
(2002) 08 AP CK 0098

In the Andhra Pradesh High Court

Case No : W.P.M.P. No. 17690 of 2002 in Writ Petition No. 14153 of 2002

Shivshakti Agencies

APPELLANT

Vs

State of A.P. and Others

RESPONDENT

Date of Decision : 16-08-2002

Acts Referred:

Prevention of Food Adulteration Act, 1954 — Section 7

Citation : (2002) 2 ALD(Cri) 332 : (2002) 5 ALT 139 : (2003) CriLJ 312

Hon'ble Judges : AR. Lakshmanan, C.J.;V. Eswaraiah, J

Bench : Division Bench

Advocate : Habibullah Basha and Srinivas Shankar, for Milind G. Gokhale, for the Appellant; Ramesh Ranganadham, A.A.G., for the Respondent

Final Decision : Dismissed

Judgement

AR. Lakshmanan, C.J.—Heard Mr. Habibullah Basha, learned senior Advocate appearing for the petitioner assisted by Mr. Srinivas Shankar and Mr. Ramesh Ranganadham, learned Additional Advocate General.

2. The Writ Petition was filed by the petitioner Seeking a Writ of Certiorari calling for the records pertaining to the impugned G.O. Ms. No. 44 issued by the Health, Medical and Family Welfare (L1) Department, dated 19-2-2002 and G.O.Ms. No. 55 issued by the Health, Medical and Family Welfare (L1) Department, dated 27-2-2002 prohibiting sale of Pan Masala under any brand name with an emblem of "Gutka" which contains Tobacco in the entire State of Andhra Pradesh, and to quash and set aside the impugned G.O.Ms. No. 44 issued by the Health, Medical and Family Welfare (L1) Department, dated 19-2-2002 and G.O.Ms. No. 55 issued by the Health, Medical and Family Welfare (L1) Department, dated 27-2-2002 after declaring the same as arbitrary, illegal and violative of petitioner's Fundamental Rights guaranteed to them under Articles 14, 19 and 21 of the Constitution of India and also to declare the provisions of Section 7(iv) of the Prevention of Food Adulteration Act, 1954 as ultra vires of the Constitution of India.

3. The W.P.M.P. was filed in the main Writ Petition praying to suspend the effect and operation of the impugned G.O.Ms. No. 44 issued by the Health, Medical and Family Welfare (L1) Department, dated 19-2-2002 and G.O. Ms. No. 55 issued by the Health, Medical and Family Welfare (L1) Department, dated 27-2-2002 prohibiting the sale of Pan Masala under any brand name with an emblem of "Gutka" which contains Tobacco in the entire State of Andhra Pradesh, consequently permit the petitioner to manufacture, sale of Pan Masala under brand name with an emblem of "Gutka" which contains tobacco in the State of Andhra Pradesh pending disposal of the main writ petition.

4. For the sake of convenience we reproduce the operative portions of impugned G.O.Ms. Nos. 44 and 55 dated 19-2-2002 and 22-2-2002 respectively :

G.O.Ms. No. 44

In exercise of the powers conferred under Clause (iv) of Section 7 of the Prevention of Food Adulteration Act, 1954 (Central Act 37 of 1954), the Director (FAC), Institute of Preventive Medicine Public Health Labs. & Food (H) Administration of Food (Health) Authority for the State of Andhra Pradesh in terms of Notification issued in G.O.Ms. No. 289, Health Medical & Family Welfare (L1) Department, dated 23-7-2001 hereby prohibits in the interest of public health the sale of pan masala under any brand name with the emblem of "Gutka" which contains tobacco in the entire State of Andhra Pradesh with immediate effect.

G.O.Ms. No. 55

In exercise of the powers conferred under Clause (IV) of Section 7 of the Prevention of Food Adulteration Act, 1954 (Central Act 37 of 1954), the Director (Full Additional Charge) of Institute of Preventive Medicine Public Health Labs. & Food (Health) Administration as Food (Health) Authority for the State of Andhra Pradesh in terms of Notification issued in G.O. Ms. No. 289 Health Medical & Family Welfare (L1) Department, dated 23-7-2001 hereby prohibits in the interest of public health, the sale of all brand of Pan Masala (containing tobacco) and Chewing tobacco/Zarda Khanini under any brand name, in the entire State of Andhra Pradesh with immediate effect.

