CASE NO.:
Appeal (civil) 4674 of 2004

PETITIONER:
Godawat Pan Masala Products I.P. Ltd. & Anr.

RESPONDENT:
Union of India & Ors.

DATE OF JUDGMENT: 02/08/2004

BENCH:
K.G. Balakrishnan & B.N. Srikrishna.

JUDGMENT:
J U D G M E N T

(arising out of SLP (C) No. 24449 of 2002)

With

Civil Appeal No. 4677 /2004 @ SLP (C) No.23635/02,
Civil Appeal No. 4676 /2004 @ SLP (C) No.24292/02,
Civil Appeal No. 4675 /2004 @ SLP (C) No. 533/03,
Civil Appeal No. 4678/2004 @ SLP (C) No. 834/03,
Civil Appeal No. 4679 /2004 @ SLP (C) No. 2186/03
And
Writ Petition (C) No. 173 of 2003

SRIKRISHNA, J.

Leave granted in the special leave petitions and the writ petition is admitted.

These appeals and writ petition arise from different areas and, though marginally differing on facts, raise substantially similar issues of law. They can, therefore, be conveniently disposed of by a common judgment.

The common issue raised for consideration of this Court in all these cases is the validity of notifications issued by the Food (Health) Authority under Section 7(iv) of the Prevention of Food Adulteration Act, 1954 (hereinafter referred to as the 'Act') by which the manufacture, sale, storage and distribution of pan masala and gutka (pan masala containing tobacco) were banned for different periods. We shall take the facts in the civil appeal arising out of special leave petition No. 24449 of 2002 as typical of the cases.

Facts:

Civil Appeal arising out of SLP(C) No. 24449 of 2002

The appellants manufacture gutka within the state of Maharashtra, which is stored in convenient godowns and sold both within and outside the state of Maharashtra. By a notification dated 23rd July, 2002 issued by the Commissioner, Food and Drug Administration and Food (Health) Authority for the State of Maharashtra, the manufacture, sale, storage and distribution of pan masala and gutka (pan masala containing tobacco) were banned for a period of five years with effect from 1st August, 2002. The appellants challenged the validity of this notification by a writ petition No. 2024 of 2002 before the High Court of Judicature at Bombay. By its judgment dated 18th /19th September, 2002, the division bench of the Bombay High Court dismissed the writ petition upholding the validity of the notification. Aggrieved thereby, the appellants challenge the said judgment by the present appeal.

Writ Petition No. 173 of 2003:

Petitioners Nos. 1 to 5 are associations and cooperative societies of

arecanut growers, petitioners Nos. 6 and 7 are engaged in the manufacture and sale of pan masala and gutka in the State of Karnataka. They are aggrieved by a notification dated 27th February, 2002, issued by the competent officer appointed as Food (Health) Authority for the State of Andhra Pradesh under Section 7(iv) of the Act, by which the sale of all brands of pan masala (containing tobacco) and chewing tobacco/ zarda/ khaini under any brand name was prohibited "in the interest of public health" in the entire state of Andhra Pradesh with immediate effect.
The petitioners also challenge another notification dated 19th November, 2001 issued by the Director for Public Health and Preventive Medicine and State Food (Health) Authority, Government of Tamil Nadu, under Section 7(iv) of the Act directing that no person shall himself or by any person on his behalf, manufacture for sale or store, sell or distribute: (i) chewing tobacco; (ii) pan masala; (iii) gutka, containing tobacco in any form or any other ingredients injurious to health, under whatever name or description in the State of Tamil Nadu. This notification is purported to have been issued in the "interest of public health", for a period of five years with effect on and from 19th November, 2001.
The third notification which is challenged in the writ petition is the notification dated 23rd July, 2002 issued by the Commissioner of Food and Drug Administration and Food (Health) Authority for the State of Maharashtra. By the said notification, issued purportedly in exercise of the powers under Section 7(iv) of the Act, "in the interest of public health", the sale of gutka and pan masala, containing tobacco or not containing tobacco, is prohibited for a period of five years effective from 1st August, 2002. The notification directs that "no person shall himself or any person on his behalf, shall manufacture for sale or store, sell or distribute gutka or pan masala, containing tobacco or not containing tobacco, by whatever name called.
The fourth notification challenged in the writ petition is the notification dated 24th January, 2003 issued by the Directorate of Food and Drugs Administration and Food (Health) Authority for the State of Goa. By this notification, purportedly issued under Section 7(iv) of the Act, the "sale of gutka and pan masala, containing tobacco or not containing tobacco, by whatever name called," is prohibited within the state of Goa and it is directed that "no person shall himself or any person on his behalf, shall manufacture for sale or store, sell or distribute gutka or pan masala, containing tobacco or not containing tobacco, by whatever name called."
The prohibition in the notification is made effective from 26th January, 2003.
All the four notifications are under challenge.
Civil Appeals arising out of S.L.P. Nos. 23635/02, 24292/02, 533/03, 834/03 and 2186/03

The appellants are engaged, inter alia, in the manufacture and trade of pan masala and gutka, pan masala containing tobacco and other allied tobacco products. They sell their products all over India including State of Maharashtra. They have a wide network of dealers through whom their products are sold to the public at large in the state of Maharashtra. They also have operating depots in the state of Maharashtra. The appellants challenge the notification dated 23rd July, 2002, issued by the Commissioner, Food and Drug Administration and Food (Health) Authority for the state of Maharashtra. The High Court by its common judgment dated 18th/19th September, 2002 negatived the challenge.
Civil Appeal arising out of SLP No. 24292 of 2002

The appellant carry on the business of manufacture and sale of pan masala, gutka and other tobacco related items. Aggrieved by the notification dated 19th February, 2002 issued by the Food (Health) Authority, State of Andhra Pradesh, prohibiting the sale of pan masala under any brand name with a emblem of gutka, containing tobacco, within the state of Andhra Pradesh, with immediate effect, and the notification dated 27th February, 2002 issued by the same authority which prohibited the sale of all brands of pan masala containing tobacco and chewing tobacco/zarda/khaini under any brand name in the entire State of Andhra Pradesh, with immediate effect, the appellant challenged the validity of both notifications before the High Court of Andhra Pradesh. The division bench of the high court by its judgment dated 16th August, 2002 dismissed the writ

petition. Being aggrieved thereby, the appellant is before this Court.

Core Issue:

These appeals and the writ petition raise the common issue as to the power of the Food (Health) Authority to issue an order of prohibition, whether permanently or quasi-permanently, under Section 7(iv) of the Act.

Challenge:

The broad grounds of challenge formulated by the appellants/petitioners are as under:

1. The Act vests the power to declare a substance as injurious to health only with the Central Government under Section 23 of the Act and no such power is vested with the State Government.
2. Each of the manufacturers has been issued a licence to manufacture the banned product by the Central Government under the provisions of the Act. As long as the conditions stipulated in the licence are fulfilled, and there is no violation of the terms of the licence or the provisions of the concerned statute, it is not open to the state Government, by any administrative order, to prohibit the manufacture of the concerned product undertaken under a licence issued by the Central Government.
3. The power of the State Government to frame rules under Section 24 of the Act is extremely narrow and limited to the field which is not covered by Section 23, the exclusive domain of the Central Government.
4. The Act is concerned with the prevention of adulterated articles of food and not intended to prohibit any article used as food or otherwise.
5. The impugned notification dated 23rd July, 2002, issued by the State of Maharashtra operates extra territorially, and, to that extent, is ultra vires of the powers of the State.
6. By enacting the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003, (Act 34 of 2003), Parliament has evinced its intent to occupy the whole field with regard to prohibition of advertisement and regulation of trade and commerce, production, supply and distribution of tobacco products. While the central legislation prohibits the sale of tobacco products only to persons below age of 18 years, the impugned notification purports to impose a wholesale ban without any qualification. Thus, there is a conflict between the powers exercisable under two central statutes dealing with the same subject and, therefore, provisions of the Act 34 of 2003 must prevail.

