, the directive principles of State Policy are not enforceable by any Court, but the principles are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws. While the courts are not free to direct the making of legislation, courts are bound to evolve, affirm and adopt principles of interpretation which will further not hinder the

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goals set out in the Directive Principles of State policy. The command of the Constitution must be ever present in the minds of judges when interpreting statutes which concern themselves directly or indirectly with matters set out in the Directive Principles of State Policy.

It is in this background she invites the attention of the Court to Article 47 of the Constitution of India, which states that, the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of consumption of, except for medical purposes of intoxicating drinks and of drugs which are injurious to health.

10. I have bestowed my careful consideration on the respective contentions of the parties.

11. The main thrust of the argument of the learned Senior Counsel for the petitioners is, with regard to the very power and jurisdiction of the Food Safety Commissioner

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under the provisions of the Food Safety and Standards Act, 2006 to issue the impugned notification imposing ban on gutka and panmasala. One of the main contentions in this regard is, that Act 34/2003 which regulates trading and commerce in, and production, supply and distribution of, cigarettes and other tobacco products and for matters connected therewith or incidental thereto, being a special legislation, the Food Safety and Standards Act, 2006 or for that matter Regulation 2.3.4 framed thereunder cannot be invoked to impose the ban.

His contention is that, special law prevails over the general law and that by resorting to imposing ban as per regulation 2.3.4, the entire primary legislation enacted vide Act.34/2003 is sought to be rendered redundant. In other words, he urges that the effect of the notification is to repeal the 2003 Act as regards gutka and panmasala.

12. It is to be stated here that, no doubt, Act No.34/2003 deals with prohibition of production, sale, etc. of cigarettes and other tobacco products and Panmasala and gutka or tobacco products as specified in the schedule to the

enactment. But, the Food Safety and Standards Act, 200 is a subsequent legislation enacted by the parliament an the definition of the term "food" as contained in Sectio 3(1)(j) of the Act undoubtedly encompasses panmasala an gutka which is intended for human consumption.

13. Hence, it is clear that while the former legislation deals with tobacco and other tobacco products, the later one deals with food and other items which includes the items specified under the former enactment, such as, gutka and panmasala. Keeping this in mind, if the nonabstante clause used in Section 89 of the Food Safety and Standards Act enacted in the year 2006 is examined, it becomes clear that parliament has given overriding effect to the provisions of 2006 Act. It is useful to refer to Section 89 of the said Act which reads as under:

> "The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."

Therefore, it is evident that the Food Safety Act has got overriding effect over all other laws. This clear intendment of the parliament expressed in the later enactment gives no room, atleast for the purpose of consideration of the argument of the learned Counsel for the petitioners that panmasala and gutka cannot be dealt with or banned by invoking the provisions of the Food Safety Act or Regulations framed therein.

14. Section 92 of the Food Safety and Standards Act, 2006, vests power in the Food Authority to make regulations with the previous approval of the Central Government and after previous publication to carry out the provisions of the Act including concerning the Food Safety or Public Health. Regulation 2.3.4 of the 2011-Regulations, provide that, tobacco and nicotine shall not be used as ingredients in any food products. These regulations have come into force with effect from 5.8.2011. It is undeniable that panmasala and gutka are food products containing tobacco and nicotine. By operation of Regulation 2.3.4, there is prohibition for manufacturing and marketing these products containing such

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substances. It is also undeniable that the substance in these products are injurious to health. Therefore, by operation of these regulations use of such substances in the food and food products are banned.

15. The impugned notification is issued for enforcing the prohibition contained in the 2011-Regulation. The notification makes specific and clear reference to Sec.92(2) and Sec.26 of the Food Safety and Standards Act,2006 and Regulations 2.3.4 framed in exercise of the powers conferred under the Act by the Food Authority of India thereby banning the food products containing tobacco and nicotine. It further states that gutka and panmasala are food products containing tobacco and nicotine. Hence, in order to effectively enforce the regulations framed, the State Government has appointed the Food Safety Commissioner. Therefore, in order to enforce Regulation 2.3.4 of 2011-Regulations in the State of Karnataka with immediate effect, the ban on gutka and panmasala has been imposed.