Constitutional validity of the above two G.Os. is challenged in the present writ petition.

5. Shri Habibullah Basha, learned Senior Counsel submits that the Legislative competence of the Legislature cannot be made to be dependent upon the rule or rules and that in the present case, the item in question is squarely covered under the Central List within the purview of the Central Legislature and any notification passed by the State Government in that regard would be illegal. It is further submitted that the Sovereign Legislature cannot delegate the powers to the State Government as has been done u/s 7(iv) of the Food Adulteration Act and hence the provisions of Section 7(iv) of the Food Adulteration Act deserves to be

declared as ultra vires the Constitution. Having been aggrieved by the same, it is submitted that the petitioner has approached this Court by filing the present writ petition seeking to quash the same as illegal. Mr. Habibullah Basha further submitted that chewing tobacco/pan/gutka is an age-old item in our country and the same is being used by the general public since long and keeping in view of the usage of tobacco, the State of Andhra Pradesh has stood first in producing tobacco at a higher level. It is also submitted that the Government of Andhra Pradesh as well as other Governments are levying heavy duties upon the tobacco products such as cigarettes and other products containing tobacco and earlier has given directions to the manufacturers to print on the product itself as a statutory warning that the same is injurious to health. In other words, he has stated that the State Government of the Andhra Pradesh has absolutely no Jurisdiction in issuing the impugned notifications in view of the fact that the item Gutka/Pan Masala chewing tobacco is an item squarely covered only under the Central List and does not find place either in the State List or the Concurrent List. According to the learned counsel, the State Government has acted in excess of its jurisdiction in trying to legislate/act upon the item squarely covered under the Central List for which only the Central Government is competent to pass any executive directions. In para 15 of the affidavit filed in support of the writ petition, it is stated that already the Bill is pending before the Parliament of India which is the competent body to decide the socio economic repercussions of imposing such a ban and also considering the loss of revenue which would occur in case of imposing such a ban and the State Government by imposing such a ban has acted in excess of its jurisdiction and has interfered in the arena in which the Central Government alone is capable of entering. The present Act which the State Government is seeking to enact is purely within the ambit and jurisdiction of the Central Legislature and cannot be interfered with by the State Government.

6. In support of his prayer in the stay petition, Mr. Basha has invited our attention to the Order dated 13th August, 1999 passed by a learned single Judge of the Kerala High Court in O.P. No. 8891 of 1999 and the decision of a Larger Bench of this Court reported in *Society for Cancer in Society for Cancer in Oral-Cavity Prevention Vs. Union of India (UOI) and Others*, and also to a very recent order dated 18th July, 2002 passed by the Allahabad High Court in *Cri. Misc. Writ Petition No. 3654 of 2002* and also to the order dated 5th August, 2002 passed by the Supreme Court of India and also to another order passed by the Supreme Court of India in *C.C. No. 6358 of 2002 dated 7th August, 2002* filed against the judgment and order dated 2-8-2002 in *W.P. No. 3837 of 2002* of the High Court of Madhya Pradesh at Jabalpur Bench. Placing reliance on the above orders, Mr. Basha submits that since the Supreme Court itself has now granted interim stay of the impugned direction of the Allahabad High Court order in *Crim. Misc. Writ Petition No. 3654 of 2002 dated 18-7-2002*, a similar order of stay should also be granted in favour of the petitioner.

7. On the contrary, Mr. Ramesh Ranganadham, learned Additional Advocate

General, after inviting our attention to various averments made in the counter-affidavit and also on certain passages of the order passed by the Larger Bench of this Court in *Society for Cancer in Society for Cancer in Oral-Cavity Prevention Vs. Union of India (UOI) and Others*, and certain other orders, submitted that Section 7(iv) of the Food Adulteration Act, 1954 contains adequate guidelines and safeguards, that the said power can be exercised by the authority only in the interests of Public Health, and that the Food Adulteration Act, 1954 was enacted with a view to checking the antisocial evil of adulteration of foodstuffs. He also submitted that the reliance placed by the petitioner on the interim orders passed by the Apex Court against the orders of the Madhya Pradesh and Allahabad High Courts is erroneous and misplaced.

