**W.P.(C) Nos. 12352, 12932 , 13271 & 13773 of 2012**

**Dated this the 2nd day of August, 2012**

**ORDER**

These writ petitions are filed challenging an order dated 22.5.2012 issued by the Commissioner of Food Safety, invoking Section 30 of the Food Safety and Standards Act, 2006. The matter has been heard in detail with regard to the prayer for grant of interim order, made in various writ petitions.

2. Before going into the further details, it is necessary to recapitulate certain intervening developments. In fact, the writ petitions were heard on 14.6.2012 on the interim prayers sought and were referred to a Division Bench as per the reference order dated 14.6.2012. On that day, when the matter was taken up for hearing, attention was brought to the notice of this Court about the judgment by a Division Bench of this Court in W.P.(C) No.13630/2012 in a public interest litigation, wherein certain directions have been issued with regard to the implementation of the impugned orders in these writ petitions. In the light of the above, the matter was adjourned to be heard by a Division Bench. Accordingly, it was heard by another

Division Bench, headed by the Hon'ble the Acting Chief Justice.

3. The Division Bench, by order dated 19.6.2012, directed the matters to be placed before this Court in the light of the contention raised by the writ petitioners herein that the judgment in W.P.(C) No.13630/2012 was obtained by a public interest litigant without mentioning the pendency of these writ petitions. Therefore, the Division Bench was of the view that if the petitioners could establish that fraud was played on the Court in obtaining a particular order, it is open to this Court to proceed with the matters. Accordingly, the writ petitions were reposted for hearing.

4. In the meanwhile, the State had filed R.P.No.596/2012 in W.P.(C) No.13630/2012 which was disposed of by the Division Bench by order dated 2.7.2012 clarifying various aspects. It was clarified that no fraud was committed in obtaining the judgment in W.P.(C) No.13630/2012, as the pendency of the writ petitions and the fact that no interim order of stay was granted, were brought to the notice of the said Bench. Therefore, the Bench was of the view that since the matter was pending before this Court, the Division Bench has not gone into the validity or otherwise of the order under challenge and the direction was to enforce the order only because the Single Judge did not grant stay. It was also clarified as follows:

"In other words, our judgment will stand as long as Single Judge

> does not stay or vacate the impugned order issued by the Government. In our view, no fraud or misrepresentation was committed in this court in the writ petition which was disposed of by us."

Therefore, in the light of the above order passed by the Division Bench in R.P.No.596/2012, it is not necessary for this Court now to consider the plea regarding fraud in obtaining the judgment in W.P.(C) No.13630/2012.

5. Learned Senior Counsel appearing for the petitioners therefore argued on the various aspects in support of their plea for grant of an interim order, which was strongly opposed by the respondents.

6. The petitioners in W.P.(C) No.12352/2012 are respectively, an Association of Tobacco Dealers and a member of it as well as Secretary of the said Association. According to them, they are members of the Association and traders in tobacco products such as cigarettes, chewing tobacco, gutka, beedis, panmasala, etc. Articles like chewing tobacco and gutka, have other brand names like Hans, Madhu khaini, Pan parag, Bombay, etc.

7. The petitioner in W.P.(C) No.12932/2012 is a public limited company having its registered office in Delhi and branch at Aluva, in the address mentioned in the cause title of the writ petition. The said petitioner is engaged in the manufacturing and trading of various food items like

salts, spices, soda water, dry fruits, mouth freshener, mineral water, panmasala without containing tobacco or nicotine as an ingredient.

8. In W.P.(C) No.13271/2012, the petitioner is a Company incorporated under the Companies Act and having registered office at Kolhapur in Maharashtra and it is engaged in the business of manufacture, supply and distribution of panmasala and panmasala containing tobacco known as gutka, for a number of years.

9. The petitioner in W.P.(C) No.13773/2012, viz. the Central Arecanut & Cocoa Marketing and Processing Co-operative Ltd. (CAMPCO Ltd.), Bangalore is one registered under the Multi State Co-operative Societies Act. They are procuring arecanut, cocoa and rubber from its members and arrange for sale of the same. Their main grievance is that the order passed by the Food Safety Commissioner has adversely affected the sale of arecanut and the livelihood of arecanut growers particularly in the States of Kerala and Karnataka.

10. The impugned notification is produced as Ext.P2 in W.P.(C) No.13271/2012, as per which the Food Safety Commissioner, Kerala, in pursuance of Regulation 2.3.4 of the Food Safety and Standards (Prohibition and Restrictions on Sales) Regulations, 2011 prohibited the manufacture, the storage, the sale or the distribution of gutka and

panmasala containing tobacco or nicotine as ingredients, by whatsoever name it is available in the market, in the State of Kerala, in the interest of public health. Thereafter, another circular was issued on 29.5.2012 which is produced as Ext.P2 in W.P.(C) No.12932/2012, containing various directions for implementation of the notification.

11. Heard learned Senior Counsel Shri M.K.Damodaran and Shri Santhosh Mathew, appearing for the petitioner in W.P.(C) No.13271/2012, Shri P.Vijaya Bhanu, learned Senior Counsel and Shri C.S.Manu, learned counsel appearing for the petitioners in W.P.(C) No.12352/2012, Shri. Deepak Dhingra, learned Senior Counsel and Shri Anil D. Nair appearing for the petitioner in W.P.(C) No.12932/2012 and Shri K.Ramakumar, learned Senior Counsel and Shri S.M.Prasanth, appearing for the petitioner in W.P.(C) No.13773/2012. The learned Advocate General Shri K.P.Dandapani, the learned Government Pleader Shri Tom K.Thomas, learned counsel Shri Shaji P.Chaly appeared for respondents and Shri Basil Attipetty appeared as party in person.

12. First I will refer to the pleas raised by the petitioners in W.P.(C) Nos.13271/2012 and 12352/2012 in which the petitioners are dealing with manufacture and distribution of panmasala and gutka. Learned Senior Counsel Shri M.K. Damodaran, appearing for the petitioner in W.P.(C) No.13271/2012, mainly raised the following arguments:- It is contended

that as far as tobacco products are concerned, the Central Act, viz. The Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution Act, 2003 (for short 'COTPA Act') is holding the field. It is submitted that going by Section 2 therein, the Union of India is having control over the tobacco industry. Section 3(b) will show that "tobacco products" are products specified in the schedule and in the schedule item 8 is panmasala or any chewing material having tobacco as one of its ingredients (by whatever name called) and item 9 is 'gutka'. It is submitted that going by the provisions of the Act, it can be seen that it is a special law as far as tobacco products are concerned. Section 30 of the Act confers power on the Central Government to add other tobacco products in the schedule. Therefore, it is contended that the said Act is a complete law in itself as far as tobacco products and the State Government and its authorities have no role in the matter.