Legal provisions:

In order to appreciate the contentions of the learned counsel, it will be necessary to briefly notice the relevant provisions of the Act. As the preamble of the Act indicates, "it is an Act to make provision for the prevention of adulteration of food." Section 2(ia) defines what is 'adulterated food'. Broadly speaking, the definition covers situations where a food article is sub-standard, or contains injurious ingredients or has become injurious to health by reason of packing or keeping under unsanitary conditions or having become contaminated or is otherwise not fit for consumption. The definition also extends to cases of articles which fall below the prescribed standards of purity or quality. The Act also deals with misbranding of food articles, which is not of concern to us for the present. For the purpose of administration of the Act, any urban or rural area may be declared by the Central Government or the State Government by a notification to be a 'local area' for the purpose of the Act. In relation to such local area, an officer is appointed by the Central Government or the State Government by notification in the Official Gazette to be in-charge of the Health administration in such area with such designation as specified therein and such officer is defined to be a 'Local (Health) Authority' by Section 2(viiia). Section 2(vi) defines 'Food (Health) Authority' as the Director of Medical and Health Services or the Chief Officer in-charge of Health administration in a State, by whatever designation he is known, and includes any officer empowered by the Central Government or the State Government, by notification in the Official Gazette, to exercise the powers

and perform the duties of the Food (Health) Authority under the Act with respect to such local area as may be specified in the notification. Section 7, upon which most of the arguments turn, needs to be noticed. Section 7 reads as under:

"7. Prohibitions of manufacture, sale, etc., of certain articles of food. - No person shall himself or by any person on his behalf manufacture for sale, or store, sell or distribute -

(i) any adulterated food;
(ii) any misbranded food;
(iii) any article of food for the sale of which a licence is prescribed, except in accordance with the conditions of the licence;
(iv) 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;
(v) any article of food in contravention of any other provision of this Act or of any rule made thereunder; or
(vi) any adulterant.

Explanation.-For the purposes of this section, a person shall be deemed to store any adulterated food or misbranded food or any article of food referred to in clause (iii) or clause (iv) or clause (v) if he stores such food for the manufacture therefrom of any article of food for sale."

Section 22A empowers the Central Government to give such directions as it may deem necessary to a State Government regarding the implementation of the Act. Section 23 empowers the Central Government to make rules to carry out the provisions of the Act. In particular, and without prejudice to the generality of the rule making power, the power of the Central Government includes the one in clause (f). Section 24 of the Act is the section which grants rule making power to the State Government. The State Government may, after consultation with the Committee, and subject to the condition of previous publication, thereunder make rules for the purpose of giving effect to the provisions of the Act in matters not falling within the purview of section 23. Sub section (2) of Section 24 grants power to the State Government to make rules with regard to the powers and duties of the different authorities under the Act. Prescription of forms of licences for the manufacture for sale, storage, sale and distribution of articles of food, the conditions subject to which such licences may be issued and the fees payable therefor, analysis of any article of food or matter and provision for further delegation of power by the State Government to the Food (Health) Authority or the subordinate authorities are the matters covered within this delegated power.

Part IX of the Prevention of Food Adulteration Rules, 1955 (hereinafter referred to as the 'Rules') deals with the conditions for sale and licence. Rules 49 and 50 lay down detailed conditions applicable to different types of licences granted for manufacturing of different products used as food articles.

In Appendix B there is prescription of definitions and standards of quality of different food articles. Of relevance to us is paragraph A.30 which deals with pan masala. Paragraph A.30 reads thus:

"A.30 PAN MASALA means the food generally taken as such or in conjunction with pan, it may contain-

Betelnut, lime, coconut, catechu, saffron, cardamom, dry fruits mulathi, sabermusa, other aromatic herbs and spices, sugar, glycerine, glucose, permitted natural colours, menthol and non-prohibited flavours.

It shall be free from added coaltar colouring matter, and any other ingredient injurious to health.

It shall also conform to the following standards, namely:-

Total ash.-Not more than 8.0 per cent by weight (on dry basis).

Ash insoluble in dilute hydrochloric acid.-Not more than 0.5 per cent by weight (on dry basis)."

Significantly, in this specification of standard the prescription is that the article is "free from added coaltar colouring matter, and any other ingredient injurious to health". It is also required to conform to the prescribed standard with regard to total ash.

As far as the rules made by the State Government are concerned, the Maharashtra Prevention of Food Adulteration Rules, 1962 and the Goa, Daman and Diu Prevention of Food Adulteration Rules, 1982 may be noticed. The relevant Goa rules are as under:

"3. Powers and duties of Food (Health) Authority:

(1) The Director of Health Services for the Union Territory of Goa, Daman and Diu being the Chief Officer in charge of the Health Administration in the Union Territory shall be the Food (Health) Authority.

(2) The Food (Health) Authority shall be responsible for the general superintendence of the administration and enforcement of the Act.

(3) The Food (Health) Authority shall, for the purpose of giving effect to the provisions of the Act, have control over the Public Health Laboratories maintained by the Government and Local Authorities and Local (Health) Authorities, Licensing Authorities, the Public Analyst and Food Inspectors appointed under the Act.

(4) The Food (Health) Authority may give to a Local (Health) Authority such directions as he may consider necessary in regard to any matter connected with the enforcement of the Act and the Rules made thereunder and the Local (Health) Authority shall comply with such directions.

(5) The Food (Health) Authority whenever called upon to do so shall advise the Government in matters relating to the administration and enforcement of the Act.

(6)(a) If the Union Territory or any part thereof is visited by, or threatened with any outbreak of any infectious diseases, the Food (Health) Authority shall ascertain the cause of such outbreak of the infectious disease.

(b) If in the opinion of the Food (Health) Authority the outbreak of any infectious disease is due to any article of food, the Food (Health) Authority shall take such measures as it shall deem necessary to prevent the outbreak of such disease or the spread thereof.

(7) The Food (Health) Authority may issue from time to time guidelines for the efficient working of the Act.

(8) The Food (Health) Authority may from time to time issue guidelines to the Public Analyst for efficient working of the Act.

(9) The Food (Health) Authority may also have powers to inspect, control and superintend the operation of other functionaries working under the Act viz. Licensing Authority, Local Authority etc. etc.

4. Powers and duties of Local (Health)Authority:

(1) Subject to the provisions of sub-rule (3), the Local (Health) Authority shall be responsible for the proper day to day administration and enforcement of the Act and the Rules within its jurisdiction.

(2) The Local (Health) Authority or Health Officer/Medical Officer authorised by it shall be the Licensing Authority for local area concerned.

(3) The Local (Health) Authority or Health Officer/Medical Officer/Food Inspector authorised by it shall have powers to inspect all the establishments engaged in the manufacture, for sale or for distribution of articles of food in respect of which a licence is required under the Act and the Rules.

5. Licences :

(1) Any person desiring for the manufacture for sale, for the storage, for the sale or for the distribution of articles of food in

respect of which a licence is required under Rule 48A and Rule 50 of the Central Rules, shall apply for a licence in Form A to the Licensing Authority concerned.

(2) Any person desiring for the manufacture for sale, for the storage, for the sale or for the distribution of articles of food in a mobile van shall apply in Form B to the Licensing Authority and if such mobile van is to move in any one or more than one local area to the Local (Health) Authority, District of Goa.

(3) The applicant shall furnish in the application in Form A detailed information regarding location of the business premises which are intended for the manufacture for sale, for the storage, for the sale or for the distribution of any article of food and in Form B the details about the locality in which, the mobile van is intended to be moved and its registration number issued by the Road Transport Authority.

(4) On receipt of such application, the Licensing Authority shall, if on inspecting the said premises is satisfied that the premises are free from sanitary defects and are in proper hygienic conditions and the applicant complies with other conditions for holding licence, grant the applicant a licence in Form as specified below on payment of fees laid down in the Schedule appended to the rules.

