
**Tirupati Products and Haji Shah Hussain Buksh Khand Sons Khan and
Sons and Another Vs State of Jharkhand and Others**

Writ Petition (C) No"s. 4093 and 4206 of 2004

Court: Jharkhand High Court

Date of Decision: March 7, 2005

Acts Referred:

Central Excise Rules, 1944 " Rule 44#Constitution of India, 1950 " Article 14, 19, 19(1),
19(6)#Drugs and Cosmetics Act, 1940 " Section 26A, 3#Prevention of Food Adulteration Act,
1954 " Section 23, 23(1A), 24, 7

Citation: (2005) 1 BLJR 806 : (2005) 2 JCR 212 : (2005) 3 RCR(Criminal) 495

Hon'ble Judges: S.J. Mukhopadhaya, J; R.K. Merathia, J

Bench: Division Bench

Advocate: J.P. Gupta and Nidhi Jaiswal, S.K. Ughal, Nalin Talwar, Tapas Kabiraj, Prabhash
Kumar and Kiran Choubey, in W.P.C. No. 4093/04, R.K. Dhawan, Maqbool Ejaz and Ramit
Satender, in W.P.C. No. 4206/04, for the Appellant; Anil Kumar Sinha, General and Sameer
Saurabh, J.C. to A.G., for the Respondent

Final Decision: Allowed

Judgement

S.J. Mukhopadhaya, J.

Both the writ petitions, having been preferred by the petitioners against common Notification dated 18th June,

2004, issued under Memo No. 11 Sva. F-2-48/2002-385 (ii)/Sva, whereby and whereunder, the respondent, Secretary, Health and
Family

Welfare-cum-Director, Health Services, Jharkhand, Ranchi, in exercise of powers u/s 7(iv) of the Prevention of Food Adulteration
Act, 1954, has

imposed ban on production, manufacture and sale of "gutka" or "pan masala" or "gul", containing tobacco or without tobacco from
the date of

issuance of the Notification, have been heard together and are being disposed of by this common order.

2. The main plea, taken by the petitioners, is that the impugned Notification dated 18th June, 2004 is illegal, arbitrary, without
jurisdiction and

violative of the provisions of Articles 14 and 19(i)(g) of the Constitution of India.

3. Counsel for the petitioners submitted that a similar Notification came up for consideration before the Supreme Court regarding its

constitutionality on the ground of Legislative competence. In the case of Godawat Pan Masala Products I.P. Ltd. and Another Vs. Union of India

(UOI) and Others, , the Supreme Court held that the State Government has no power to issue such Notification under the provisions of Prevention

of Food Adulteration Act, 1954 and thereby struck down the similar Notification.

4. Counsel for the State of Jharkhand and Union of India tried to distinguish the case of one of the petitioners, namely, M/s. Hazi Shah Hussain

Buksh Khan and Sons and another, [W.P. (C) No. 4206 of 2004]. However, they could not distinguish the case of other petitioner, namely, M/s.

Tirupati Products [W.P. (C) No. 4093 of 2004].

W.P. (C) No. 4093 of 2004 :

Petitioner, in this case, carries the business of manufacturing "gutka", mainly in the town of Jamshedpur, District Singhbhum (East), within the

territory of the State of Jharkhand. It has obtained licence from the competent authority to sell the product "gutka". The main plea taken is that the

case of the petitioner is covered by the decision of the Supreme Court in the case of Godawat Pan Masala Products I.P. Ltd (supra) and, as such,

the impugned Notification dated 18th June, 2004, being without jurisdiction, petitioner can not be prohibited from manufacturing or selling "gutka"

in absence of any prohibition, imposed by the Union of India.

W.P. (C) No. 4206 of 2004 :

(i) The case of these petitioner is that petitioner No. 1 is a partnership firm, having its registered office at Tharpakhna, Hazaribagh Road, Ranchi,

within the State of Jharkhand and is engaged in manufacture and trade of "gul". It is stated that although it is a tobacco product, it is not used for

chewing tobacco rather it is used for cleaning the teeth and it is nothing but a tooth powder, "gul" is used to be rubbed on the teeth for a few

minutes and is thrown out with the water. Gul was first prepared in or about 1932 by Shah Hussain Buksh Khan in Howrah and when he shifted to

Ranchi and settled here, started selling "gal" under the Trade Name "'gulab marka gul'". The Ranchi unit for manufacture and sale was set up in the

year, 1956.

(ii) Grievance of these petitioners is that because of the impugned Notification dated 18th June, 2004, they have to close their business, retrenching

the employees out of business and thereby hundreds of people, dependent on the trade, have been rendered jobless. These petitioners have also

taken plea that either the Secretary. Department of Health, Govt. of Jharkhand, or the State of Jharkhand has no jurisdiction to issue any

prohibitory order, stopping manufacture or sale of "gul", as it is without jurisdiction. These petitioners have also relied on the Supreme Court's

decision, rendered in the case of Godawat Pan Masala Products I.P. Ltd., (supra).