13. It is submitted that the Apex Court in the judgment in **Godawat Pan Masala Products India Pvt. Ltd. and another v. Union of India & others** {(2004) 7 SCC 68} has considered in detail the validity of similar notifications. It was held, after elaborate consideration of the provisions of COTPA Act and the Prevention of Food Adulteration Act, 1954 (P.F.A.

Act for short) that the notification issued by the respective State Governments and the authorities under the Food Adulteration Act cannot survive. Therefore, the power, if any, with respect to banning of an item can only be exercised by the Central Government. Learned Senior Counsel submitted that the power under Section 30 of the Food Safety and Standards Act, 2006 is one enabling the Food Safety Commissioner to issue notification for a period not exceeding one year, but herein the notification permanently prohibits the business in the items concerned and therefore the same cannot be supported. Learned Senior Counsel further submitted that as far as COTPA Act, 2003 is concerned, it is a special law as far as tobacco products are concerned whereas the later enactment, viz. the Food Safety and Standards Act, 2006 is a general enactment and he relied upon the principles stated by the Apex Court in **Board of Revenue of Rajasthan, Ajmer v. Rao Baldev Singh** (AIR 1968 SC 898), **Ashoka Marketing v. P.N.B.** {(1990) 4 SCC 406}, **State of Kerala v. M.M. Mathew** {(1978) 4 SCC 16, **A.B. Krishna v. State of Karnataka and others** {(1998) 3 SCC 495 and to contend for the position that the special enactment will prevail over the provisions of the general enactment. By inviting my attention to the Food Safety and Standards Act, it is submitted that even though Section 94 provides for power on the State Government

to frame rules, no such rules have been framed. It is submitted that the second schedule of the enactment will give the list of enactments which have been repealed under Section 97 of the Act and the COTPA Act is not one specifically repealed by the Food Safety and Standards Act, 2006. Therefore also, it is submitted that the provisions of COTPA Act will govern the matter.

14. The petitioner's contention, going by the pleadings in the writ petition also, show that the amendment of the Prevention of Food Adulteration Rules, 2006 introducing Rule 44J which is on similar terms, is under challenge before various High Courts and interim orders have been passed in those writ petitions also. It is submitted that the power exercised under Section 30 is arbitrary and illegal and without notice to the parties concerned. None of them have verified the impact of the judgment in **Godawat Pan Masala Products' case** (supra). It is therefore submitted that the rights of the petitioner under Article 19(1)(g) of the Constitution of India, have been affected by the notification issued. Apart from the same, it is also pointed out that the State Government and its authorities do not have the power to ban products on a permanent basis and the Parliament alone can legislate on those matters. Finally, it is pointed out that by way of a notification itself, the said power cannot be exercised as it

is a legislative power as stated by the Apex Court in **Godawat Pan Masala Products' case (supra)** itself.

15. Learned Senior Counsel Shri P. Vijaya Bhanu, appearing for the petitioners in W.P.(C)( No.12352/2012 supported the above arguments and further pointed out that the total ban on any tobacco products and panmasala containing tobacco or gutka cannot be a matter for the Food Safety Commissioner to direct as he is only a delegate under the enactment. It is submitted that such a power cannot be exercised by the issuance of a notification like the one herein. My attention was invited to the detailed provisions of the respective enactments. One of the contentions raised by the petitioners in W.P.(C) No.12352/2012 is that going by Article 253, the Parliament has the exclusive power to legislate on tobacco. It is stated that the COTPA Act itself was passed based on various resolutions taken in an international conference. It is a special law on the subject.

16. The pleas of the petitioner in W.P.(C) No.12932/2012 are slightly different. The petitioner points out that certain items like Pass Pass, Rajnigandha, Rajnigandha Meetha Mazaa, which are the products of the petitioner, are not covered by the notification. The petitioner is having the requisite licence for the manufacture and distribution of these items. It

is submitted that the petitioner is strictly conforming to the standards prescribed for those items. Learned Senior Counsel Shri. Deepak Dhingra submitted that in the notification, panmasala and gutka have been grouped together which is ill conceivable. Actually, gutka is panmasala containing tobacco. It is submitted that COTPA Act being a special enactment for the production, supply and distribution of tobacco products, the same alone will govern the field. The notification specifying that "gutka and panmasala by whatsoever name available in the market is under prohibition" is therefore unreasonable and without any justification. It is submitted that the petitioner has conformed to the labelling declaration and other regulations. But in the light of the notification they are unable to sell it in the market because of the interference by the officials concerned based on the notification. Therefore, the petitioner is seeking for a direction to the officers not to disturb or impose any restrictions on the business conducted by the petitioner including manufacturing, storing, distribution, sale and marketing.

17. As far as the contention of the petitioner in W.P.(C) No.13773/2012, highlighted by the learned Senior Counsel Shri K. Ramakumar is concerned, therein the petitioner is a Multi State co-operative society. It is pointed out that issuance of ban order on

panmasala and tobacco has resulted in reducing the price of raw materials like arecaut and in turn it has affected their business.

18. Learned Advocate General Shri K.P. Dandapani raised prelimiary objections with regard to the maintainability of the writ petition Nos.12932/2012 and 13271/2012. It is submitted that the petitioners therein are not aggrieved by the impugned notifications. As far as the petitioners in these writ petitions are concerned, they are stationed in other parts of the country and they have not obtained any licences under the relevant provisions of the Food Safety and Standards Act for manufacturing or for distributing any articles in the State which are mandatory. While referring to the avements in both these writ petitions, it is submitted that the averments of the petitioners are insufficient to bring out a cause of action for them to file the writ petitions challenging the impugned notifications issued in this State. It is submitted that even the documents produced along with the writ petitions will show that the petitioner in W.P.(C) No.12932/2012 has obtained Ext.P3 from the concerned authority under the Act in Assam. With regard to W.P.(C) No.13271/2012 is also concerned, it is pointed out that the situation is similar.

19. On the merits of the contentions of the petitioners, it is explained that the Food Safety and Standards Act, 2006 is a special enactment

concerned with food safety. It is submitted that the Act was promulgated to consolidate the laws relating to food and to establish the Food Safety and Standards Authority of India, which will fix standards for food and regulate/monitor the manufacturing, import, processing, distribution and sale of food, so as to ensure availability of safe and wholesome food for human consumption. It is therefore submitted that a comprehensive enactment has been brought in, covering various aspects concerning food, the requirements for conducting food business, the obligations of manufacturers and food business operators and other things. It is stated that the standards have been prescribed in terms of the regulations framed under the express provisions of the Act. Particular mention was made about Section 16 providing for the duties and functions of the food authority, the provisions of Chapter III, IV and VI of the Act and the power to make regulations under Section 92. It is submitted that the notification is not without jurisdiction as contended by the petitioners herein, as the Food Safety Commissioner is well empowered to act to implement the provisions of the Act. As far as the regulations framed are concerned, it is pointed out that the relevant regulation, viz. para 2.11.5 of the Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011 prescribes the standard for panmasala. It is expressly made clear in