(i) Form 'C' in respect of any premises.
(ii) Form 'D' in respect of any mobile van.
(iii) Form 'E' in respect of any temporary stall.

(5) If the information furnished in the application appears to be incorrect or incomplete or if the prescribed fee has not been paid, the Licensing Authority shall make such enquiry as he considers necessary and after giving the applicant an opportunity of proving the correctness and completeness of the information so furnished, may if he is satisfied that the applicant is eligible for the licence applied for grant or renew the licence.

(6) If the articles of food are manufactured, stored or exhibited for sale at different premises situated in more than one local area, separate applications shall be made and a separate licence shall be issued in respect of such premises not falling within the same local area.

Provided that the itinerant vendors who have no specified place of business, shall be licensed to conduct business in a particular area within the jurisdiction of the Licensing Authority.

(7) The licensee shall abide by the provisions of the Act and the Rules made thereunder and the conditions of licence granted to him.

6. Fees for grant and renewal of licences:

The fees to be paid for the grant or renewal of licence shall be as specified in the Scheduled appended to the Rules.

7. Validity of licence:

A licence granted under these rules shall be valid for the period beginning on the date of its issue and ending on 31st day of March, next following.

8. Renewal of licences :

A licence granted under the rules may be renewed by the Licensing authority on an application made in that behalf, thirty days before the day on which such licence is due to expire and on payment of fees specified in the Schedule.

Provided that, if the application for renewal is made after the expiry of the licence but not later than one month from the date of such expiry, the licence may be renewed only on payment of a fee equal to one and half times of the fee payable for the renewal of the licence.

9. Conditions for grant or renewal of licences :

The Licensing Authority shall not grant or renew the licence until such officer as may be specified by him by general or special order has inspected the place in respect of which the licence for grant or renewal is applied for and has recommended the grant or renewal of the licence. The Licensing Authority shall however use his own judgment in granting/renewal of licences."

Rule 13 deals with the circumstances under which the Licensing Authority may by order in writing refuse to grant or renew a licence. Rule 14 prescribes the procedure for cancellation or suspension of the validity of a licence. Rule 15 gives a right to appeal to any person aggrieved by an order of the Licensing Authority passed under rule 13 or rule 14.

The relevant rules of the Maharashtra Prevention of Food Adulteration Rules, 1962 are as under:

"3. Food (Health) Authority and its powers and duties -

(1) The Director of Public Health for the State of Maharashtra being the Chief Officer-in-charge of the Health Administration in the State of Maharashtra shall be the Food (Health) Authority (hereinafter referred to as the authority).

(2) The authority shall be responsible for the general superintendence of the administration and enforcement of the Act.

...

(6)(a) If the State or any part thereof is visited by, or threatened with an outbreak of any infectious disease, the authority shall ascertain the cause of such outbreak of the infectious disease.

(b) If in the opinion of the authority the outbreak of any infectious disease is due to any article of food, the authority shall take such measures as it shall deem necessary to prevent the outbreak of such disease or the spread thereof."

Rule 5 deals with licences and the manner of suspension or cancellation of licences.

Submissions :

Ex visceribus actus:

The first contention urged on behalf of the appellants is that Section 7 of the Act is not declaratory of the power of any authority, but merely of the consequences of certain acts. The section prohibits the manufacture for sale, store or distribution of (i) any adulterated food; (ii) any misbranded food; (iii) any article of food for the sale of which a licence is prescribed, except in accordance with the conditions of the licence; (iv) 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; (v) any article of food in contravention of any other provision of this Act or of any rule made thereunder; or (vi) any adulterant. Although, Section 2(vi) defines as to who is a Food (Health) Authority, there is no corresponding provision in the Act which delineates the powers of the Food (Health) Authority. On the other hand, Section 24(2) of the Act empowers the State Government to "define the powers and duties of the Food (Health) Authority, local authority and Local (Health) Authority under this Act". The source of the powers of the Food (Health) Authority is to be found only under the rules, if any, made under Section 24(2) of the Act, subject to the restriction that it can be made only "for the purpose of giving effect to the provisions of this Act in matters not falling within the purview of Section 23".

Learned counsel for the appellants contend that in view of the nature of the limitations placed on the State Government's power under Section 24(1), a reading of Sections 23 and 24 would lead to the irresistible conclusion that the powers exercisable by the State Government under Section 24 can only be in the field not occupied by Section 23. As we have already noticed, Section 23(1A)(f) empowers the Central Government to prescribe rules for prohibiting the sale or defining the conditions of sale of any substance which may be "injurious to health" when used as food or

restricting in any manner its use as an ingredient in the manufacture of any article of food or regulating by the issue of licences the manufacture for sale of any article of food. Learned counsel, therefore, contend that the power of the Food (Health) Authority has to be necessarily found under the rules made by the State Government and subject to the limitation that they cannot operate in the field covered by Section 23. Since Section 23(1A)(f) empowers the Central Government to make rules for prohibition of any substance which may be injurious to health, it is contended that the state Food (Health) Authority is denuded of such power.

There appears to be merit in the contentions of the appellants. Rule 3 of the Maharashtra Prevention of Food Adulteration Rules, 1962 and the corresponding rule in the Goa, Daman & Diu Prevention of Food Adulteration Rules, 1982 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. In such a contingency, the Food (Health) Authority is empowered to take all such action as it deemed necessary to ascertain the cause of such infectious disease and to prevent the outbreak of such disease or the spread thereof. Certainly, such power would include the power to ban "for the time being" the sale of such injurious articles of food. Hence, correspondingly Section 7(iv) of the Act 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." In other words, when a contingency envisaged by Rule 3, or one similar thereto, arises and it becomes necessary for the Food (Health) Authority to take immediate steps, the Food (Health) Authority is empowered to prohibit "for the time being" the concerned injurious article and to take any appropriate step "in the interest of public health".

On the collocation of the statutory provisions, we are unable to accept the contention of the learned counsel for the States that clause (f) of Section 7 of the Act is an independent source of power. This conclusion of ours is also supported by the legislative history. Prior to the amendment by Act 49 of 1964, with effect from 1.3.1965, clause (iv) of Section 7 read as under:

"Any article of food the sale of which is for the time being prohibited by the Food (Health) Authority with a view to preventing the outbreak or spread of infectious diseases."

Learned counsel for the State Governments contend that as a result of the amendment and the substitution of the words "in the interest of public health" for the words "with a view to preventing the outbreak or spread of infectious diseases", the legislature has expanded the power of Food (Health) Authority so that it can act to prohibit the sale of any article, the only limitation being that the power exercised is "in the interest of public health". It is not possible for us to accept this submission. It is, undoubtedly, true that the intention of Parliament in bringing forth the amendment to clause (iv) of Section 7 was to expand the area of operation of the said clause. As originally intended, it was to operate only in the event of a contingency aimed at preventing the outbreak or spread of infectious diseases. This certainly was restricted. There could be several situations in which there may not be any apprehension of outbreak or spread of infectious diseases and yet it may become necessary for the Food (Health) Authority to act by taking appropriate steps to control a situation which has arisen. It is with this view that the prohibition in clause (iv) of Section 7 of the Act was expanded to apply to such contingencies also. It is unfortunate that, despite the amendment made in clause (iv) of Section 7 of the Act, (by Act 49 of 1964) the rules have not been correspondingly updated. Going strictly by the state rules, which actually determine the extent of the power of the Food (Health) Authority, it appears to us that the arguments of the State Governments that this amendment was intended to give a carte blanche to the Food (Health) Authority cannot be accepted. On the contrary, the construction canvassed by the appellants appears to be more reasonable. We are inclined to the view 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. It is not possible to accept the State Governments' contention that clause (iv) of Section 7 of the Act is an independent provision which clothes the Food (Health) Authority with the power to issue an order of ban for a long period.

