

HON'BLE SRI JUSTICE R. RAGHUNANDAN RAO

W.P.No.7336, 8635, 8638, 8717, 10161, 10320, 10500, 11405,
11440, 11480, 11502, 11531, 11543, 11834, 11903, 12059,
12061, 12062, 12087, 12094, 12179, 12277, 12291, 12344,
12793, 12915, 14416, 14445, 19010 of 2021

COMMON ORDER:

The various petitioners, who approached this Court in the present batch of writ petitions, are aggrieved by the action of the police authorities, and in some cases the authorities under the Food Safety and Standards Act, 2006 (for short 'the Food Safety Act'), seizing tobacco products, either at the stage of transportation or at the stage of storage or sale of these products. Even though, there are slight variations in the reliefs sought by the petitioners, the essential relief sought by all the petitioners is for a direction to the police authorities and the food safety officers not to harass the petitioners in their daily business, dealing with tobacco products, by filing criminal cases against them or seizing their goods.

2. The authorities in the State of Andhra Pradesh, for some time, have been cracking down on the transportation, storage and sale of tobacco products in the State of Andhra Pradesh. The coercive process of the State is being applied to any person, who is found to be transporting, storing or selling tobacco products in the State of Andhra Pradesh, by applying three statutes. Cases are being filed against the persons involved in the trade, either under Sections 188, 269, 270, 272, 273 and 328 of the Indian Penal Code, or Sections 26, 30, 49(iv), 57, 58, 59 and 63 of the Food Safety and Standards Act, 2006 or Sections 5(1), 7(1)(2)(3) and (5),

Sections 22, 24(1) and 26 of the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 (for short 'the COTP Act').

3. The applicability of these provisions of law and the powers of the police authorities as well as the food safety officers under the above three Acts has been the subject matter of the litigation before various Courts of this country and some parts of this litigation has reached the Hon'ble Supreme Court of India also.

4. These issues had come up, earlier, before a learned Single Judge of this Court in Criminal Petition No.3731 of 2018 and batch, which had been disposed of by a judgment dated 27.08.2018. The learned Single Judge, after an elaborate analysis and discussion of the provisions of law and after an extensive review of the judgments rendered by various High Courts, and the Judgement of the Hon'ble Supreme Court in **Godawat Pan Masala Products I.P. Limited & Anr., v. Union of India & Ors.**,¹ had come to the following conclusions:-

- 1) Chewing Tobacco, Pan Masala and khaini cannot be treated, under the Food Safety Act, as food, and as such, the provisions of the Food Safety Act would not apply to these tobacco products.
- 2) Even assuming that the provisions of the Food Safety Act apply to tobacco and tobacco products, the provisions of the said Act can be applied and prosecutions can be launched only by the food Safety officer designated under the Food Safety Act, after he complies with the requirements of Section 42(2) and (4) of the Food Safety

¹ (2004) 7 SCC 68

Act. A police officer cannot initiate or launch any prosecution against any person for offences under the Food Safety Act.

3) Transportation of Pan Masala, Khaini, Chewing tobacco and other tobacco products would not attract Sections 188, 269, 270, 272, 273 and 328 of IPC as they are not food and as such these provisions would not apply.

4) Plain Pan Masala is not a tobacco product and the provisions of COTP Act cannot be applied to plain Pan Masala.

5. The learned Single Judge on the aforesaid findings had quashed the prosecutions, which were at variance with the above observations and findings.

6. Despite the above judgment, the authorities continued to initiate criminal cases and seize tobacco products applying the very same provisions of law. This resulted in another batch of cases being filed before this Court. Another learned Single Judge had considered these issues in Criminal Petition No.5421 of 2019 and batch, which was disposed of on 18.12.2019. The learned Single Judge followed the earlier judgment of this Court shown above. It may also be stated that the learned Single Judge while following the earlier judgment, had considered the issues raised, afresh, and essentially came to the same conclusions.

7. Despite the declaration of law by the learned Single Judge in the first round of litigation, and affirmation by another learned Single Judge in the second round of litigation, cases continue to be filed on the basis of the same provisions of law. This has resulted in the present round of litigation.