para 2.3.4 of the Food Safety and Standards (Prohibition and Restriction on Sale) Regulation 2011 that tobacco and nicotine shall not be used as an ingredient in any food products. It is therefore submitted that going by Section 26, it is the responsibility of the food business operators also to conform to the provisions of the Act and Regulations. The provisions of Food Safety and Standards Act and the Prevention of Food Adulteration Act have nothing in comparison and it is pointed out that all the articles except those exempted, will come within the purview of Food Safety and Standards Act. Therefore, the reliance placed on the decision of the Apex Court in **Godawat Pan Masala Products' case (supra),** cannot come to the aid of the petitioners. The salient findings in the said judgment would show that the decision turned upon the absence of power for the State Government and it was also found, going by the material provisions of the P.F.A. Act, 1954 that the notifications issued cannot survive. But herein, the system is totally different. In the Food Safety and Standards Act, there are various newly introduced provisions which were not available under the Prevention of Food Adulteration Act. Under the Food Safety and Standards Act, the authorities are fully empowered to impose the prohibition and the legislative policy is clear from the various provisions of the Act and the concerned regulations.

20. As regards the arguments raised by some of the petitioners that the impugned notification is in violation of the principles of natural justice, my attention was invited to the procedures adopted for framing regulations which will show that the authorities had given opportunities to all by inviting objections and suggestions from all persons likely to be affected, when draft regulations were published in the Gazette of India and only after considering the objections and suggestions from the stakeholders, the draft regulations were finalised by the Food Safety and Standards Authority of India. It is therefore submitted that the said argument cannot be accepted.

21. The details of the licencing regulations were also relied upon by the learned Advocate General while contending that the petitioners in the two writ petitions, viz. W.P.(C) Nos.12932/2012 and 13271/2012 are not entitled for any reliefs. With regard to the plea raised by the petitioner in W.P.(C) No.12932/2012, it is also submitted by the learned Advocate General that no blanket permission can be granted by this Court to the petitioner, so as to distribute the products mentioned therein. The competence of the petitioner to do business in Kerala itself is in doubt. Even though the petitioner contends that the products are different from those banned under the notification, these are matters which have to be examined by the authorities concerned. At this stage, the petitioner cannot

seek for permission to bring these products into Kerala. Therefore, the learned Advocate General opposed the plea for grant of interim prayer by the petitioner therein also. It is pointed out that if at all any objection is raised by any officers or if any items are seized, it is upto them to clarify before them or to challenge the same in appropriate proceedings.

22. Shri Shaji P. Chaly, learned counsel appearing for the additional fourth respondent in W.P.(C) No.12932/2012 and additional 6th respondent in W.P.(C) No.13271/2012, explained in detail the provisions of the Act 34 of 2006. My attention was invited to the various clauses in Section 3 containing definitions and it is pointed out that none of the provisions of the Act are under challenge in these writ petitions. It is submitted that the definition of the terms "adulterant" in Section 3(a), "contaminant" in Section 3(g), "food additive" under Section 3(k), "misbranded food" under Section 3(zf), "risk analysis" under Section 3(zn) and "unsafe food" under Section 3(zz) and sub-clause (v) therein are quite important while anaylsing the provisions of the Act. It is submitted that the scheme of the Act will show that certain ingredients are not permitted in food items and what all are permitted are provided under the standards fixed. Therefore, when an 'unsafe food' as defined therein is marketed, the authorities under the Act are empowered to take appropriate action, in the

light of the various provisions of the Act. It is pointed out that Section 16 (2) confers specific power on the Food Authority to make regulations and sub-section (5) of Section 16 is also important. It is pointed out that the general principles of food safety provided under Chapter III are also important in this context, as those are guiding parameters provided in the Act itself to the Central and State Governments Food Authority and other agencies. Therefore, it amounts to a policy prescribed under the enactment itself. It is submitted that Section 26 is an important provision which provides for responsibilities of food business operators, who will have to ensure that the articles of food satisfy the requirements of the Act at all stages. It is submitted that some of the products of the petitioners are under the cover of banned items and going by Sections 26 and 27, responsibilities are placed on the food business operators, manufacturers, packers, wholesalers, distributors and sellers alike, which cannot be disowned by them. It is pointed out that a reading of Section 30 will show that the prescription of one year period under sub-section 2(a) is in a matter concerning food item and not on an unsafe food item. Therefore, it is pointed out that no separate provision is required for the authority to issue a notification as far as a banned item is concerned. It is also pointed out that the provisions of the Act amounts to conditional legislation and

there cannot be any comparison of them with those of the P.F.A. Act, 1954. With the avowed object to protect public health, these provisions have been incorporated. It is submitted that going by the provisions of Sections 23 and 24 of the Prevention of Food Adulteration Act, there were only limited powers for the State Government and the principles stated in **Godawat Pan Masala Products' case (supra)** were in that context alone. Various paragraphs of the said judgment were also relied upon in this context. Learned counsel also relied upon the decisions of the Apex Court in **Laxmikant v. Union of India and others** {(1997) 4 SCC 739}, **State of T.N. represented by Secretary, Housing Deptt, Madras v. K. Sabanayagam and another** {(1998) 1 SCC 318} and **Bajaj Hindustan Limitd v.Sir Shadi Lal Enterprises Limited and another** {(2011) 1 SCC 640} and other decisions to elaborate the points argued. While explaining the provisions of COTPA Act, it is stated that the said Act was promulgated only in the context of providing regulations for advertisement and like other factors.

23. My attention was invited to the elaborate procedure contained under the Food Safety and Standards (Packing and Labelling) Regulations, 2011 which requires the manufacturers to provide the informations in terms of the provisions of the said Regulations. It is pointed out that para

2.6 alone contains the provision for exemption. The provisions of Standards of Weights and Measures Act, 1976 were also relied upon by the learned counsel. It is also pointed out that Article 162 of the Constitution empowers the Government to act in cases like these. Herein, the ban is only to protect the public health and other like factors, as it was found out that the unrestricted use of panmasala and gutka containing the prohibited materials, are tempting the younger elements of the society to use the same and evidently it will affect the general health of the entire public.