Mr. Lalit, learned counsel for the state of Maharashtra, took us through the affidavit filed by the state Government and the voluminous data presented therein by the state to indicate that gutka and pan masala are addictive and, in the long run, deleterious to human health. He also referred to certain scientific reports on the subject by the National Toxicology Centre, an International Agency for Research on Cancer, part of the World Health Organisation, and so on. In our view, it is not necessary to make any pronouncement thereupon. Even if we accept that the scientific data supports the view that chewing of pan masala with or without tobacco is injurious to health, the question which remains to be answered is whether the Food (Health) Authority in the state has the power of prohibiting the manufacture for sale, or storage, sale or distribution of any article assuming it to be injurious to health. A contrast of the powers of the Central Government with those of the state Government, with particular reference to the power of the Central Government to make rules to prohibit the manufacture, sale and distribution of such articles which are injurious to health when used as food, enumerated in clause (f) of sub-section(1A) of Section 23 of the Act, leads us to believe that, even assuming that gutka and tobacco products are injurious to health, the power of their prohibition is only vested with the Central Government and not with the state Food (Health) Authorities. The State (Food) Health authorities have only a limited power of issuing an order of prohibition for a short term while they investigate local problems and take appropriate measures to control the situation. Beyond that, the state authorities have no power as urged by the learned counsel for the state Governments and as accepted in the impugned judgment of the Bombay High Court.

It is an accepted canon of Construction of Statutes that a statute must be read as a whole and one provision of the Act should be construed with reference to other provisions of the same act so as to make a consistent, harmonious enactment of the whole statute. The court must ascertain the intention of the legislature by directing its attention not merely to the clauses to be construed, but to the scheme of the entire statute. The attempt must be to eliminate conflict and to harmonise the different parts of the statute for it cannot be assumed that Parliament had given by one hand what it took away by the other. [See in this connection Commissioner of Income Tax v. Hindustan Bulk Carriers and C.I.T. Central, Calcutta v. National Taj Traders .] This Court in O.P. Singla and Anr. v. Union of India and Ors. (vide para 17), said: "However, it is well recognised that, when a rule or a section is a part of an integral scheme, it should not be considered or construed in isolation. One must have regard to the scheme of the fasciculus of the relevant rules or sections in order to determine the true meaning of any one or more of them. An isolated consideration of a provision leads to the risk of some other inter-related provision becoming otiose or devoid of meaning."

Against the background of these principles, it is not possible to agree with the view taken by the High Court that Section 7(iv) of the Act is an independent source of power of such amplitude as held. In our view, the power of the state under Section 7(iv) of the Act is statutory; absolute to the extent provided therein, and limited to the extent indicated by Section 23(1A) of the Act.

Learned counsel for the appellants urged that the expression "for the time being" used in clause (iv) of Section 7 of the Act is significant and indicates the transient nature of the power that is conferred on the Food (Health) Authority under the rules to ban or otherwise take any other appropriate action in relation to an article of food even if it be "in the interest of public health". This too lends support to their contention.

Learned counsel for the state of Maharashtra and the learned Advocate General for the state of Goa relied on the judgments of this Court in Pukhraj Jain v. Padma Kashyap and Anr. and Jivendra Nath Kaul v. Collector/District Magistrate and Anr. to contend that the expression

"for the time being" would suggest the time period for which the order is in force and not necessarily the transient nature of the order. Even if this be correct, the fact still remains that the state authority has no power to make an order of prohibition, either of a permanent nature or enduring for such a long time as to be deemed to be permanent.

Contemporanea expositio:

The appellants point out that, despite the amendment having been made in the year 1964, even the state of Maharashtra kept on corresponding with the Central Government to suggest that it was necessary to carry out an amendment in the law to enable it to permanently ban the article concerned. Reliance is placed on pp. 152 - 154, Vol. II of S.L.P. No. 834 of 2003, the annexure to the counter affidavit filed by F.K. Pandey on behalf of the Government of India. Particular reference is made to the letter dated 1st August, 1997 from the Commissioner, Food and Drug Administration and Food (Health) Authority to the Secretary, Medical Education and Drug Department, Mumbai about the ill-effects of gutka and requesting the state Government to amend the Maharashtra Prevention of Food Adulteration Rules and also to make a request to the Central Government to amend the Prevention of Food Adulteration Act so as to enable the state of Maharashtra to exercise the powers of a permanent ban. While this may not be really conclusive, it certainly indicates the manner of the state authority viewing its power and the rules under which it was exercising the power. The court can certainly take into account this situation on the doctrine of Contemporanea expositio.

It is significant that, while dealing with the powers of food inspector under Section 10(1)(c) of the Act, the Act provides that a food inspector shall have power, with the previous approval of the Local (Health) Authority having jurisdiction in the local area concerned, or with the previous approval of the Food (Health) Authority, to prohibit the sale of any article of food in the interest of public health. Secondly, this clause does not include the phrase "for the time being". If the arguments of the learned counsel for the state Governments were to prevail, then this provision would give to the food inspector, a lower authority in the hierarchy, an extraordinary power of banning permanently - which power can only be the result of a policy decision to be taken at the highest level of the state Government. In our view, it is not possible to interpret these clauses disparately or disjunctively. Clause (iv) of Section 7 and clause (c) of sub-section (1) of Section 10 of the Act and their interplay unmistakably suggest that the power conferred on the Food (Health) Authority and the food inspector, being derived from the Rules made in exercise of the powers exercised under Section 24 of the Act are necessarily subservient to the powers derivable from the rules made under Section 23 of the Act. Hence, neither the Food (Health) Authority, nor the food inspector can be said to have such power which could be available to the Central Government by prescription of a rule in exercise of power under Section 23(1A)(f).

Reliance was placed by the respondents on the decision of a learned Single Judge in Gandhi Irwin Salt Manufacturers Association v. The Government of Tamil Nadu . Having perused the judgment, we are unable to approve of it. We notice that neither the interplay between Sections 23 and 24, nor the question as to whether Section 24 can be the source of power, is discussed or decided therein.

Conflict with Central Act 34 of 2003:

Mr. Nariman, learned counsel appeared for the appellants in the appeals arising out of SLP Nos. 23635 of 2002 and 533 of 2003, attacked the judgment of the Bombay High Court from a different perspective. He contends that the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003, (Act 34 of 2003), referable to entry 52, List I and entry 18, List III to the Seventh Schedule of the Constitution of India, now occupies the entire field in relation to tobacco. The preamble to the Act 34 of 2003 reads as under:

" An Act to prohibit the advertisement of, and to provide for the regulation of trade and commerce in, and production, supply

and distribution of, cigarettes and other tobacco products and for matters connected therewith or incidental thereto"

The Statement of Objects and Reasons accompanying the Bill reads as under:

"1. Tobacco is universally regarded as one of the major public health hazards and is responsible directly or indirectly for an estimated eight lakh deaths annually in the country. It has also been found that treatment of tobacco related diseases and the loss of productivity caused therein cost the country almost Rs.13,500/- crore annually, which more than offsets all the benefits accruing in the form of revenue and employment generated by tobacco industry. The need for a comprehensive legislation to prohibit advertising and regulation of production, supply and distribution of cigarettes and tobacco products was recommended by the Parliamentary Committee on Subordinate Legislation (Tenth Lok Sabha) and a number of points suggested by the Committee on Subordinate Legislation have been incorporated in the Bill.

2. The proposed Bill seeks to put total ban on advertising of cigarettes and other tobacco products and to prohibit sponsorship of sports and cultural events either directly or indirectly as well as sale of tobacco products to minors. It also proposes to make rules for the purpose of prescribing the contents of the specified warnings, the languages in which they are to be displayed, as well as displaying the quantities of nicotine and tar contents of these products. For the effective implementation of the proposed legislation, provisions have been proposed for compounding minor offences and making punishments for offences by companies more stringent. The objective of the proposed enactment is to reduce the exposure of people to tobacco smoke (passive smoking) and to prevent the sale of tobacco products to minors and to protect them from becoming victims of misleading advertisements. This will result in a healthier life style and the protection of the right to life enshrined in the Constitution. The proposed legislation further seeks to implement article 47 of the Constitution which, inter alia, requires the State to endeavour to improve public health of the people.