8. There have been extensive arguments on behalf of the petitioners by Sri Raja Reddy Koneti, which were adopted by all the other learned counsel. The learned Government Pleader for Medical and Health, the learned Government Pleader for Home and Sri Aditya Singla, appearing for the Food Safety authority, had also addressed extensive arguments before this Court.

9. The petitioners, essentially, reiterated the findings of this Court in the earlier two rounds of litigation. Sri Raja Reddy Koneti, while reiterating the contentions, raised before this Court in the earlier two rounds of litigation, would also raise additional grounds which require to be recorded. It is the contention of Sri Raja Reddy Koneti that the provisions of the Indian Penal Code cannot be made applicable to cases relating to transport, storage and sale of tobacco products.

10. The contentions relating to the applicability of the Indian Penal Code, the Food Safety Act and the COTP Act, to tobacco products, are as follows:

A) The Food Safety Act and the COTP Act fall in separate and distinct legislative fields. It is recorded in the preamble to the COTP Act that it came to be enacted on account of the resolutions passed in the 39th World Health Assembly and 43rd World Health Assembly meetings. The COTP Act would have to be treated as an enactment made on account of Entry 13 of the Union List, which reads as follows:

“Participation in international conferences, associations and other bodies and implementing of decisions made thereat.”

B) Section 2 of the COTP Act, records the declaration of parliament that it is expedient in the public interest that the Union should take, under its control, the tobacco industry. He submits that this would bring the enactment under Entry 52 of the Union List also. The said Entry reads as follows:-

“Industries, the control of which by the Union is declared by the Parliament by law to be expedient in the public interest.”

C) The Food Safety Act was enacted under Entry 33 of List III of the 7th Schedule to the Constitution, which reads as follows:

“33. Trade and Commerce in and the production, supply and distribution of, –

- a)
- b) Foodstuffs including edible oil seeds and oils;
- c)

D) The enactment of COTP Act as well as the Food Safety Act fall under different and distinct legislative heads and do not cover the same field of legislation. He submits that to the extent of any overlap, the provisions of the Food safety Act would have to give way to the COTP Act. He relies upon the judgment of the Hon’ble Supreme Court in **Godawat Pan Masala Products I.P. Limited & Anr., v. Union of India & Ors.**² wherein the provisions of COTP Act and the provisions of the Prevention of Food Adulteration Act, 1954 (which was the predecessor of the Food Safety Act) were considered and the Hon’ble Supreme Court had held that the COTP Act is a special Act, intended to deal with tobacco products, while the prevention of Food Adulteration Act is a general Act,

² (2004) 7 SCC 68

and therefore, the COTP Act being a special Act would override the provisions of the Prevention of Food Adulteration Act.

E) The COTP Act is a comprehensive self contained code, which does not place an absolute prohibition on the storage, transportation or sale of tobacco products. The COTP Act itself set out the commodities, which shall be treated as tobacco or tobacco products. The said products enumerated in the Schedule to the COTP Act can be regulated only under the provisions of the COTP Act and none of the other general Acts can be made applicable to tobacco products.

F) The COTP Act only places certain restrictions/guidelines for dealing with tobacco or tobacco products. Section 5 of the Act prohibits advertising, in any nature, of cigarettes and other tobacco products. Section 6 places an absolute prohibition on the sale of cigarettes or other tobacco products to persons below the age of 18 years and to everybody else in an area within a radius of 100 yards of any educational institution. Section 6 restricts trade and commerce in cigarettes and other tobacco products which do not contain specific warnings on the package of such cigarettes or tobacco products. Section 7 (5) also prohibits trade or commerce in relation to cigarettes or tobacco products where nicotine and tar contents of these tobacco products are not set out on the labels of the containers. Section 8 to 10 set out the details of the manner in which the warnings on the packages are to be given, in which such warning should be expressed, and the size of the letters and figures. Apart from these restrictions/regulations, the COTP Act does not provide for any other restriction.