24. Heard Shri Basil Attipetty who appeared in person and argued the matter as additional respondent No.5 in W.P.(C) No.13271/2012. According to him, the prohibition herein as per the notification is for public good and to put an end to the menace of spreading of diseases like cancer which are the results of the use of tobacco and other products. It is submitted that the measure is fully justified in the light of Article 47 of the Constitution of India. The word 'prohibition' therein is quite important. Even under the provisions of COTPA Act, it can be seen that prohibitory measures have been imposed therein also. It is submitted that Section 89 of the Food Safety and Standards Act will override the other enactments and therefore the petitioners cannot rely upon the provisions of COTPA Act. It is submitted that the petitioners have no fundamental right to do business in

tobacco products. It is also submitted that identical notifications have been upheld by the Madhya Pradesh as well as Patna High Courts and those decisions were placed for consideration. My attention was invited to **Sunny Markose v. State of Kerala** (1996 (1) KLT 799), wherein this Court upheld the notification relating to ban on arrack. Shri Basil also relied upon the decisions of the Apex Court in **Tata Engineering and Locomotive Co. Ltd. v. The State of Bihar and others** (AIR 1965 SC 40), **Khoday Distilleries Ltd. and others v. State of Karnataka** {(1995) 1 SCC 574}, **Zee Telefilms Ltd. and another v. Union of India and others** {(2005) 4 SCC 649} and **Commissioner of Income tax v. Udaipur, Rajasthan v. MC Dowell and Company Ltd.** {(2009) 10 SCC 755}, the decisions of this Court in **Asokan v. State of Kerala** (1998 (1) KLT 330), **Secy., Cannanore Dist. Muslim Educational Association v. State of Kerala** (2008 (1) KHC 245), that of Bombay High Court in **Ghodawant Industries (India) P. Ltd. v. the Union of India and others** (W.P. No.341/2008) and that of the Patna High Court in **Lal Babu Yadav v. The State of Bihar** (Civil Writ Jurisdiction Case No.10297/2012) in support of his pleas. It is submitted that none of the petitioners are affected by the notification. Shri Basil also submitted that the principle is well

settled that an earlier Act should give place to a later one, if the two cannot be reconciled and my attention was invited to page 348 of the Interpretation of Statutes and Written Instruments by Herbert Broom.

25. Learned Senior Counsel Shri Deepak Dhingra, appearing for the petitioner in W.P.(C) No.12932/2012 submitted that the licencing provisions will show that the relevant provision itself has allowed a period of one year to apply and get licence for those licenced under the earlier enactment. The said regulation came into force only on 5.8.2011. It is submitted that the contention therefore that the petitioner has no locus standi, cannot be sustained. Certain documents were placed for perusal in support of the above plea also. Learned Senior Counsel emphasised the fact that labelling rules have not been violated by the petitioner.

26. Shri Santhosh Mathew, learned counsel appearing for the petitioner in W.P.(C) No.13271/2012 submitted, in reply to the arguments of the respondents, submitted that clause 2.3.4 was never intended to apply for a tobacco product. As far as gutka is concerned, standards are not prescribed under the Act and Regulations. It is submitted that introduction of Rule 44-J which is similar terms itself is under challenge in various writ petitions and interim orders have been passed also. It is also submitted that Section 89 may not apply in a situation like this.

27. Shri C.S. Manu, learned counsel appearing for the petitioner in W.P.(C) No.12352/2012 submitted that COTPA Act has not been repealed and he also placed reliance upon Article 253 of the Constitution. Para 2.3.4 of the regulations under the Food Safety and Standards Act will not apply to the products under the schedule to the COTPA Act.

28. Arguments have been made by both sides elaborately on various aspects. Now I shall discuss the essential points, so as to consider the plea for grant of interim prayers in these cases.

29. Mainly, the question will be whether the points raised in these writ petitions are covered in the light of the decision of the Apex Court relied upon by the petitioners, in **Godawat Pan Masala Products' case** (supra). The next important question will be whether the COTPA Act as interpreted by the Apex Court therein, will have precedence over the provisions of the Food Safety and Standards Act, 2006. The incidental question will be whether the COTPA Act is a special law and the Food Safety and Standards Act is a general law and vice-versa also.

30. As far as **Godawat Panmasala Products' case** (supra) is concerned, para 3 of the judgment itself indicates the questions considered. It was regarding the validity of the notifications issued by the Food (Health) Authority under Section 7(iv) of the Prevention of Food

Adulteration Act, 1954. Therein also, the manufacture, sale, storage and distribution of pan masala and gutka were banned for different periods. The details of the notifications are clear from paragraphs 4 to 8 which will show that the authorities in the respective States had issued the notifications. The appellants therein have been engaged in the manufacture and sale of panmasala and gutka (pan masala containing tobacco) and other allied products. Therefore, mainly the power of the Food (Health) Authority under Section 7(iv) to issue an order of prohibition was considered, as evident from paragraphs 3 and 12.

31. The arguments were centered on the power of the Central Government under Section 23 of the Prevention of Food Adulteration Act ('P.F.A. Act ' for short), the limits of power available to the State Government under Section 24 of the Act and the impact of COTPA Act. The Apex Court has elaborately considered the provisions of P.F.A. Act and the relevant rules framed by the various States. It was held in para 24 that the State rules suggest that the power given to the Food (Health) Authority is only a *pro tem* power to deal with an emergent situation, such as outbreak of any infectious disease, which may be due to any article of food and correspondingly Section 7(iv) provides that "no person shall manufacture for sale, or store, sell or distribute any article of food the sale

of which is for the time being prohibited by the Food (Health) Authority in the interest of public health." Accordingly, it was held in para 25 that Section 7(iv) does not give any independent source of power. In para 27, with respect to the said power, again it was reiterated that the power of the State authority which is discernible under Section 24(2)(a) read with the State Rules, operates only for a temporary period during which an emergent situation exists which needs to be controlled. With regard to the power to prohibit the articles concerned, it was held in para 28 that the power is only vested with the Central Government and not with the State Food (Health) Authorities. With regard to the provisions of COTPA Act, it was explained in para 37 that the prohibition was only conditional against sale to persons under 18 years of age.

32. The summary of the findings are contained in para 77 which is extracted below:

> "1. Section 7(iv) of the Act is not an independent source of power for the State Authority;
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> 2. The source of power of the State Food (Health) Authority is located only in the valid rules made in exercise of the power under S. 24 of the Act by the State Government to the extent permitted thereunder;
>
> 3. The power of the Food (Health) Authority under the rules is only of transitory nature and intended to deal with local

emergencies and can last only for short period while such emergency lasts;

4. The power of banning an article of food or an article used as ingredient of food, on the ground that it is injurious to health, belongs appropriately to the Central Government to be exercised in accordance with the Rules made under S. 23 of the Act, particularly, sub-section (1A)(f);

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 S. 23 of the Act;

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 S. 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 S. 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;

7. The impugned Notifications are ultra vires the Act and, hence,

bad in law;

8. The impugned Notifications are unconstitutional and void as abridging the fundamental rights of the appellants guaranteed under Arts. 14 and 19 of the Constitution."

33. Learned Senior Counsel and other learned counsel appearing for the petitioners therefore, as already noticed, argued that the provisions of the Food Safety and Standards Act, 2006 which replaced the Prevention of Food Adulteration Act, should also be given such an interpretation and if so, the provisions of COTPA Act which is a special enactment, will override the provisions of the Prevention of Food Adulteration Act.