3. The Bill seeks to achieve the aforesaid objects."

The aforesaid internal evidence in the statute, by reason of the preamble, and the external evidence in the Statement of Objects and Reasons, indicate that Parliament has evinced its intention to bring out a comprehensive enactment to deal with tobacco and tobacco products. However, the provisions of the statute do not suggest that Parliament had considered it to be expedient to ban tobacco or tobacco products in public interest or to protect public health. Act 34 of 2003 passed by Parliament does not totally ban the manufacture of tobacco or tobacco products. Section 6 merely prohibits sale of cigarettes and tobacco products to a person under the age of eighteen years. There are stringent provisions made in the Act containing the prohibition of advertisement of cigarettes and tobacco products. Section 3(p) defines the expression "tobacco products" as the products specified in the Schedule. Entry 8 of the Schedule to the Act reads "pan masala or any chewing material having tobacco as one of its ingredients (by whatever name called)." Thus, pan masala or any chewing material having tobacco is also one of the products in respect of which the Act could have imposed a total prohibition, if Parliament was so minded. On the other hand, there is only conditional prohibition of these products against sale to persons under eighteen years

of age.
Against this backdrop of Act 34 of 2003, learned counsel contended that inasmuch as Act 34 of 2003 occupies the whole field of tobacco and tobacco products and does not completely ban the sale of 'tobacco products' except to under aged persons, while the impugned notification expressly bans manufacture or sale to any person of the very same product (viz. Pan masala and gutka), there is legislative repugnancy which calls for resolution. Reliance was placed on the judgment of this Court in Deep Chand v. The State of U.P. and Ors. wherein this Court considered the constitutional validity of a state enactment. This Court's earlier judgment in Ch. Tika Ramji & Ors. v. The State of U.P. & Ors. and Zaverbhai Amaidas v. The State of Bombay were approved and the test of repugnancy was formulated thus:
"Repugnancy between two statutes may thus be ascertained on the basis of the following three principles
(1) Whether there is direct conflict between the two provisions;
(2) Whether Parliament intended to lay down an exhaustive code in respect of the subject matter replacing the Act of the State Legislature; and
(3) Whether the law made by Parliament and the law made by the State Legislature occupy the same field."

Learned counsel contended that when two legislations referable to the same legislative authority are inconsistent with each other, then the later enactment is deemed to have impliedly repealed the previous one and referred to the observations of this Court in State of Orissa v. M.A. Tulloch and Co. :
"The entire theory underlying implied repeals is that there is no need for the later enactment to state in express terms that an earlier enactment has been repealed by using any particular set of words or form of drafting but that if the legislative intent to supersede the earlier law in manifested by the enactment of the provisions as to effect such supersession, then there is in law a repeal notwithstanding the absence of the word 'repeal' in the later statute. Now, if the legislative intent to supersede the earlier law is the basis upon which the doctrine of implied repeal is founded could there be any incongruity in attributing to the later legislation the same intent which s. 6 presumes where the word 'repeal' is expressly used. So far as statutory construction is concerned, it is one of the cardinal principles of the law that there is no distinction or difference between an express provision and a provision which is necessarily implied, for it is only the form that differs in the two cases and there is no difference in intention or in substance."

The learned counsel relied on Vijay Kumar Sharma & Ors. v. State of Karnataka and Ors. . The observation of this Court in the majority judgment of this Court is that if the later legislation is on the same subject and the legislative intent is to occupy the whole field, then the later legislation prevails.
It is submitted that a reading of the Act 34 of 2003 clearly suggests that it is a special law intended to deal with tobacco and its product. The Prevention of Food Adulteration Act, 1954 is a general law dealing with adulteration of food articles and a tobacco product is incidentally referred to in the said law in the context of prevention of adulteration. In case of conflict between a special law and a general law, even if both are enacted by the same legislative authority, the special law must displace the general law to the extent of inconsistency. The operation of the maxim generalia specialibus non derogant has been approved and applied by this Court in such situations. (See in this connection: U.P. State Electricity Board and Ors. v. Hari Shanker Jain & Ors. , Gujarat State Cooperative Land Development Bank Ltd. v. P.R. Manded and Ors. , The LIC of India v. D.J. Bahadur & Ors. , Jain Ink Manufacturing Co. v. LIC of India & Anr. , Prof. Sumer Chand v. Union of India and Ors. and Allahabad Bank v. Canara Bank & Anr. .)

Respondents contend that inasmuch as Act 34 of 2003, though passed by Parliament, and assented to by the President, is not brought into force by the Central Government by notification, the question of conflict with the provisions of the Act does not arise. We need not consider this contention since Act 34 of 2003 has now been brought into force w.e.f. 1st May, 2004. In any event, as pointed out in Pt. Rishikesh and another v. Salma Begum there is distinction between "making law" and "commencement of the operation of an Act" and a situation of conflict can arise even when a law has been made and not brought into force.

Articles 14 and 19 of the Constitution of India:

Mr. Shanti Bhushan, learned counsel for the appellant in SLP No. 2186 of 2003, urged that the said appellant manufactures Rajnigandha pan masala which contains no tobacco. Though there might be arecanut in it, there is no trace of magnesium carbonate in the product. Assuming that traces of magnesium carbonate were to be formed during consumption of the product along with lime, the exercise of power should have been restricted to banning pan masala containing magnesium carbonate and not wholesale banning of pan masala, irrespective of the content of magnesium carbonate. The learned counsel contended that the order made under Section 7(iv) of the Act is bad for it is an unreasonable and excessive restriction on the Fundamental Right to carry on trade or business guaranteed under Article 19(1)(g) of the Constitution of India. The learned counsel highlighted the unreasonableness by reference to the provisions of the Act and the Rules and the specific situation contemplated in Appendix B at Paragraph A.25.02.01, which gives the definition and standards of quality with reference to chewing gum and bubble gum, for which magnesium carbonate, inter alia, is a permitted ingredient. He therefore contends that magnesium carbonate is not per se injurious to health for otherwise it would never have been permitted in any article of food. There is no material on the basis of which it can be demonstrated that the very same magnesium carbonate would become injurious to health if it arises on account of mixing of traces of magnesium in arecanut and carbonate in lime According to the learned counsel, this is a clear case of non-

application of mind, notwithstanding the medical research papers and data made available in the affidavit filed by the state Government.

We are unable to discern as to how the very same magnesium carbonate would become injurious as a result of combined chewing of arecanut and lime, particularly when it is not the case of the state Government that Rajnigandha pan masala itself contains magnesium carbonate. It is permissible under Article 19(6) to impose a reasonable restriction "in the interest of general public". Assuming that such a restriction can be imposed, even if by legislation intended to prohibit manufacture, sale or storage of articles harmful or injurious to health, the restriction has to be commensurate with the danger posed. On a conspectus of the facts, we are unable to uphold the prohibition imposed by the impugned notification as a restriction which can pass the test of reasonableness under Article 19(6) of the Constitution of India for two reasons. First, there is no demonstrated danger to the public health by magnesium carbonate by consumption of Rajnigandha pan masala; secondly, even if there were, the prohibition could only have extended to pan masala containing magnesium carbonate and could not be wider than that.