G) The Indian Penal Code is the general law of offences. Section 5 of the Indian Penal Code provides that nothing in the Indian Penal Code shall affect the provisions of any special or local law. Section 41 IPC defines a special law as "a law applicable to a particular subject". The COTP Act is a law restricted to cigarettes and other tobacco products and falls within meaning of Special law under section 5 of the Indian Penal Code. As such the provisions of the Indian Penal Code cannot affect the provisions of COTP Act.

11. Sri Raja Reddy, relying upon the Judgement of the Hon'ble Supreme Court in **ITC v. Agricultural Market Committee**³, submits that Tobacco does not answer the description of 'Food' under section 3 (j) of the Food Safety Act. As such the provisions of the Food Safety Act would not apply at all. He further submits that the provisions of the Indian Penal Code would also not be applicable in view of the decisions of this Court in the cases mentioned above. As far as the COTP Act is concerned, it is the submission of Sri Raja Reddy that, the Act does not ban or place an absolute prohibition on the transportation, storage and sale of Tobacco products. It only regulates these activities by placing certain safeguards, whose violation would lead to penal consequences. He submits that these provisions are blindly and indiscriminately used to file cases against persons who are dealing with Tobacco products.

12. The learned Government Pleader for Medical and Health would submit that the foundation for the case of the petitioners is that tobacco and tobacco products do not fall within the definition of 'food' under the Food Safety Act and that the provisions of the Indian Penal

³ (2002) 9 SCC 232

Code and the Food Safety Act would not apply as a special Act, viz., COTP Act, covers the field.

13. Learned Government Pleader for Medical and Health also submits that both these foundations are non-existent . He submits that the two earlier judgments of this Court in this regard have not noticed para-67 of the judgement in the case of **Godawat Pan Masala Products I.P. Limited & Anr., v. Union of India & Ors**, which specifically rejected the contention that tobacco is not a food product. In view of this finding of the Hon'ble Supreme Court, the earlier two judgments of this Court would have to give way to the judgment of the Hon'ble Supreme Court.

14. The Learned Government Pleader would also submit that the Hon'ble Supreme Court in **Godawat Pan Masala Products I.P. Limited & Anr., v. Union of India & Ors**, while considering the applicability of the COTP Act as opposed to the Prevention of Food Adulteration Act had held that COTP Act would have precedence as it is a later Act and is a special Act as opposed to the Prevention of Food Adulteration Act, which is a general Act. However, the Food Safety Act, which replaced the Prevention of Food Adulteration Act, is a later Act and contains a non-obstante clause in Section 89, which reads as follows:

"89. Overriding effect of this Act over all other food related laws, – The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."

15. It is submitted that in view of the non-obstante clause, the provisions of the Food Safety Act would override the provisions of the

COTP Act, and consequently, both the Food Safety Act as well as the provisions of the Indian Penal Code would be applicable to transportation, storage and sale of tobacco and tobacco products. The learned Government pleader would also submit that the judgment of the High Court of Bombay in **Dhariwal Industries Ltd., and Anr., v. State of Maharashtra and Ors.**⁴ Would apply squarely to the present case and the provisions of the Food Safety Act would definitely be applicable to the activities of the petitioners.

16. The learned Government Pleader relies upon Regulation No.2.3.4 of the Food Safety Regulations 2011 to submit that there is a specific bar in this regulation prohibiting the mixing of tobacco or tobacco products into any foodstuffs, in the circumstances, the petitioners cannot claim immunity from the process under the Food Safety Act.

17. The learned Government Pleader, on facts, would submit that apart from police officers, the food safety inspectors designated under the Food Safety Act have been involved in the seizure of tobacco products after complying with the procedural requirements of the Food Safety Act made thereunder. He submits that the prosecutions launched by the food safety officers be allowed to continue.