34. One thing to be noticed as far as the **Godawat Panmasala Products' case** (supra) is that COTPA Act is later in point of time which is an enactment of 2003, whereas the P.F.A. Act is of the year 1954. Therefore, the provisions of Food Safety and Standards Act, 2006 which is the later Act in force, will have to be gone into find out the objects and reasons for the enactment, the aspects covered by the said enactment, the import of the same and other facts to analyse the question whether the same is a special enactment or a general one.

35. The preamble of the Act has already been noticed. Some of the important provisions have also been noticed already. The emphasis appears to be not to permit any substance to be used as an ingredient in a

food item which is not permitted by the provisions of the Act and the relevant regulations. This is clear from the definition of 'unsafe food' under Section 3(1)(zz) and particularly sub clause (v) therein. A combined reading of Section 3(1)(zz) and the sub clause (v) will show that an addition of a substance directly or as an ingredient which is not permitted, will make the item 'unsafe food' so as to render injurious to health. It will affect its nature, substance or quality by such addition. Chapter II deals with Food Safety and Standards Authority of India and various details regarding the composition and appointment of Chairman and other members and the functions of the same, its officers and the respective committees and allied matters. Section 16 defines duties and functions of Food Authority and sub-section (2)(a) confers power on the Food Authority to specify by regulations, standards and guidelines in relation to articles of food and to specify an appropriate system for enforcing the various standards notified under the Act. The general principles of Food Safety are continued in Chapter III. Sections 19 to 24 contained in Chapter IV include various prohibition clauses. Section 19 prohibits use of food additive or processing aid which are not in accordance with the provisions of the Act and regulations framed; Section 20 prohibits use of any contaminants, naturally occurring toxic substances or toxins or hormone or

heavy metals, etc. in excess of such quantities as may be specified by regulations. Similar are the provisions contained in Section 21 concerning pesticides, veterinary drugs residues, antibiotic residues and microbiological counts. Section 22 is concerned with "genetically modified foods", organic foods, functional foods, proprietary foods etc.. Proprietary food also should not contain any of the foods and ingredients prohibited under the Act and regulations. Section 23 relates to packing and labelling of foods and going by the same, the manufacturers, exporters, sellers, etc. will have to conform to the regulations with regard to the labelling. Section 24 is concerned with restrictions of advertisement and prohibition as to unfair trade practice.

36. Chapter VI is important which is under the heading "Special responsibilities as to food safety" Section 26 provides for the responsibilities of the food business operators. Sub-section (1) reads as follows:

> "**26. Responsibilities of the food business operator.**--(1) Every food business operator shall ensure that the articles of food satisfy 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 this control."

Going by sub-section (2)(i) no food business operator shall himself or by

any person on his behalf manufacture, store, sell or distribute any article of food which is "unsafe". Section 27 makes the manufacturer or packer of an article of food liable for such article of food if it does not meet the requirements of the Act and the rules and regulations made thereunder. Sub-section 2(c) relates to unsafe or misbranded articles of food as far as a wholesaler or a distributor is concerned. Chapter VII contains provisions for enforcement of the Act. Section 29 is quite important and sub-section (1) states that the Food Authority and the State Food Safety Authorities shall be responsible for the enforcement of this Act. Sub-section (2) reads thus:

> "(2) The Food Authority and the State Food Safety Authorities shall monitor and verify that the relevant requirements of law are fulfilled by food business operators at all stage of food business."

Going by sub-section (6), the Commissioner of Food Safety and Designated Officer shall exercise the same powers as are conferred on the Food Safety Officer and follow the same procedure specified in the Act. Section 30(1) states as follows:

> "**30. Commissioner of Food Safety of the State.**-- (1) The State Government shall appoint the Commissioner of Food Safety for the State for efficient implementation of food safety and standards and other requirements laid down under this Act and the rules and regulations made thereunder."

Therefore, the Food Safety Commissioner has responsibility for the efficient implementation of food safety and standards and other requirements. Various functions have been delineated in sub-section (2) and sub-section (2)(a) is important for the purpose of this case which is extracted below:

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

Section 31 contains the provisions for licence and registration of food business. Section 92 concerns the power of Food Authority to make regulations and sub-section (1) reads as follows:

> **"92. Power of Food Authority to make regulations.--** (1) The Food Authority may, with the previous approval of the Central Government and after previous publication, by notification, make regulations consistent with this Act and the rules made thereunder to carry out the provisions of this Act."

The matters which can be included in the regulations are covered by sub-section (2) and sub-section 2(e) reads as follows:

> "(e) notifying standards and guidelines in relation to articles of food meant for human consumption under sub-section (2) of section 16."

Therefore, the standards and guidelines relating to articles of food will have to be laid down in the regulations. As far as the said regulations framed under Section 92 read with Section 16 are concerned, the standard with regard to panmasala has been fixed under regulation 2.11.5 of the Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011. Under Section 92(1) read with Section 26, Regulations called "The Food Safety and Standards (Prohibition and Restrictions on Sales) Regulations, 2011" have been framed. The important prohibition clause as far as the addition of tobacco and nicotine is the one contained as regulation 2.3.4 in "The Food Safety and Standards (Prohibition and Restrictions on Sales) Regulations, 2011". Regulation 2.3.4 reads as follows:

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

Therefore, essentially this is a case where the said regulation itself contains total prohibition as far as use of tobacco and nicotine are concerned. Therefore, it amounts to a policy under the relevant regulation itself which has been framed as enjoined by the provisions of Section 92 of the Food Safety and Standards Act. The regulations have been framed after publishing a draft, inviting objections/suggestions and after considering the

same.

37. When we come to the relevant provisions of COTPA Act, it can be seen that the emphasis therein is with regard to the prohibition of advertisement and to provide for regulation of trade and commerce, production, supply and distribution of tobacco products, among other things. Various prohibits are contained in Sections 4 to 6. As regards the sale of tobacco products are concerned, Section 6 prohibits: (a) sale to any person who is under 18 years of age; and (b) in an area within a radius of one hundred yards of any educational institution. Sections 7, 8 and 9 are concerned with the restrictions regarding advertisement, warning, language to be used, etc. Tobacco products are defined under Section 3(p), meaning, "products specified in the schedule." As already noticed, item 8 is panmasala or any chewing material having tobacco as one of its ingredients (by whatever name called) and item 9 is gutka. These items are specified along with certain other items like, cigarettes, etc. It is not an enactment exclusively concerning panmasala and gutka, but tobacco products.

38. That panmasala and gutka will be a 'food', item is clear from the judgment in **Godawat Pan Masala Products' case** (supra) (para 65), since they are eaten for taste and nourishment.