Learned counsel for the appellants urge that if Section 7(iv) is construed in the manner as contended by the State, then it would become unconstitutional. It is contended that if Section 7(iv) is construed as giving the authority to ban articles of food, even though not adulterated, then the sweep of the section would go out of entry 18 of List III of the Constitution of India. ("adulteration of foodstuffs and other goods.") and intrude into the domain of entry 6 of List II ("public health and sanitation; hospitals and dispensaries") which is the exclusive domain of the state Government. If the court were to read Section 7(iv) in the manner suggested by the States, then it would be ultra vires the legislative

competence of Parliament. It is the duty of the court to attempt to read every legislation in such manner as to uphold its constitutional validity. The learned counsel contend that in order to uphold the legislative competence of the provisions of the Act, the sweep of Section 7(iv) must be confined to the domain of 'adulteration of food stuffs and other articles' without entering into the domain of "public health". Reading down the statute in order to upheld its constitutional validity is a device well known to the constitutional courts. [See in this connection State of Karnataka and Anr. v. Shri Ranganatha Reddy & Anr. , B.R. Enterprises and Ors. v. State of U.P. and Ors. , and State of A.P. v. National Thermal Power Corpn. Ltd. and Ors.]

Mr. Lalit, learned counsel for the States, however, supported the findings of the division bench of the Bombay High Court that the constitutional validity of Section 7(iv) was never in danger as it could be supported on the doctrine of pith and substance. He contends that in pith and substance the Prevention of Food Adulteration Act, 1954 deals with the subject of adulteration, though, incidentally, by reason of Section 7(iv) it may make an incursion into the domain of "public health" which is the exclusive province of the State legislature. This contention appears to have been accepted by the impugned judgment of the High Court of Bombay.

In fact, the High Court goes to the extent of saying that the power of the Food (Health) Authority under Section 7(iv) is much wider than the power of the Central Government under the Rules made under Section 23(1A)(f) on the reasoning that while the power of the Central Government under a rule made under Section 23(1A)(f) extends to the prohibition of the sale of "any substance which may be injurious to health when used as food or as an ingredient in the manufacture of any article of food" there is no such restriction under Section 7(iv) which is posited as an independent source of power. It is urged that by exercise of the power invested in the Food (Health) Authority under clause (iv) of Section 7, any article, irrespective of whether it is used as food or as an ingredient in the manufacture of any article of food, may be prohibited as long as the prohibition is "in the interest of public health".

We find it difficult to agree with the submissions of Mr. Lalit. That all provisions of a statute have to be read harmoniously and any interpretation as to be ex visceribus actus, is a trite doctrine of construction of statutes. Undoubtedly, if Section 7(iv) is read in isolation, it gives the impression that this is an independent source of power, not subject to any limitation other than the guideline "in the interest of public health". But, when the scheme of the Prevention of Food Adulteration Act is analysed in the light of its preamble and the Statement of Objects and Reasons, it becomes clear that there is no independent source of power under Section 7(iv). Had it been so, there was no need for the rule making power of the State Government under Section 24(2)(a) to define the powers and duties of the Food (Health) Authority or local authority and Local (Health) Authority under the Act. The interplay of sections 23(1A)(f) and 24(2)(a) read with the existing rules in the different states, even after the amendment of Section 7(iv) by the Act 49 of 1964, leads us to conclude that the contention of the states in this regard cannot be accepted.

Learned counsel for the appellants contend that the impugned notification is violative of the fundamental rights guaranteed under Article 19(1)(g) as it is excessively restrictive in nature. While the notification seeks to ban pan masala which does not include tobacco, it does not at the same time ban tobacco in any form. The literature produced by the State of Maharashtra before the High Court suggested, undoubtedly, that consumption of tobacco in any form was injurious to health, but that consumption of pan masala was likely to be addictive and lead to hyper-magnesia. Strangely, the States did not ban chewing tobacco or other tobacco products which contain almost cent per cent tobacco, but they banned the sale of gutka which contains only about 6 per cent of tobacco and pan masala, which contains no tobacco whatsoever, even accepting on the correctness of the material presented. Further, the literature produced by the States indicates that pan masala is addictive amongst children and, therefore, likely to be injurious to their health in the long run. Assuming this to be true, the restriction could only have been on sale to under-aged

persons and not by way of a total ban. Thus, in our view, the impugned notification is violative of the fundamental right of the appellants guaranteed under Article 19(1)(g), both because it is unreasonable and also because it is excessive in nature. A contrast with the provisions of the Act 34 of 2003 in this regard would drive home the point.

While dealing with the nature of a reasonable restriction on the fundamental rights under Article 19(1)(g), this Court observed in Mohd. Faruk v. State of Madhya Pradesh and Ors. as under:

"The impugned notification, though technically within the competence of the State Government, directly infringes the fundamental right of the petitioner guaranteed by Art. 19(1)(g), and may be upheld only if it be established that it seeks to impose reasonable restrictions in the interest of the general public and a less drastic restriction will not ensure the interest of the general public. The Court must in considering the validity of the impugned law imposing a prohibition on the carrying on of a business or profession, attempt an evaluation of its direct and immediate impact upon the fundamental rights of the citizens affected thereby and the larger public interest sought to be ensured in the light of the object sought to be achieved, the necessity to restrict the citizen's freedom, the inherent pernicious nature of the act prohibited or its capacity or tendency to be harmful to the general public, the possibility of achieving the object by imposing a less drastic restraint, and in the absence of exceptional situations such as the prevalence of a state of emergency - national or local - or the necessity to maintain essential supplies, or the necessity to stop activities inherently dangerous, the existence of a machinery to satisfy the administrative authority that no case for imposing the restriction is made out or that a less drastic restriction may ensure the object intended to be achieved."

The impugned notification fails on this test of reasonable restriction.

Res extra commercium:

Appellants next contend that the assumption of the High Court that pan masala or gutka is res extra commercium is wholly incorrect. The concept of res extra commercium was expounded in the Constitutional Bench of this Court in Khoday Distilleries Ltd. and Ors. v. State of Karnataka and Ors. thus:

"58. We also do not see any merit in the argument that there are more harmful substances like tobacco, the consumption of which is not prohibited and hence there is no justification for prohibiting the business in potable alcohol. What articles and goods should be allowed to be produced, possessed, sold and consumed is to be left to the judgment of the legislative and the executive wisdom. Things which are not considered harmful today, may be considered so tomorrow in the light of the fresh medical evidence. It requires research and education to convince the society of the harmful effects of the products before a consensus is reached to ban its consumption. Alcohol has since long been known all over the world to have had harmful effects on the health of the individual and the welfare of the society. Even long before the Constitution was framed, it was one of the major items on the agenda of the society to ban or at least to regulate, its consumption. That is why it found place in Article 47 of the Constitution. It is only in recent years that medical research has brought to the fore the fatal link between smoking and consumption of tobacco and cancer, cardiac diseases and deterioration and tuberculosis. There is a sizeable movement all over the world including in this country to educate people about the dangerous effect of tobacco on individual's health. The society may, in course of time, think of prohibiting its production and consumption as in the case of alcohol. There may be more such dangerous products, the harmful effects of which are today unknown. But merely

because their production and consumption is not today banned, does not mean that products like alcohol which are proved harmful, should not be banned.

. . . . .

60(b) The right to practise any profession or to carry on any occupation, trade or business does not extend to practising a profession or carrying on an occupation, trade or business which is inherently vicious and pernicious, and is condemned by all civilised societies. It does not entitle citizens to carry on trade or business in activities which are immoral and criminal and in articles or goods which are obnoxious and injurious to health, safety and welfare of the general public, i.e., res extra commercium, (outside commerce). There cannot be business in crime."

Is the consumption of pan masala or gutka (containing tobacco), or for that matter tobacco itself, considered so inherently or viciously dangerous to health, and, if so, is there any legislative policy to totally ban its use in the country ? In the face of Act 34 of 2003, the answer must be in the negative. It is difficult to accept the contention that the substance banned by the impugned notification is treated as res extra commercium. In the first place, the gamut of legislation enacted in this country which deals with tobacco does not suggest that Parliament has ever treated it as an article res extra commercium, nor has Parliament attempted to ban its use absolutely. The Industries (Development and Regulations) Act, 1951 merely imposed licensing regulation on tobacco products under item 38(1) of the First Schedule. The Central Sales Tax Act, 1956 in Section 14(ix) prescribes the rates for Central Sales Tax. Additional Duties of Excise (Goods of Special Importance) Act, 1957 prescribes the additional duty leviable on tobacco products. The Tobacco Board Act, 1975 established a Tobacco Board for development of tobacco industries in the country. Even the latest Act, i.e. the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003, does not ban the sale of tobacco products listed in the Schedule except to minors. Further, we find that in the tariff schedule of the Central Sales Tax Act, there are several entries which deal with tobacco and also pan masala. In the face of these legislative measures seeking to levy restrictions and control the manufacture and sale of tobacco and its allied products as well as pan masala, it is not possible to accept that the article itself has been treated as res extra commercium. The legislative policy, if any, seems to be to the contrary. In any event, 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.