18. Sri Aditya Singla appearing for the Food Safety Authority took this Court through the Judgments of various High Courts on the questions of whether tobacco and tobacco products can be treated as "Food" and whether the provisions of the Food Safety Act would prevail upon the provisions of the COTP Act. He further submits that in view of the directions of the Hon'ble Supreme Court in **Central Arecanut**

⁴ (2012) Law Suit (Bom.) 1219

Marketing Corporation and others Vs Union of India Transfer case

(Civil) Nos.1/2010, dated 23.09.2016, there is a binding direction to the respondent authorities to ensure that there is no sale of Gutka at all. He contends that in view of the aforesaid direction of the Hon'ble Supreme Court, the respondent authorities are bound to take action to stop sale of Gutka and any failure to do so would invite contempt proceedings.

Consideration of the Court:

19. The above submissions would give rise to the following issues that need to be determined.

- 1) Do any of the Tobacco products, enumerated in the Schedule to the COTP Act, answer, the description of Food, as defined under Section 3 (1) (j) of the Food Safety Act and consequently amenable to the jurisdiction of the said Act;
- 2) In the event, any of Tobacco Products, enumerated in the Schedule to the COTP Act, are held to fall within the meaning of Food, as defined under Section 3 (1) (j) of the Food Safety Act, is there a conflict between the COTP Act and the Food safety Act.
- 3) In the event of such conflict, which Act would prevail? To what effect?
- 4) Whether the manufacture sale and distribution of tobacco products would amount to offences to under Sections 188, 269, 270, 272, 273 and 328 of the Indian Penal Code and whether the provisions of the COTP Act would preclude these provisions from being invoked?
- 5) Do the directions of the Hon'ble Supreme Court in **Central Arecanut Marketing Corporation and others Vs Union of**

India Transfer case (Civil) Nos.1/2010, dated 23.09.2016, amount to a ratio that the Respondents are bound to prosecute all traders in Gutka ?

Issue No.1

“Do any of the Tobacco products, enumerated in the Schedule to the COTP Act, answering the description of Food, as defined under Section 3 (1) (j) of the Food Safety Act and consequently amenable to the jurisdiction of the said Act”

20. This issue had been raised before this Court and answered by two learned single judges at different points of time. The first judgement was the order dated 27.08.2018 in Criminal Petitions 3731 of 2018 and batch, in which quash petitions had been filed to quash various prosecutions launched under the provisions of the Food safety Act , the COTP Act and the Indian Penal code against persons who were dealing with Chewing tobacco, Pan Masala and Gutka. The learned single judge, after considering the judgements of various high courts, relied upon certain observations of the Hon’ble Supreme Court of India, in **Godawat Pan Masala Products I.P. Limited & Anr., v. Union of India & Ors**, and held that Chewing Tobacco and Khaini cannot be treated as food.

21. Another learned single judge of this court had an occasion to consider this issue again, in the judgement dated 18.12.2019, in Criminal Petition Nos. 5421 of 2019 and batch. In this judgement, the learned single judge, after referring to the judgements of various High Courts and the earlier judgement of the learned single judge of this court, had held that Tobacco products cannot be treated as food, under the provisions of the Food Safety Act. As the learned single judge referred to the earlier

judgement, of this Court, in Criminal Petitions 3731 of 2018 and batch, it must be taken that the judgement of the Hon'ble Supreme Court, in **Godawat Pan Masala Products I.P. Limited & Anr., v. Union of India & Ors**, was also taken into account in the later judgement.

22. I am afraid that I must express my inability to accept the said findings, for the following reasons.

23. The COTP Act was enacted for the purposes of prohibiting advertisement in and for regulating the Trade, Commerce, Production, Supply and Distribution of Cigarettes and other Tobacco products. Section 3 (b) defined Cigarettes. The term "Tobacco products" was defined, in section 3 (p) of the COTP Act as those products which are specified in the schedule to the COTP Act. The Schedule enumerates the following 10 products:

THE SCHEDULE
[See section 3(p)]

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.