39. Next I will consider the argument raised on behalf of the petitioners that the decision of the Apex Court in **Godawat Pan Masala Products' case** (supra) and the principles stated therein will make the notification illegal. The important thing to be noticed is that therein the former enactment was P.F.A. Act, 1954 and the COTPA Act was a later one. The first one was declared as the general enactment and the later one as the special. The notifications, as already noticed, which were under challenge were issued under Section 7(iv) of the Act and the power of the Food (Health) Authority to issue an order of prohibition was considered. The notifications were held as invalid mainly for the following reasons: (a) the power of the Food (Health) Authority is only to deal with an emergent situation (paragraphs 24 and 27), which conclusion was rendered after an analysis of the rules framed by the respective States; (b) the power of prohibition as far as gutka and panmasala is vested with the Central Government. This is conclusion was reached in the light of Section 23 (1-A)(f) of the Act and the power of the State also was held as limited to the extent indicated by the said provision; (c) In the light of the provisions of COTPA Act, only conditional prohibition of the products against sale to persons under 18 years of age, has been provided; (d) P.F.A. Act is a general law dealing with adulteration of food articles and the special law

must displace the general law to the extent of inconsistency. There is no legislative policy to have a total ban as far as consumption of pan masala and gutka are concerned and whether an article is to be prohibited as *res extra commercium* is a matter of legislative policy and must arise out of an Act of legislature and not by a mere notification issued by an executive authority (para 53); and (d) The notification is only an administrative act and not a legislative act. Para 70 of the judgment is also important, wherein it was held as follows:

> "We cannot conceive of such wide-ranging powers vested in a local authority without there being sufficient guidelines as to the manner of deciding the policy and implementing it and elucidated in the statute itself."

It was held further that the purpose of the Act is to prevent adulteration in food items. It was also held in para 76 that before the ban order was issued, the principles of natural justice should have been followed.

40. By comparing the provisions of P.F.A. Act and the Food Safety and Standards Act, 2006, we will have to find out whether the Food Safety and Standards Act is *in pari materia* with that of the former one. It can be safely concluded that the later enactment is wider in import and it covers the entire gamut of the field with regard to the fixing of standards for articles of food, regulations of their manufacture, storage, distribution, sale

and import and to ensure availability of safe and wholesome food for human consumption, whereas the former enactment was one concerning prevention of adulteration of food alone. The definition contained in both the enactments are different. The limit provided under Section 7(iv) of the P.F.A. Act was explained by the Apex Court since it was only one prohibiting manufacture, sale etc. of certain articles of food "the sale of which is for the time being prohibited by the Food (Health) Authority in the interest of public health." There was no legislative policy concerning the prohibition in the said enactment. But herein, Section 26, as noticed already, casts a responsibility on the food business operator to ensure that the article of food satisfies the requirements of the Act, rules and regulations, that too at all stages of production, processing, import, distribution and sale. Section 30(2)(a) which gives power on the State Government to appoint the Commissioner for Food Safety, is for the efficient implementation of the food safety and standards and other requirements "laid down under this Act and the rules and regulations made thereunder." The above are quite important to notice that the standards and other requirements including the prohibition regarding addition of certain articles to food, have been made part of the policy under the enactment itself and not left to be done by a delegate as per a notification or by other

means. In the former Act the Central and the State Governments were given power to make rules and in the later enactment under Section 92 the Food Authority has been given power to make regulations consistent with the provisions of the Act. Therefore, the regulations have been framed in exercise of the said power and the matters for which the regulations can be made, are clear from Section 92 which includes, as already noticed, notifying standards and guidelines relating to articles of food meant for human consumption. The standards, as well as specific items covered by prohibition permanently are laid down in the respective Regulations.

41. Unlike the P.F.A. Act, 1954 in regulation 2.3.4, it has been declared that tobacco and nicotine shall not be used as an ingredient "in any food products." Therefore, read along with other provisions of the present Act which we have already noticed, there is a total prohibition and in fact, regulation 2.3 is having its heading as "Prohibition and Restriction on sale of certain products". Read along with the clause contained in The Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011, viz. clause 2.11.5 prescribing the standards for panmasala, it can be seen that panmasala containing tobacco or nicotine invites total prohibition to be used as a food item. Hence, manufacture, sale or its distribution will be illegal.

42. Therefore, it can be seen that the circumstances noted above are not the like one considered by the Apex Court in **Godawat Pan Masala Products's case** (supra). Herein, the situation is totally different, as forcefully pleaded by the learned Advocate General and Shri Shaji P. Chali and Shri Basil Attipetty. The principles stated in **Godawat Pan Masala Products's case** (supra) as regards the interpretation of P.F.A. Act with respect, are distinguishable on the facts of this case. The absence of a legislative policy for a total ban was the important factor which weighed in favour of the invalidity of the notifications therein. The other one was the limited power which is available to the local authorities. These two are distinctively present in the Food Safety and Standards Act, 2006 and the Regulations, 2011.

43. Then the next question is whether the COTPA Act is a special enactment and the Food Safety and Standards Act is a general one and therefore the COTPA Act will have precedence and what is the effect of Section 89 of the Food Safety and Standards Act.

44. Learned Senior Counsel for the petitioners relied upon **Godawat Pan Masala Products's case** (supra) to contend that COTPA Act has been treated as a special enactment, as it deals specifically with tobacco products and the Food Safety and Standards Act, is a general one.

But the said former enactment was considered as a special one in relation to another general enactment, viz. P.F.A. Act which was the one concerning the prohibition on adulteration of food. But herein, we are confronted with a later enactment than COTPA Act which exclusively deals with articles of food laying down standards and regulation of its manufacture, storage, distribution, sale and import.

45. Learned Advocate General, Shri Shaji P. Chali and Shri Basil Attipetty submitted that the Food Safety and Standards Act is a later one which is a special law and as both the enactments have been passed by the Parliament, it can be seen that the later one will prevail, especially in the light of Section 89 of the Act. Section 89 of the Act 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."

Therefore, in the event of any inconsistency, the provisions of Food Safety and Standards Act will override the other food related laws. This is quite important and in the light of the above, it can be seen that the provisions of the Act will override the inconsistent provisions of COTPA Act. As far as the COTPA Act is concerned, it deals with tobacco products in general and

it includes in the Schedule panmasala having tobacco or any chewing material having tobacco as one of the ingredients and gutka and other tobacco products. In the Food Safety and Standards Act also, standards have been fixed for panmasala and the total prohibition on addition of tobacco into pan masala or gutka is clear from the provisions already noted, viz. regulation 2.3.4 of the Regulations 2011. Thus, under the former Act, there is no prohibition to add tobacco in panmasala, but in the later enactment read with the Regulations, there is a clear prohibition. This leads to an inconsistency. Hence, the later Act 34 of 2006, will override the COTPA Act, in the light of Section 89.