(iii) Further case of the petitioners is that petitioner No. 1 is a registered firm and has obtained valid licence under the Central Excise Rules, 1944

to cure, produce, manufacture, carry on whole-sale trade/business/broker or commission agent or otherwise deal in excisable goods, act as a use

excisable goods for special industrial purposes. It is stated that as the "gul" is not a chewing tobacco, therefore, the petitioners are not bound by

Rule 44 (zzz) of the Rules, framed under Prevention of Food Adulteration Act, 1954 but as one of the ingredients of the product ""gul"" is tobacco,

therefore, statutory warning is used in all the labels of the petitioners' product, which reads as ""Tobacco product is injurious to health.

OTHER RELEVANT FACTS & JUDGMENTS :

(a) For similar reason, almost a similar Notification dated 23rd July, 2002 was issued by the Commissioner, Food and Drugs Administration and

Food (Health) Authority for the State of Maharashtra. By the said Notification, the manufacture, sale, storage and distribution of the "pan masala"

and "gutka" (Pan Masala, containing tobacco) were banned for a period of five years with effect from 1st August, 2002. One Godawat Pan

Masala Products I.P. Ltd. and another, challenged the validity of the said Notification vide Writ Petition No. 2024 of 2002 before the High Court

of Judicature at Bombay. A Division Bench of the High Court by its judgment dated 18/19th September, 2002 dismissed the writ petition,

upholding the validity of the Notification. Being aggrieved, the writ petitioners i.e. Godawat Pan Masala Products I.P. Ltd. and another challenged

the said judgment before the Supreme Court. Similar other writ petitions were also preferred against the said Notification, which were dismissed.

Thereafter, different appeals were also preferred before the Supreme Court against the orders of dismissal. They were heard together by the

Supreme Court, which by its judgment, rendered in the case of Godawat Pan Masala Products I.P. Ltd. (supra) held as follows :

75. As a result of the discussions, we are of the view that :

1. Section 7(iv) of the Act, is not an independent source of power for the State authority;

2. The source of power of the State Food (Health) Authority is located only in the valid rules made in exercise of the power u/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 not 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 u/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 u/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 Section 7(iv) of the Prevention of Food Adulteration

Act, 1954. The former Act, is a special Act intended to deal with tobacco and tobacco products particularly, while the latter enactment is a

general enactment. Thus, the Act 34 of 2003 being a special Act, and of later origin, overrides the provisions of Section 7(iv) of the Prevention of

Food Adulteration Act, 1954 with regard to the power to prohibit the sale or manufacture of tobacco products which are listed in the Schedule to

the Act 34 of 2003;

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 Articles 14 and

19 of the Constitution.

(b) Government of Tamil Nadu also issued Notification No. 780, published in Tamil Nadu Government Gazette (Extraordinary), dated 19th

November, 2001. By the said Notification, in exercise of the powers under Clause (iv) of Section 7 of the Prevention of Food Adulteration Act,

1954 prohibition was imposed either to manufacture for sale or storage, sell or distribute (i) chewing tobacco (ii) Pan Masala and (iii) gutka. It was

challenged by M/s. Kothari Product Ltd. before the High Court of Judicature at Madras in W.A. No. 139 of 2002. The said case was heard along

with other similar cases. The Madras High Court, following the decision of the Supreme Court in the case of Godawat Pan Masala Products I.P.

Ltd., (supra), by its judgment dated 23rd August, 2004 Kothari Product Ltd. v. The Director, Public Health and Preventive Medicine and Ors.

struck down Notification No. 780, published in the Tamil Nadu Government Gazette (Extraordinary), dated 19th November, 2001, being

unconstitutional and beyond the legislative competence of the State.

W.P. (C) No. 4093 of 2004 :

So far as the case of petitioner M/s. Tirupati Product is concerned, which relates to the product of "gutka", it is covered by the decision of the

Supreme Court in the case of Godawat Pan Masala Products I.P. Ltd, (supra). The State of Jharkhand, having no legislative competence and

thereby, the impugned Notification dated 18th June, 2004, being unconstitutional, we have no option but to set aside the said Notification, so far it

relates to gutka. However, this order will not preclude the competent Government/authority to take action in the light of the said judgment of

Godawat Pan Masala Products I.P. Ltd. (supra).

W.P. (C) No. 4206 of 2004 :

(I) So far product "gul" as manufactured and sold by M/s. Hazi Shah Hussain Buksh Khan & Sons is concerned, as per the petitioners, it is a

tobacco product but not used for chewing tobacco. It is used for cleaning the teeth and is nothing but a "tooth powder." "Gul" is rubbed on the

teeth for certain minutes and thereafter, it is thrown out.