24. The Prevention of Food Adulteration Act, 1954 defined food in Section 2(v) of the Act as under:

"2. (v) 'food' means any article used as food or drink for human consumption other than drugs and water and includes—

(a) any article which ordinarily enters into, or is used in the composition or preparation of, human food;

(b) any flavouring matter or condiments; and

(c) any other article which the Central Government may, having regard to its use, nature, substance or quality, declare, by notification in the Official Gazette, as food for the purposes of this Act;”

25. A Constitution bench of the Hon’ble Supreme Court in **Pyarali K. Tejani v. Mahadeo Ramchandra Dange**⁵, while considering the question whether “Supari” should be treated as Food, under the Prevention of Food Adulteration Act, 1954, had observed as follows:

14. 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 Section 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 betel nut, drew our attention to Dr Nandkarni's Indian Materia Medica, invited us to 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

⁵ (1974) 1 SCC 167 : 1974 SCC (Cri) 87 at page 175

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 men for nourishment and takes in subsidiaries. Is supari eaten with relish by men 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 Section 2(v) of the Act.

26. The Prevention of Food Adulteration Act, 1954 has now been replaced by the Food Safety Act, 2006. The term Food has been defined, under Section 3 (1) (j) of the Food Safety Act, in the following manner:

"Section 3(1)(j):- Food means any substance, whether processed, partially processed or unprocessed, which is intended for human consumption and includes primary food to the extent defined in clause (zk), genetically modified or engineered food or food containing such ingredients, infant food, packaged drinking water, alcoholic drink, chewing gum, and any substance, including water used into the food during its manufacture, preparation or treatment but does not include any animal feed, live animals unless they are prepared or processed for placing on the market for human consumption, plants, prior to harvesting, drugs and medicinal products, cosmetics, narcotic or psychotropic substances: Provided that the Central Government may declare, by notification in the Official Gazette, any other article as food for the purposes of this Act having regards to its use, nature, substance or quality."

27. A reading of this provision would show that the definition of Food has been expanded beyond the definition given under the earlier

Act. However, this definition read along with the interpretation given to the definition of Food, under the earlier Prevention of Food Adulteration Act, 1954, by the Constitution Bench of the Hon'ble Supreme Court, would bring all those substances which are eaten and ingested or consumed within the Human Body for taste and nourishment within the ambit of "Food". Applying this principle, the products enumerated at serial Number 1 to 5 and serial number 7, namely 1) Cigarettes; 2) Cigars; 3) Cheroots; 4) Beedies; 5) Cigarette tobacco, 6) Pipe tobacco and Hookah tobacco; and 7) Snuff, in the schedule, to the COTP Act, would not fall within the definition of Food, as they are not eaten or ingested as such into the human body. The dispute and controversy is whether the products enumerated at serial Number 6) Chewing tobacco, 8) Pan Masala or any chewing material having tobacco as one of its ingredients (by whatever name called), 9) Gutka and 10) Tooth Powder containing tobacco would fall within the ambit of Food.

28. In **Godawat Pan Masala Products I.P. Limited & Anr., v. Union of India & Ors**, the Hon'ble Supreme Court was considering the validity of notifications issued by the Food (Health) Authority under section 7 (iv) of the Prevention of Food Adulteration Act, 1954 by which the manufacture, sale, storage and distribution of Pan Masala and Gutka (Pan Masala containing tobacco) were banned for different periods. One of the main grounds raised in the case was that:

"The COTP Act occupies the whole field with regard to the prohibition of advertisement and regulation of Trade, Commerce, Production, Supply and Distribution of Tobacco products. Thus there is a conflict between the Prevention of Food Adulteration Act and the COTP Act, wherein the COTP Act has to prevail."

29. In the course of considering the challenge to the impugned notifications. The Hon'ble Supreme Court went into the question of whether Pan Masala and Gutka would amount to Food. This issue was considered, in paragraphs 64 to 67 of the said judgement, in the following manner:

Is it food?