Need to read down:

There is also merit in the contention of the appellants that if the provisions of Section 7(iv) of the Act are not read down as conferring powers on the authority to deal with an emergent situation, the section would be conferring arbitrary powers on the authority and would be procedurally unfair. This is particularly so in the face of the statutory provision under which licences have already been granted to the manufactures of pan masala and gutka for manufacture of the articles. There is already a provision in the statutory scheme for cancellation and suspension of a licence. Without going through such procedure, the power in the state authority to suddenly bring out the result of cancellation or suspension of the licence, without procedural safeguards, would certainly be arbitrary and liable to be hit by Article 14 of the Constitution of India. For this reason also, the power under Section 7(iv) needs to be read down as conferring powers on the authority only to deal with an emergent situation.

There has been some argument at the Bar as to whether the impugned notification is the result of an executive act or a legislative act. We have already indicated that, in our view, Section 7(iv) is not an independent source of power. The notification can only be issued by the authority the source of whose power must be located elsewhere. Section 7(iv) merely

indicates the consequences which would flow if a valid notification is issued. It is, therefore, not necessary for us to go into the niceties between an executive and a legislative act.

Mr. Anil Divan, learned counsel appearing for one of the appellants, pointed out that the Central Sales Tax Act by Section 14(ix) recognises gutka as a legitimate article of interstate trade or interstate sale. So is pan masala recognised as such a legitimate article of interstate sale. The learned counsel relied on M/s Dwarka Prasad Laxmi Narain v. The State of U.P. and Ors. to contend that a law or order which confers arbitrary or uncontrolled power on the executive in the matter of regulating trade or commerce in normally available commodities must be held to unreasonable. [See also in this connection the observations of this Court in B.B. Rajwanshi v. State of U.P. and Ors.]

Learned counsel highlighted the observations of this Court in Maneka Gandhi v. Union of India and contended that irrespective of whether the power to issue the impugned notification is a legislative power or an executive power, it must pass the test of fairness in procedure. Any provision of law which enables to an authority by a notification to bring to standstill a business, which is otherwise permitted by law, must be held to be arbitrary; unfair and an abridgment of the fundamental rights guaranteed under Article 14 of the Constitution. [See also in this connection Kanti Lal Babulal v. H.C. Patel , Ajay Hasia and Ors. v. Khalid Mujib Sehravardi and Ors. and Delhi Transport Corporation v. D.T.C. Mazdoor Congress and Ors.]

It is in the light of these authorities that we are required to adjudge the constitutionality of the interpretation put on Section 7(iv).

Learned counsel for the States, however, urge that the impugned notification is a legislative act and not an administrative act. Thus, according to them, there is no question of giving a hearing before taking a policy decision to ban the manufacture for sale, storage, sale and distribution of pan masala and gutka.

We are unable to accept the contention of the States. In our view, the scheme of the Act suggests that a decision to ban an article injurious to health, when used as food or as an ingredient in the manufacture of any article of food, can only be the result of broader policy. Hence, this larger power appears to have been located only in the Central Government under Section 23(1A)(f) and not in the state Food (Health) Authority. As we have already pointed out, the power of the state Food (Health) Authority is only transitory in nature and designed to deal with local emergencies. In our considered view, the impugned notification is certainly an administrative act and not a legislative act. Inasmuch as by an executive act the manufacture for sale, storage, sale or distribution of the concerned article has been banned so as to interfere with the fundamental rights of the appellants guaranteed under Articles 14 and 19 of the Constitution of India, the impugned notification is illegal and unconstitutional.

We are unable to accept that the words "in the interest of public health" used in clause (iv) of Section 7 of the Act can operate as an incantation or mantra to get over all the constitutional difficulties posited. In any event, the collocation of the words in the statutory scheme suggests not a matter of policy, but a matter of implementation of policy. For this reason also, we are of the view that the impugned notification must fail.

The learned Advocate General for the State of Goa contended that in the State of Goa, apart from the impugned notification dated 24th January, 2003, there is a subsequent notification dated 7th April, 2003 which is not impugned by the appellants. Reliance is placed on a judgment of the division bench of the Bombay High Court in Vaman Raghunath Fallary & Sons and Ors. v. State of Goa and Ors. . The division bench in the said decision seems to have been overwhelmed by the material produced with regard to the hazardous nature of pan masala with tobacco and taken the view that the State Government was justified in taking a decision to ban tobacco products within the realm of such policy decision. The division bench has not addressed itself to any of the sections of the Act which decide the powers. The learned Advocate General for the State of Goa contends that matters of public health are essentially matters of policy decision, legislative or administrative, planned and executed in the greater

interest of public health by the Government and the court should not interfere with such policy matters. He relied on the observations of P.N. Krishna Lal and Ors. v. Govt. of Kerala and Anr. wherein this Court said:

"24. The raison d'etre of the State being the welfare of the members of the society, the whole purpose of the creation of the State would be to maintain order, health and morality by suitable legislation and proper administration. The State has the power to prohibit trade or business which are illegal, immoral or injurious to the health and welfare of the people. No one has the right to carry on any trade or occupation or business which is inherently vicious and pernicious and is condemned by all civilized societies. Equally no one could claim entitlement to carry on any trade or business or any activities which are criminal and immoral or in any articles of goods which are obnoxious ad injurious to the safety and health of general public. There is no inherent right in crime. Prohibition of trade of business of noxious or dangerous substances or goods by law is in the interest of society welfare."

There is a plethora of legislation dealing with tobacco products, gutka and pan masala and the fact that licences have been issued to the appellants to manufacture the concerned articles, which does not lead to the conclusion that the trade or business in the concerned articles is an activity which is "criminal in propensity, immoral, obnoxious, injurious to the health of general public" or that the ban is a result of 'public expediency and public morality'.

Is it food ?

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."

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 P.K. Tejani v. M.R. Dange , this Court held that the word "food" is a very general terms 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.

The learned counsel relied on a judgment of a division bench of this Court in C.A. No. 12746-12747 of 1996 (decided on 6th November, 2003). 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 9th June, 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 (supra) was a judgment of the Constitutional Bench which does not seem to have been noticed.

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

Paradoxical consequence:

There is yet another reason why we are inclined to take the view that Section 7(iv) deals with a situation of emergency with respect to the local area. A decision for banning an article of food or an article containing any ingredient of food injurious to health can only arise as a result of broadly considered policy. If such a power be conceded in favour of a local authority like the Food (Health) Authority, paradoxical results would arise. The same article could be considered injurious to public health in one local area, but not so in another. In our view, the construction of the provision of the statute must not be such as to result in such absurd or paradoxical consequences. Hence, for this reason also, we are of the view that the power of the State (Health) Authority is a limited power to be exercised locally for temporary duration.