16. Thus, the language used in the notification, its contents make it very clear that the Food Safety

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Commissioner is not exercising his powers traceable to Section 26 of the food Safety and Standards Act, 2006. He is only enforcing the Regulations 2.3.4 which enacts a ban on such food products. Therefore, the contention urged by the learned Counsel for the petitioners stating that, the Commissioner does not have power under Section 26 of the Food Safety and Standards Act to issue the impugned notification and that as per sub-clause (2) of section 30 of the said Act, the Commissioner of Food Safety is required to perform only such of the functions as laid down in sub-clause (2)(a) to (f) of Section 30, which only clothes him with powers to prohibit, in the interest of public health, the manufacture, storage, distribution or sale of any article of food, for such period not exceeding one year, apart from carrying out certain other activities, is totally misconceived.

17. In fact, as is clear from sub-sec.(1) of sec.30, the Commissioner of Food Safety is appointed by the State Government for efficient implementation of Food Safety and Standards and other requirements laid down under the Act, Rules and Regulations made therein. In fact, the impugned

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notification is issued by the Commissioner of Food Safety in exercise of his powers and duties for efficient implementation of food safety and standards as laid down in regulation 2.3.4 of the Food Safety and Standards (Prohibition and Restrictions on Sales) Regulations 2011. Hence, the argument advanced by the learned Senior Counsel for the petitioners stating that the Commissioner lacks jurisdiction to issue the impugned notification is prima facie untenable.

18. Lastly, as regards the contention advanced regarding imposition of ban all of a sudden without prior notice, denying an opportunity to the petitioners to make arrangements to dispose of their stock, thereby pushing them to serious loss, it has to be stated that the regulations imposing the ban have come into effect in the year 2011, to be precise on 05.08.2011. By the impugned notification the Commissioner has enforced them. The ban is sought to be enforced after a lapse of nearly 1 year 8 months. Therefore, there is no justification for the petitioners to contend that the

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ban has been introduced all of a sudden pushing them into immediate crises.

19. The materials and the information supplied by the Cancer Patients Aid Association which has filed application seeking to be impleaded as additional respondent in these writ petitions, prima facie, make it clear that the dangerous effects of gutka and panmasala on the human body upon regular consumption is serious, and that it causes cancer apart from other deceases. The significant risk of oral cancer, oesophageal cancer, liver cancer and throat cancer is stated in the report prepared by the National Institute of Health and Family Welfare.

20. It is common knowledge that lakhs of youngsters including children above and around the age of 15 years have been addicted to gutka and panmasala. The said product is sold widely throughout the country and is available in almost every street and corner. It has now emerged as one of the biggest health hazards in the country. In order to address the growing concerns caused by these products so as to raise the level of public health and nutrition

in India, the regulations banning use of such products has been enacted in the year 2011 which has statutory sanction. These regulations have been framed after prior publication by giving sufficient opportunity to the interested parties likely to be affected to file objections.

21. As per article 21 of the Constitution of India, the State is duty bound to protect the right to life of all citizens which includes the public health. Under Article 47 the State is enjoined with a duty to protect public health. It provides that the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as one of its primary duties. The regulations now framed in the year 2011, particularly, regulation 2.3.4 of 2011 is in discharge of this obligation of the State to improve public health and the level of nutrition and the standard of living of the people. The impugned notification is only a step in enforcing the ban imposed by the regulations and therefore, none of the contentions urged by the petitioners with regard to lack of jurisdiction, denial of the principles of natural justice are tenable in law.

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In fact, this is my prima facie view for the purpose of considering the matter for grant of interim relief to the petitioners. If any interim order were to be granted, then it will be a step in derogation of improvement of public health, raising the level of nutrition and the safety standards sought to be enforced by the respondent authorities. Hence, I decline to grant the interim relief sought by the petitioners.

Accordingly, the prayer for grant of interim order is rejected.

Sd/-
JUDGE

HIGH COURT CIRCUIT BENCH DHARWAD

hsb/

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Circuit Bench, Dharwad.

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