64. Mr Nagaraja, learned counsel appearing for the petitioners in Writ Petition No. 173 of 2003, raised a further contention that pan masala or *gutka* which is the subject-matter of the impugned notification does not amount to food within the meaning of its definition in Section 2(v) of the Act. Section 2(v) of the Act reads as under:

"2. (v) 'food' means any article used as food or drink for human consumption other than drugs and water and includes—

(a) any article which ordinarily enters into, or is used in the composition or preparation of, human food;

(b) any flavouring matter or condiments; and

(c) any other article which the Central Government may, having regard to its use, nature, substance or quality, declare, by notification in the Official Gazette, as food for the purposes of this Act;"

65. In his submission, the expression "food" as defined in the *Lexicon* could only be "a substance taken into the body to maintain life and growth". No one in his right mind would consider that pan masala or *gutka* would be consumed for maintenance and development of health of human being. In *Pyarali K. Tejani v. Mahadeo Ramchandra Dange* [(1974) 1 SCC 167 : 1974 SCC (Cri) 87 : AIR 1974 SC 228, a case arising under the Prevention of Food Adulteration Act,

1954.] this Court held that the word “food” is a very general term and applies to all that is eaten by men for nourishment and takes in also subsidiaries. Since pan masala, *gutka* or *supari* are eaten for taste and nourishment, they are all food within the meaning of Section 2(v) of the Act.

66. The learned counsel relied on a judgment of a Division Bench of this Court in CAs Nos. 12746-47 of 1996 (decided on 6-11-2003) [*S. Samuel, M.D., Harrisons Malayalam v. Union of India*, (2004) 1 SCC 256] . In our view, this judgment is of no aid to us. In the first place, this judgment arises under the provisions of the Essential Commodities Act, 1955 read with the Tamil Nadu Scheduled Articles (Prescription of Standards) Order, 1977 and the notification dated 9-6-1978 issued by the Central Government which laid down certain specifications “in relation to foodstuffs”. The question that arose before the Court was whether tea is “foodstuff” within the meaning of the said legislation. The Division Bench of this Court came to the conclusion that “tea” is not food as it is not understood as “food” or “foodstuff” either in common parlance or by the opinion of lexicographers. We are unable to derive much help from this judgment for the reason that we are not concerned with tea. It is not possible to extrapolate the reasoning of this judgment pertaining to tea into the realm of pan masala and *gutka*. In any event, the judgment in *Tejani* [(1974) 1 SCC 167 : 1974 SCC (Cri) 87 : AIR 1974 SC 228, a case arising under the Prevention of Food Adulteration Act, 1954.] was a judgment of the Constitutional Bench which does not seem to have been noticed.

67. We are, therefore, unable to agree with the contention that pan masala or *gutka* does not amount to “food” within the meaning of the definition in

Section 2(v) of the Act. However, we do not rest our decision solely on this issue.”

30. The Petitioners contend that the definition of Food interpreted by the Hon’ble Supreme Court in both the above judgements is on the basis of the definition in the Prevention of Food Adulteration Act, 1954 and the same cannot be extended to the definition of Food under the Food Safety Act, 2006. I am afraid that this Court cannot accede to this contention. A comparison of the definition of Food under these two Acts would make it obvious that the definition of Food under the Food Safety Act is more expansive and would definitely bring within its fold the definition of food under the prevention of food Adulteration Act, 1954 and consequently, the interpretation of the definition of food under the 1954 Act would, at the very least, apply to the definition of food under the Food Safety Act, 2006.

31. Another ground raised by the Petitioners is that a Constitution Bench of the Hon’ble Supreme Court in **ITC v. Agricultural Market Committee**, had held that Tobacco was not food and as such the judgment of the Hon’ble Supreme Court in **Godawat Pan Masala Products I.P. Limited & Anr., v. Union of India & Ors.**, has to give way to the judgement in **ITC Ltd. v. Agricultural Produce Market Committee (at page 267)**

32. The issue before the Hon’ble Supreme Court in this case was the validity of the Bihar and Karnataka agricultural market committees Act, insofar as they regulate the sale of Tobacco in their areas and their levy of market fees on such sales even after the enactment of a central Act, namely the Tobacco Board Act, 1975. The Constitution Bench while

considering the question whether the central legislature, under Entry 52 of the first list of the seventh Schedule, could regulate activities relating to Raw tobacco, had held that this entry would be available only when it relates to an Industry and not for regulating the raw material required for such an industry. In the course of such discussion, the Constitution Bench had held as follows:

63. The subject-matter of the issue here is about the interpretation of Entry 52 in List I of the Seventh Schedule. It requires Parliament to make a declaration by law identifying an industry, the control of which by the Union is expedient in the public interest. Under the said entry only an "industry" can be declared as an industry, the control whereof by the Union is regarded as expedient in public interest. It is, therefore, implicit that if an activity cannot be regarded as industry, Entry 52 will have no applicability to that activity. The question is about the concept of "industry" in Entry 52 of List I. As already stated, the entries in the legislative list have to be construed in the widest sense cannot be disputed but it has also to be borne in mind that such construction should not make other entries totally redundant. The meaning of the word "industry" in various dictionaries, reliance on which was placed by Mr Shanti Bhushan, is not of any assistance while considering the constitutional meaning of the said term. There may not be any embargo or limitation on the power of Parliament to enact the law in respect of activities other than manufacturing activities but that power is non-existent in Entry 52 of List I. It may be elsewhere. Reference in this regard can be made to Entry 33 of List III including in its ambit foodstuff and certain raw materials. Tobacco, however, is admittedly not a foodstuff.

33. As can be seen, the reference to Tobacco was a reference to raw tobacco and not tobacco products, which is the subject matter of the present Lis.

34. In view of the above judgements of the Hon'ble supreme Court in **Pyarali K. Tejani v. Mahadeo Ramchandra Dange** and **Godawat Pan Masala Products I.P. Limited & Anr., v. Union of India & Ors.** The tobacco products, viz., Chewing Tobacco, Pan Masala or any chewing material having tobacco as one of its ingredients (by whatever name called), Gutka and Tooth Powder containing tobacco would have to be construed as food.

35. However, the earlier decisions of this Court on the basis of **Godawat Pan Masala Products I.P. Limited & Anr., v. Union of India & Ors.,** have been to the effect that, the above tobacco products are not Food. There are now two contradictory views being expressed by this court, on the basis of the very same judgements. In such circumstances, the following observations of the Hon'ble Supreme Court, in **U.P. Power Corporation. Ltd. v. Rajesh Kumar**⁶, are apt:

16. We have reproduced the paragraphs from both the decisions in extenso to highlight that the Allahabad Bench was apprised about the number of matters at Lucknow filed earlier in point of time which were part-heard and the hearing was in continuum. It would have been advisable to wait for the verdict at Lucknow Bench or to bring it to the notice of the learned Chief Justice about the similar matters being instituted at both the places. The judicial courtesy and decorum warranted such discipline which was expected from the learned

⁶ (2012) 7 SCC 1 : (2012) 2 SCC (L&S) 289 : 2012 SCC OnLine SC 385

Judges but for unfathomable reasons, neither of the courses, were taken recourse to.

17. Similarly, the Division Bench at Lucknow erroneously treated the verdict of the Allahabad Bench not to be a binding precedent on the foundation that the principles laid down by the Constitution Bench in *M. Nagaraj* [(2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013 : AIR 2007 SC 71] are not being appositely appreciated and correctly applied by the Bench when there was reference to the said decision and a number of passages were quoted and appreciated albeit incorrectly, the same could not have been a ground to treat the decision as per incuriam or not a binding precedent. Judicial discipline commands in such a situation when there is disagreement, to refer the matter to a larger Bench. Instead of doing that, the Division Bench at Lucknow took the burden on themselves to decide the case.

36. In the circumstances, the issue as to whether Chewing Tobacco, Pan Masala or any chewing material having tobacco as one of its ingredients (by whatever name called), Gutka and Tooth Powder containing tobacco would have to be construed as food or not is referred for the consideration of a Division Bench of this Court.

37. Registry to place all these matters before the Hon'ble Chief Justice for appropriate directions.

R. RAGHUNANDAN RAO, J.

21st September, 2021.
Js.

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