(II) The Supreme Court in the case of Godawat Pan Masala Products I.P. Ltd. and Anr. v. Union of India and Ors., (supra) has held that

cigarettes and other tobacco products are regulated by Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of

Trade and Commerce, Production, Supply and Distribution) Act, 2003. With regard to a similar matter, concerning tobacco products, the

Supreme Court held that Section 7(iv) of the Prevention of Food Adulteration Act, 1954 is directly in conflict with the provisions of Cigarettes and

other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003.

The former Act, is special Act, intended to deal with the tobacco and tobacco products particularly while the later i.e. Prevention of Food

Adulteration Act, 1954 is a general enactment. Thus, Act 34 of 2003, being special Act and of later origin, over-rides the provisions of Section

7(iv) of the Prevention of Food Adulteration Act, 1954 with regard to the power to prohibit the sale or manufacture of tobacco products, which

are listed in the Schedule to Act 34 of 2003.

(III) As noticed above, "Gul" being a tobacco product, which is a tooth powder, containing tobacco, the case of petitioners M/s. Hazi Shah

Hussain Buksh Khan and Sons and another, [W.P.(C) No. 4206 of 2004] is also covered by the decision of the Supreme Court in the case of

Godawat Pan Masala Products I.P. Ltd. and Anr. v. Union of India and Ors., (supra) and, as such, the impugned Notification dated 18th June,

issued by the State of Jharkhand, can not be upheld, being without jurisdiction. The State Government, as such, can not prohibit the petitioners

from manufacturing or selling "Gul" in exercise of power u/s 7(iv) of the Prevention of Food Adulteration Act, 1954. However, the competent

Government/authority can impose prohibition in the light of the said judgment in case of Godawat Pan Masala Products I.P. Ltd. (supra).

(IV) The 2nd respondent, Secretary, Department of Health & Family Welfare, Govt. of Jharkhand, Ranchi, has opposed the case on some other

ground. According to the 2nd respondent, the Ministry of Health and Family Welfare, Department of Health, Govt. of India, New Delhi has

already issued a Notification dated 30th April, 1992, prohibiting the manufacture and sell of all tooth paste/tooth powder, containing tobacco, and

in view of the decision taken by the Central Government, the State of Jharkhand has also prohibited the sale, purchase and storage of "gul", which

is a tooth powder, containing tobacco, and the same is within the competence and power of the State Government as per List-2 & 3 of Schedule

7 of the Constitution of India. It is stated that the writ petitioners were illegally manufacturing and selling the "gul", which is a tobacco product,

though there is a ban imposed by the Central Government. Reliance was placed in the case of Laxmikant Vs. Union of India (UOI) and Others,

(V) The Union of India was allowed time to State :

(i) Whether the Central Government has issued any Notification of prohibition, relating to "pan masala", "gutka", "gul",

(ii) Whether Notification No. GSR-443 (E) dated 30th April, 1992, issued from the Ministry of Health & Family Welfare, Department of Health,

Govt. of India, New Delhi, has been superseded or is still in existence and

(iii) Whether the aforesaid Notification dated 30th April, 1992 is still applicable in the matter of Manufacture and sale of "gul" or not.

(VI) The petitioners were also given liberty to file rejoinder to it.

(VII) The Union of India, in its affidavit, while opposed the prayer, made in the writ petition, has given the following replies to (sic), made by this

Court.

4. In reply to the three queries raised by this Hon'ble High Court in this matter in its order dated 6.10.2004, this respondent submits as under :

(i) The Central Government in the Ministry of Health and Family Welfare has not issued any notification of prohibition relating to ""Pan Masala,

Gutka, Panmasala or gul"" under the provisions of the Prevention of Food Adulteration Act, 1954.

(ii) The Gazette Notification No. GSR 443(E) dated 30th April 1992 as well as the notification in GSR 444(E) dated 30th April, 1992, issued by

the Ministry of Health & Family Welfare under the Drugs and Cosmetics Act, 1940, are still in vogue.

(iii) The Drugs and Cosmetics Act, 1940 regulates the import, manufacture, distribution and sale of drugs and cosmetics. The term "cosmetic" is

defined u/s 3(aaa) of the said Act, and is reproduced below ;

Cosmetics"" means any article intended to be rubbed, poured, sprinkled or sprayed on, or introduced into or otherwise applied to the human body

or any part thereof for cleansing, beautifying, promoting attractiveness, or altering the appearance, and includes any article intended for use as a

component of cosmetic.