Width of power:

The learned counsel for the state of Maharashtra contended that the power of the Food (Health) Authority discernible in clause (iv) of Section 7 of the Act is an independent power and much wider than the power of the Central Government under Section 23 of the Act. He contended that while the power of the Central Government discernible from Section 23(1A)(f) is restricted only to prohibiting the manufacture or sale of articles of food or ingredients of food, the power of the state Food (Health) Authority is much wider and could extend even to articles which may not amount to food or ingredients of food, or even if they are not injurious to health, as long as the test of "in the interest of public health" is satisfied. In our view, this is an argument of desperation. We cannot conceive of such wide ranging power 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. We may hasten to point out that even the power of Central Government for making the rules under Section 23 is subject to the condition of consultation with the Central Committee for food standards constituted under Section 23 and placing of the rules before Parliament. If the power of the Food (Health) Authority is such as contended by the learned counsel for the state of Maharashtra, then its power would range sky high without any limitation whatsoever. The authority could ban any article, irrespective of whether it is used as food or otherwise, and irrespective of whether it is injurious to health or otherwise. To take an extreme illustration, if a state Food (Health) Authority in some local area were taken it into its head that consumption of tea, coffee or milk is not 'in the interest of public health', it can issue an order of absolute prohibition irrespective of whether it is injurious to health or not. We do not think that the scheme of the Act warrants such an interpretation.

A reference of this Court's judgment in Dineshchandra Jamnadas Gandhi v. State of Gujarat vide paras 16 and 17 makes it clear that the object and the purpose of the Preventon of Food Adulteration Act, 1954 is to eliminate the danger to human life from the sale of unwholesome articles of food. This Court held that the legislation of 'Adulteration of Food Stuffs and other Goods' (entry 18 List III of the Seventh Schedule) is enacted to curb the widespread evil of food adulteration and is a legislative measure for social defence. This court indicated the object of the Prevention of Food Adulteration Act, 1954, its constitutional basis and its purpose in the following observations:

"16. The object and the purpose of the Act are to eliminate the danger to human life from the sale of unwholesome articles of food. The legislation is on the topic 'Adulteration of Food Stuffs and other Goods' (entry 18 List III Seventh Schedule). It is enacted to curb the widespread evil of food adulteration and is a legislative measure for social defence. It is intended to

suppress a social and economic mischief - an evil which attempts to poison, for monetary gains, the very sources of sustenance of life and the well-being of the community. The evil of adulteration of food and its effects on the health of the community are assuming alarming proporations. The offence of adulteration is a socio-economic offence. In Municipal Corporation of Delhi v. Kacheroo Mal Sarkaria, J. said:

The Act has been enacted to curb and remedy the widespread evil of food adulteration, and to ensure the sale of wholesome food to the people. It is well-settled that wherever possible, without unreasonable stretching or straining, the language of such a statute should be construed in a manner which would suppress the mischief, advance the remedy, promote its object, prevent its subtle evasion and foil its artful circumvention.

(emphasis supplied)

...

18. The offences under the 'Act' are really acts prohibited by the police powers of the State in the interests of public health and well-being. The prohibition is backed by the sanction of a penalty. The offences are strict statutory offences. Intention or mental state is irrelevant. In Goodfellow v. Johnson referring to the nature of offences under the Food and Drugs Act, 1955, it was said:

As is well known, Section 2 of the Food and Drugs Act, 1955, constitutes an absolute offence. If a person sells to the prejudice of the purchaser any food, and that includes drink, which is not of the nature or not of the substance or not of the quality demanded by the purchaser he shall be guilty of an offence. The forbidden act is the selling to the prejudice of the purchaser."

These observations make it clear that the purpose of the Act, as its title suggests, is to prevent adulteration of food. Any attempt to travel beyond these parameters must necessarily be looked at askance by the court.

There is one more facet of the impugned notification which needs consideration. Neither Section 7(iv) of the Act, nor any other provision of the Act or the Rules indicates the manner in which an order of prohibition is to be notified by the Food (Health) Authority. The manner of bringing into force the Rules made by a delegate of legislative authority would be indicated in the Act itself. There is no indication in the Act as to how the order made by the Food (Health) Authority would be brought into force. This is a pointer to the fact that the orders made by the Food (Health) Authority are only transitory and intended to deal with emergent local situations.

Natural Justice:

Learned counsel for the State of Maharashtra cited Union of India and Anr. v. Cynamide India Ltd. and Anr. (vide para 7) where this Court observed thus:

"The third observation we wish to make is, price fixation is more in the nature of a legislative activity than any other. It is true that, with the proliferation of delegated legislation, there is a tendency for the line between legislation and administration to vanish into an illusion. Administrative, quasi-judicial decisions tend to merge in legislative activity and, conversely, legislative activity tends to fade into and present an appearance of an administrative or quasi-judicial activity. Any attempt to draw a distinct line between legislative and administrative functions, it has been said, is 'difficult in theory and impossible in practice'. Though difficult, it is necessary that the line must sometimes be drawn as different legal rights and consequences may ensue. The distinction between the two has usually been expressed as 'one between the general and the particular'. 'A legislative act is the creation and promulgation of a general rule of conduct

without reference to particular cases; an administrative act is the making and issue of a specific direction or the application of a general rule to a particular case in accordance with the requirements of policy'. 'Legislation is the process of formulating a general rule of conduct without reference to particular cases and usually operating in future ; administration is the process of performing particular acts, of issuing particular orders or of making decisions which apply general rules to particular cases'. It has also been said: 'Rule-making is normally directed toward the formulation of requirements having a general application to all members of a broadly identifiable class' while, 'adjudication, on the other hand, applies to specific individuals or situations'. But, this is only a broad distinction, not necessarily always true. Administration and administrative adjudication may also be of general application and there may be legislation of particular application only. That is not ruled out. Again, adjudication determines past and present facts and declares rights and liabilities while legislation indicates the future course of action. Adjudication is determinative of the past and the present while legislation is indicative of the future. The object of the rule, the reach of its application, the rights and obligations arising out of it, its intended effect on past, present and future events, its form, the manner of its promulgation are some factors which may help in drawing the line between legislative and non-legislative acts."

We are, however, unable to accept the contention of the learned counsel for the state of Maharashtra that, because the notification is generally intended, it is necessarily a legislative act and therefore there was no question of complying with principles of natural justice. If that were so, then every executive act could masquerade as a legislative act and escape the procedural mechanism of fair play and natural justice.

In State of Tamil Nadu v. K. Sabanayagam and Anr. (vide para 17), this Court after referring to the aforesaid observations of Chinnappa Reddy, J. in Cynamide (supra), observed that even when exercising a legislative function, the delegate may in a given case be required to consider the view point which may be likely to be affected by the exercise of power. This Court pointed out that conditional legislation can be broadly classified into three categories: (1) when the legislature has completed its task of enacting a statute, the entire superstructure of the legislation is ready but its future applicability to a given area is left to the subjective satisfaction of the delegate (as in Tulsipur Sugar Co. case); (2) where the delegate has to decide whether and under what circumstances a legislation which has already come into force is to be partially withdrawn from operation in a given area or in given cases so as not to be applicable to a given class of persons who are otherwise admittedly governed by the Act; (3) where the exercise of conditional legislation would depend upon satisfaction of the delegate on objective facts placed by one class of persons seeking benefit of such an exercise with a view to deprive the rival class of persons who otherwise might have already got statutory benefits under the Act and who are likely to lose the existing benefit because of exercise of such a power by the delegate. This Court emphasised that in the third type of cases the satisfaction of the delegate must necessarily be based on objective considerations and, irrespective of whether the exercise of such power is judicial or quasi-judicial function, still it has to be treated to be one which requires objective consideration of relevant factual data pressed into service by one side, which could be rebutted by the other side, who would be adversely affected if such exercise of power is undertaken by the delegate.

In our view, even if the impugned notification falls into the last of the above category of cases, whatever the material the Food (Health) Authority had, before taking a decision on articles in question, ought to have been presented to the appellants who are likely to be affected by the ban order. The principle of natural justice requires that they should have been given an

opportunity of meeting such facts. This has not been done in the present case. For this reason also, the notification is bad in law.

Conclusion:

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 under Section 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 Section 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 Section 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.

In the result, we allow the appeals and the writ petition and set aside the impugned judgments of the division benches of the Bombay High Court and Andhra Pradesh High Court and quash the notifications impugned as bad in law, void, illegal and unenforceable against the appellants/petitioners.

No order as to costs.