8. We have given our anxious consideration to the arguments advanced by the learned counsel on either side.

9. In an identical matter, a Larger Bench of this Court reported in *Society for Cancer in Society for Cancer in Oral-Cavity Prevention Vs. Union of India (UOI) and Others*, decided an identical issue. The said writ petition was filed by the Society for Cancer in Oral-Cavity Prevention through Education, Hyderabad as a public interest litigation for issuance of a writ in the nature of Mandamus to the official respondents to declare the oral use of Pan Masala, Gutka, Zarda and other tobacco related items as highly deleterious and dangerous to public health leading to cancer and the action of the respondents in not declaring as such is arbitrary, illegal, unjust and violative of the fundamental rights guaranteed to the citizens under Articles 14 and 21 of the Constitution of India apart from being violative of the Directive Principles of State Policy enshrined in Part IV of the Constitution of India, more particularly, Article 47 of the Constitution of India and for consequential directions to the respective Governments to discharge the constitutional duties obligated on them under Article 21 and to prevent the manufacture, sale, advertisement and consumption of Paan Masala, Gutka, Zarda and allied tobacco products.

10. A Larger Bench of this Court, after hearing the learned counsel on either side and also the learned Attorney General of India, disposed of the said writ petition observing that the Government of India have already launched steps and introduced a Bill in the Parliament on 7-3-2001 itself and the Bill was referred to the Parliamentary Standing Committee on 12-3-2001 and that this Court cannot issue a direction in that regard on Judicial side. Speaking for the Bench, AR. Lakshmanan, the Chief Justice at paras 29, 30, 32, 33 and 37 of the judgment observed as follows :

29. We have given our thoughtful consideration to the rival submissions of the respective parties. There can be no doubt that chewing of tobacco/gutkha or smoking is noxious to the health of persons who are habituated to such practice. It is also true that maintenance of health and environment falls within the purview of the Article 21 of the Constitution. Consumption of gutkha and chewing of tobacco adversely affect the life of the citizen and reduces the very life span

itself. Taking into account the alarming scenario as discussed above, the question then is what is the relief, which this Court can grant to the petitioners. Can this Court direct the Legislature to enact a law banning manufacture of gutkha or tobacco or the allied products? In our opinion, the answer can only be an emphatic no. It is entirely for the Executive branch of the Government to decide whether or not to introduce any particular legislation. The Court certainly cannot mandate the Executive or the Parliament or any Legislature to initiate legislation howsoever necessary or desirable the Court may consider it to be. If the Executive has not carried out any duty laid down it, by the Constitution or the law, the Court can certainly require the executive to carry out such duty and this is precisely what the Courts would do when it entertains public interest litigation. But at the same time, the Court cannot usurp the functions assigned to the Executive and the Legislature under the Constitution and it cannot even indirectly require the executive to introduce a particular legislation or the legislature to pass it or assume the supervisory role over the law making activities of the Executive and the Legislature. It has to be borne in mind that this Court acting as a sentinel on the qui vive can certainly interfere and grant relief by issuing a mandamus to the Government to enforce the existing laws in order to safeguard the interests of the public. When laws are there to deal with the problem, the law has to be enforced by the law enforcing agency or the State.

30. As already noticed, the Government of India have already launched steps and introduced a Bill in the Parliament on 7-3-2001 itself and the Bill was referred to the Parliamentary Standing Committee on 12-3-2001. The Standing Committee has submitted its report in December, 2001 and the same is under consideration. Therefore, the bill is now pending in Parliament.

32. As already stated, the Government of Andhra Pradesh have issued two G.Os. -- G.O. Ms. Nos 44 and 55 through Health, Medical and Family Welfare (L1) department dated 19-2-2002 and 27-2-20002 respectively in exercise of the powers conferred under Clause (iv) of Section 7 of Prevention of Food Adulteration Act, 1954 (Central Act 37 of 1954). The notification issued under the G.O.Ms. No. 44 prohibits the sale of pan masala under any brand name with an emblem of "Gutka" which contains tobacco in the entire State of Andhra Pradesh in the Interest of Public Health. Similarly, G.O.Ms. No. 55 was issued prohibiting 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 in the interest of public health.