46. Shri M.K. Damodaran, learned Senior Counsel appearing for the petitioner in W.P.(C) No.13271/2012 relied upon various decisions of the Apex Court dealing with the interpretation of the maxim *generalia specialibus non derogant* which principle has also been relied upon by the learned Advocate General and other learned counsel appearing for the respondents. In **Ashoka Marketing Ltd. v. P.N.B.** {(1990) 4 SCC 406}, the question which arose was with regard to the alleged inconsistency between the provisions of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 and the Delhi Rent Control Act, 1958. In paragraphs 49 and 50, the Apex Court considered the general principle governing such

cases and the principle was laid down thus:

> "49.....In our opinion the question as to whether the provisions of the Public Premises Act override the provisions of the Rent Control Act will have to be considered in the light of the principles of statutory interpretation applicable to laws made by the same legislature.
>
> 50. One such principle of statutory interpretation which is applied is contained in the latin maxim: leges posteriores priores conterarias abrogant (later laws abrogate earlier contrary laws). This principle is subject to the exception embodied in the maxim: generalia specialibus non derogant (a general provision does not derogate from a special one). This means that where the literal meaning of the general enactment covers a situation for which specific provision is made by another enactment contained in an earlier Act, it is presumed that the situation was intended to continue to be dealt with by the specific provision rather than the later general one (Bennion: Statutory Interpretation pp. 433-34)."

Therefore, the general principle is "later laws abrogate earlier contrary laws" with one exception, viz. *generalia specialibus non derogant.* But, for the latter principle to apply, it should be a case where the literal meaning of the general enactment covers a situation for which specific provision is made by another enactment contained in the earlier Act and in such cases the later Act will be treated as a general one. In fact, in a later decision, viz. **ICICI Bank Ltd. v. Sidco Leathers Ltd. And others**

{(2006) 10 SCC 452}, in para 47, the Apex Court has laid down thus:

> "In *Maru Ram v. Union of India and Others* [(1981) 1 SCC 107], this Court distinguished between a specific provision and a special law holding that a specific provision dealing with a particular situation would override even a special law, which is inconsistent therewith."

Therefore, if a special provision is there which deals with a particular situation, it will override even a special law which is inconsistent therewith. This principle will also apply herein, as far as the overriding effect of the Food Safety and Standards Act.

47. As far as the present situation is concerned, we will have to find out whether COTPA is the special one and whether the Food Safety and Standards Act is a general one. In fact, both the enactments will have to be treated as special enactments since the first one deals with tobacco and other products and the later one deals with food and other items including the ones specified under the former enactment.

48. Therefore, the question is whether in case of inconsistency in such cases , how the said aspect will have to be resolved. This is clear from the observations contained in paragraph 61 of **Ashoka Marketing Ltd.'s case** {(1990) 4 SCC 406}. The same is extracted below:

> "61. The principle which emerges from these decisions is that in

> the case of inconsistency between the provisions of two enactments, both of which can be regarded as Special in nature, the conflict has to be resolved by reference to the purpose and policy underlying the two enactments and the clear intendment conveyed by the language of the relevant provisions therein."

The clear intendment conveyed by the later enactment is prohibition of tobacco or nicotine in food products. These will definitely include addition of these items in panmasala and gutka. Therefore, the principle stated in **ICICI Bank's case** {(2006) 10 SCC 452} will squarely apply to the facts of this case. The Regulation is one framed under Section 92 read with Section 26(2) of the Food Safety and Standards Act. Section 89 of the Food Safety and Standards Act will therefore have full effect and applicability. In the book "A selection of Legal Maxims" by Herbert Broom, relied upon by Shri Basi Attipetty, the following principle has been stated:

> "It is then, an elementary rule that an earlier Act must give place to a later if the two cannot be reconciled.-- l*ex posterior derogat priori (e)-- non est novum ut priores leges and posteriores trahatur* (f)-- and one Act may repeal another by express words or by implication; for it is enough if there be words which may necessary implication repeal it (g)."

It may also help to resolve the situation herein. Section 89 of the Act cannot therefore be read in isolation even though learned counsel for the

petitioners in W.P.(C) No.12352/2012 submitted that it will override only the provisions of another food related law. It cannot be. The overriding effect will apply to the provisions of any enactment in force which contain provisions which are inconsistent with the Food Safety and Standards Act.

49. Then we will come to certain other related aspects. In fact, justification for the notification has been stated in detail in the counter affidavit filed in W.P.(C) No.12352/2012. It is pointed out therein that the analysis conducted in the Government Analysis Lab under the Commissioner of Food Safety reveals that the products available in the market contains nicotine and other harmful constituents like magnesium, carbonate, saccharine, etc. beyond the permitted limits. It is mentioned that the food articles sold or distributed in Kerala in the name of Panmasala cannot be considered as panmasala conforming to the standards laid down in the Food Safety and Standards Act/Regulations. No permission has been taken other than the licence for the distribution and sale, by the food business operator. It is emphasised that it is impractical for any law enforcing authority to collect each and every sachet of panmasala or gutka available in the market in innumerable varieties and names and it is also impractical to distinguish between which are the pan masala conforming to the standards and which are not. It is also stated that gutka is panmasala

containing 12.8% tobacco as an ingredient and going by Regulation 2.3.4. of the Regulations, no food article containing tobacco shall be sold. It is emphasised that the scheme of the provisions of the Act is to provide safe food for human consumption.

50. The strong reliance placed on **Godawat Panmasala Products' case** (supra) to understand the effect of Section 30 of the Act, therefore will have to be considered. The provision, viz. Section 30(2)(a) gives power to pass an order containing prohibition for period not exceeding one year. But as rightly pointed out by the learned counsel Shri Shaji P.Chali, there cannot be a situation wherein an item which comes within the definition of 'unsafe food' under Section 3(1)(zz) and sub-clause (v) therein, can be a matter for manufacture and distribution. As tobacco and nicotine are not permitted, definitely it can be seen that if it is added, the same will be declared as "unsafe food". As we have already noticed, there are various provisions under the Act for enforcing the prohibition including Section 30(2)(a). Therefore, the various prohibitory measures can be taken to implement the provisions of the Act as well as the policies contained under the Act and the said policies alone have been implemented here, as rightly argued by the learned Advocate General and other learned counsel. Therefore, prima facie it can be seen that the notification is only one in

tune with the provisions of the Act and the particular regulations. Nobody can sell panmasala and gutka containing tobacco in the light of clause 2.3.4 of the regulations, as a food item. In that view of the matter, unlike the situation covered in **Godawat Panmasala Products's case** (supra), there is ample power in support of the notification. The prohibition itself is permanent as far as the policy under the Act is concerned. Therefore, whether the power is exercised under Section 30(2)(a) of the Act or in regard to the implementation of the provisions under the general powers of the Act, the situation will be more or less same. In the light of clause 2.3.4, it is not a case where a further provision for total exclusion of the item is required under any other provisions of the Act or to be enacted by the Parliament alone.