(VIII) Copy of the Notification bearing No. GSR 443 (e) dated 30th April, 2002 has been enclosed by the petitioners, which reads as follows :

MINISTRY OF HEALTH AND FAMILY WELFARE

(Department of Health)

NOTIFICATION

G.S.R. 444(E)--Whereas the Central Government is satisfied on the basis of evidence and other material available before it that the use of tobacco

in tooth pastes/tooth powders is likely to involve risk to human beings and that it is necessary and expedient in the public interest so to do :

Now, therefore in exercise of powers conferred u/s 26-A of the Drugs and Cosmetics Act, 1940 (23 of 1940), the Central Government hereby

prohibit the manufacture and sale of all cosmetics licensed as Tooth Pastes/Tooth Powders containing tobacco.

Illegible

B.S. Lamba, H. Secy.

(IX) Learned counsel for the petitioners relied on a Division Bench decision of Patna High Court, as was rendered in the case of one M/s. A.

Rahim Khan and others, as also the present petitioner No. 1, M/s. H.S. Hussain Buksh and sons, reported in 1997 (1) PLJR 891 (Haji A. Rahim

Khan and Ors. v. State of Bihar and Ors.).

(X) The present petitioner No. 1, namely, M/s. Hazi Shah Hussain Buksh Khan & Sons, which manufactures "gul" and one M/s. Haji A. Rahim

Khan were noticed by the State Drugs Controller, Bihar, Patna, on 28th July, 1987 and thereby, they were intimated that the manufacturer of

gul/gudka/dant manjan (dentifrice) were required to obtain a Cosmetic Licence under the provisions of the Drugs & Cosmetics Act, 1940

(hereinafter to be referred as the "Act, 1940") and the Rules, framed thereunder. By notices, the authority further asked them to make application

for licence, failing which legal action would be taken against them for being engaged in manufacture of "gal" without licence. Petitioners of the

present case and M/s. Haji A. Rahim Khan challenged the notices dated 28th July, 1987 before the Patna High Court. A learned Single Judge of

Patna High Court held that "gul" was covered by definition of Cosmetics, as provided under the Act, 1940 and, accordingly, dismissed the writ

petition. Against the said judgment, two Letters Patent Appeals were preferred, one by the present petitioner No. 1, namely, M/s. Haji Shah

Hussain Buksh Khan and Sons and another by M/s. Haji A. Rahim Khan. A Division Bench of Ranchi Bench of Patna High Court by its decision,

rendered on 17th December, 1996 in the case of Haji Rahim Khan v. State of Bihar and Ors., (supra) held that "gut is another form for

consumption of tobacco, a toxic and addictive substance and gravely injurious to human health describing "gul" as cosmetics would be strongly

opposed to public policy and held that "gul" is not a cosmetic. The Court observed that it should be left for what it is undesirable and unhealthy

concoction of tobacco rather than give it a fancy name of cosmetic and add to its advertisement potential. Thus, the Court held that the "gul" is not

cosmetics with the meaning of Section 3(aaa) of the Drugs and Cosmetics Act, and thereby set aside the judgment and order under appeal.

(XI) We may notice here that the said Notification No. GSR 444(E) dated 30.4.1992 was not brought to the notice of the Patna High Court.

Moreover, while justifying similar notification [GSR 443(E) dated 30.4.1992], issued under the Drugs and Cosmetics Act, the Supreme Court held

in paragraph 10 of the judgment of Laxmikant, (supra) as follows :

Therefore, the International Conference held in collaboration with the World Health Organisation was of the opinion that the ban on use of

tobacco in toothpaste and toothpowder should totally be imposed since it is prone to cancer. Under these circumstances, the view taken by the

Government of India imposing total prohibition on the use of tobacco in the preparation of toothpowder and toothpaste is well justified in the public

interest covered by Article 19(6) of the Constitution, though it offends the right to carry on trade guaranteed under Article 19(1) of the

Constitution. The imposition of total ban is in the public interest.

(XII) In the present case, the Notification bearing GSR No. 443 (E) dated 30th April, 1992, issued by the Central Government, has not been

challenged. It is unfortunate that this notification was not enforced. It is for the State Government and the Central Government to enforce

Notification bearing G.S.R. No. 443 (E) dated 30th April, 1992, if not yet given effect to.

5. So far as Legislative competence with regard to Notification No. 385 (2) dated 18th June, 2004, issued by 2nd respondent i.e. Secretary,

Health and Family Welfare Department, Jharkhand, Ranchi, is concerned, the question having been answered in negative against the State

Government, it being without jurisdiction, is hereby set aside, so far "gutka" and "gul" are concerned.

6. Both the writ petitions are, accordingly, allowed with the observations aforesaid. However, in the facts and circumstances, there shall be no

order as to costs.

R.K. Merathia, J.

7. I agree.