33. We do appreciate the contention of Mr. Ramachandra Rao that so long as manufacture of Gutkha/pan masala is not prohibited in other parts of the country, consumption of those products in Andhra Pradesh could not effectively be prevented. But, the question is when the matter is already seized by the Parliament, can this Court under Article 226 of the Constitution go into the same and issue a mandamus to make enactment for total prohibition of gutka/pan masala in a public interest litigation. The answer must be an emphatic no. The

Apex Court in *State of Himachal Pradesh Vs. A Parent of a Student of Medical College, Simla and Others*, , held that public interest is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that under the guise of redressing a public grievance, it does not encroach upon the sphere reserved by the Constitution to the Executive and the Legislature. In our considered opinion, it is entirely a matter for the Executive branch of the Government to decide whether or not to introduce any particularly legislation. There is no dispute that under the expanded horizons of Article 21 of the Constitution, right to life includes right to health *State of Punjab and others Vs. Mohinder Singh Chawala, etc.*, and the Constitutional Courts are duty bound to protect and uphold the rights guaranteed under the Constitution. But, when a Bill is pending before the Parliament on the subject-matter, it is not within the realm of this Court to deal with the same and issue a mandamus to enact legislation in a particular manner.

37. It may also be noted that ultimately, a balance has to be struck between the interests of framers growing tobacco on one hand and the citizens who are addicted to consumption of tobacco and allied products on the other in a strategic manner keeping in view the economic interests of the coun-try. In such a situation, the Union of India, having control over the economy, is the appropriate authority to decide as to what policy should be evolved in the matter with the assistance of persons working in various departments, institutions etc., having administrative and economic expertise. This Court, in exercise of its power under Art. 226 of the Constitution of India, cannot enter into such arena and render its opinion one way or the other in substitution of the one by the government."

11. In our opinion, in the present case the Pan Masala per se is not prohibited, it is only prohibited when tobacco is added to Pan Masala bringing it within the definition of "adulterated food." As there is sufficient scientific information available to the effect that tobacco, on being mixed with Pan Masala/Zarda, is injurious to public health, this power conferred u/s 7(iv) of the Prevention of Food Adulteration Act, 1954 is being exercised. The Act empowers the statutory authority to exercise powers under certain situations. Such exercise of powers by the statutory authority cannot be said to be beyond the legislative competence of the State Legislature. It is not correct to say that the State Government cannot exercise its executive function, since this field is occupied by the Central Legislature. In our view, Entry 6 of List II and Entry 18 of List III confers powers on the State Legislature to make laws in this regard. Since the powers conferred u/s 7(iv) of the Act is exercised by the Food (Health) Authority, and that the State Government has merely issued a notification intimating the exercise of such powers, the question of the State Legislature acting without jurisdiction or beyond its legislative competence does not arise.

12. We have also perused the orders passed by the Allahabad High Court. In the said order, the Allahabad High Court directed the State Government to issue a

similar ban as has been imposed earlier by many State Governments and directed the Uttar Pradesh Government to issue a similar notification forthwith without any delay. The Bench further directed the State Government that until further orders from the date of that order, all manufacture and sale of Pan Masala and Gutka etc., by whatever they may be called or under whatever label they are sold shall be stopped immediately and the administration including the police will see to it that manufacture of Pan Masala and Gutka are not longer permitted any further. This order was challenged before the Honourable Supreme Court of India and the Honourable Supreme Court granted leave and after allowing the application for impleadment of certain parties, granted interim stay of the impugned direction insofar as it relates to ban of Pan Masala and Gutka. Similar order was passed granting stay insofar as the order passed by the Madhya Pradesh High Court is concerned. In our considered opinion, reliance placed by the petitioner on the interim orders passed by the Honourable Supreme Court of India against the orders of the Madhya Pradesh and Allahabad High Courts, will not come to the aid of the petitioner. In the said two cases, prohibition of sale of Pan Masala and Gutka was not by the statutory authority in exercise of the powers conferred by the statute but was by the Honourable High Courts. It is these directions issued by the above High Courts, that have been stayed by the Honourable Supreme Court. The prohibition of sale of Pan Masala/Zarda, in exercise of powers conferred under the provisions of Prevention of Food Adulteration Act, 1954 in the three States of Tamilnadu, Maharashtra and Andhra Pradesh are not the subject matter of stay before the Honourable Supreme Court and the SLPs filed before the Supreme Court stand on a different footing from that of the orders passed by the Madhya Pradesh and Allahabad High Courts.

13. For the foregoing reasons, we are of the view that no case has been made out by the petitioner for grant of stay of the impugned notifications as prayed for in the miscellaneous petition. The W.P.M.P. is, therefore, dismissed.