51. In fact, the said provision is wider in import than Section 7(iv) of the P.F.A. Act, 1954. Under Section 7(iv) the prohibition for manufacture for sale, or store, sell or distribute, will apply in a case where the sale of an article of food is prohibited by the Food (Health) Authority in the interest of general public. But herein, Section 30(2)(a) gives the Commissioner of Food Safety, the power to prohibit "the manufacture, storage, distribution or sale of any article of food, either in the whole of the State or any area.....". Therefore, it is a specific and independent power

conferred on the Commissioner himself. The provisions are therefore not identical. In fact, a reading of Ext.P2 notification produced in W.P.(C) No.13271/2012 makes it clear that it reiterates the prohibition under Regulation 2.3.4, whereby it can be seen that information is given by way of a notification that the addition of tobacco and nicotine is prohibited and consequently the manufacture, the storage, the sale or the distribution of gutka and panmasala containing tobacco and nicotine as ingredients, is prohibited. Therefore, the power is available under Section 30(2)(a) read with the other provisions of the Act. In fact, Section 31 which contains the licencing provisions, also will show that a licence can be issued only for manufacture, sale, distribution, etc. of products which fulfil the standards provided under the Act. At any rate, therefore, the arguments of the petitioners will have to fail, with regard to the validity of the notifications.

52. In fact, the Patna High Court examined the matter in Lal Babu Yadav's case (Civil Writ Jurisdiction Case No.10297/2012) and in para 6, has taken a similar view as follows:

> "It was within the discretion of the Commissioner of Food Safety to choose the tobacco food products for being brought under the purview of ban on manufacture, storage and sale or distribution and he having exercised his power confining the ban to Gutka and Paan Masala containing tobacco or nicotine as ingredient, no error

can be found in exercise of power by the Commissioner of Food Safety under Section 92 read with Section 26 of the of the Act 34 of 2006 and Regulation 2.3.4 of the Restrictions, 2011 providing for ban on manufacture, storage, sale or distribution of Gutka and Paan Masala containing tobacco or nicotine as ingredient under the impugned order dated 30.5.2012, Annexure-I, validity whereof, in my opinion, has to be upheld."

53. Arguments have been raised as to whether it violates Article 19 (1)(g). In fact, the principle delineated in **Godawat Panmasala Products' case** (supra), by holding that the notification therein issued under Section 7(iv) of the P.F.A. Act is not a reasonable one in the light of Article 19(6) and it violates Article 19(1)(g), is in the light of the policy under the COTPA Act, which contains only a restricted prohibition with regard to the sale to persons under the age of 18. It is in that context it was held that the notification violates the right under Article 19(1)(g). But herein, the situation is different, obviously. Therefore, the said argument also cannot help the petitioners.

54. The Patna and Madhya Pradesh High Courts have dismissed similar writ petitions challenging identical ban orders. I am not going into in detail the argument regarding maintainability of the two writ petitions, viz. W.P.(C) Nos.12932/2012 and 13271/2012, by both sides, in the light of the conclusions arrived regarding the validity of the notification.

55. One of the arguments forcefully raised by the learned Senior Counsel for the petitioners is the violation of the principles of natural justice, relying upon the principles stated in **Godawat Panmasala Products' case** (supra). As rightly argued by the learned Advocate General and other learned counsel appearing for the respondents, the regulations have been framed after pre-publication inviting objections and suggestions and only after considering them, prohibitions have been incorporated in the regulation. Therefore, the situation that was considered in **Godawat Panmasala Products' case** (supra) is not available here. In the light of the above, I do not find any merit in the said argument also.

56. Prima facie it can be seen that the notification is not illegal or invalid for the reasons stated by the petitioners. Therefore, the interim prayer sought to stay the operation of the notification is rejected.

57. As far as W.P.(C) No.12932/2012 is concerned, learned Senior Counsel submitted that the facts of the case are on a different footing, as it is not a case where the petitioner is selling panmasala or gutka containing tobacco. But the products are different, namely, Pass Pass, Rajnigandha, Rajnigandha Meetha Mazaa, etc. It is submitted that under the guise of implementation of the notification, these products are also sought to be included within its purview by drawing support from the words 'whatever

name' in the last paragraph of Ext.P1 notification. It was strongly argued that gutka and panmasala also cannot be grouped together and it amounts to a misnomer. Various other points especially in the matter of labelling of the items, have also been vehemently argued to show that such notifications of general nature cannot be issued.

58. As far as the interim prayer sought in the said writ petition is concerned, the petitioner is seeking stay of operation of Ext.P1 to the extent of prohibiting the business of manufacturing, storing, distribution, sale and marketing of petitioner's products, which are mentioned above. The point vehemently submitted by the learned Advocate General is that this Court cannot grant a general declaration in favour of a manufacturer as far as the specified products mentioned in the writ petition are concerned. It is pointed out that if the petitioner is confronted with any action, they will have to be specifically prove that the said products are not covered by the notification. In fact, it is also pointed out that a declaration as sought for, cannot be granted by a writ Court, as the same will be misutilised by the manufacturers, sellers and distributors for selling other products which will disentitle the officers from taking any action. In the counter affidavit filed in the said writ petition, in para 2 it is stated that prohibition applies only in respect of gutka and panmasala containing

tobacco and nicotine as ingredients. Contentions have been raised that the products of the petitioner referred to in the writ petition, do not conform to the regulations, viz. Food Safety and Standards (Packing and Labelling) Regulations, 2011. It is also alleged that the petitioner has not disclosed the ingredients of the products in the label. It is explained that gutka and panmasala and other similar products have sweet smell and it is difficult to detect the use by the students even in the classrooms or in the school/college campuses, as these items are kept under the tongue.

59. Learned Senior Counsel appearing for the petitioner, Shri Deepak Dhingra, vehemently disputed the above contentions raised in the counter affidavit with regard to the violations of the labelling regulations.

60. Having considered the arguments, I am of the view that this Court will not be justified in granting the interim prayer sought. Evidently the petitioner claims that the products are different from gutka and panmasala. This Court in a writ petition, will not be justified in giving a blanket order permitting that the products manufactured by the petitioner could be easily sold in market or distributed in the State. If at all any action against the petitioner or any distributors or sellers are taken in respect of these products by the designated authorities, then it will be for the parties concerned to agitate the matter.

61. In the light of the above prima facie conclusions, I am not discussing the various judgments cited by both sides. I am not going into the disputes now raised with regard to the alleged violation of the labelling rules, absence of requirements of any licence for the petitioners in W.P.(C) Nos.12932/2012 and 13271/2012, since a decision on those matters are not required at this stage.

62. It appears that during the pendency of the writ petitions and during the hearing of the matter, various items have been confiscated and kept sealed. After the impugned notification was issued, a circular dated 29.5.2012 produced as Ext.R2(1) in W.P.(C) No.12352/2012 was issued, by which time was granted upto 15.6.2012 for removing the articles from the State. The apprehension of the petitioners is that the confiscated articles will be readily destroyed. In the light of the order refusing stay of the notification impugned, it is only proper that time is granted for removal of the articles, for which a fresh order/circular will be issued.