

ABC 2016 (I) 316 BOM
ACQUITTAL & BAIL CASES
HIGH COURT OF BOMBAY

(A.V. Nirgude & Indira K. Jain, JJ.)

Criminal Writ Petition No. 1027 of 2015 with Criminal Writ Petition No. 1186 of 2014 with Criminal Writ Petition No. 856 of 2015 with Criminal Writ Petition No. 1183 of 2015 with Criminal Writ Petition No. 1368 of 2015 with Criminal Application No. 615 of 2014 with Criminal Application No. 1369 of 2014 with Criminal Application No. 1992 of 2014 with Criminal Application No. 1992 of 2014 with Criminal Application No. 2271 of 2014 with Criminal Application No. 4395 of 2015 with Criminal Application No. 4517 of 2015

Decided on 4 March, 2016

Aurangabad Bench

GANESH PANDURANG JADHAO

- Appellant(s).

Versus

STATE OF MAHARASHTRA & ORS.

- Respondent(s).

Law Covered:- (A) *Food and Safety Standards Act, 2006 – Sections 26, 30 & 55 – Indian Penal Code, 1860 – Sections 272, 273, 188 & 328 – Manufacture of scented supari, tobacco, kharra – prohibitory order issued by Commissioner – Disobedience of – Held, this disobedience apparently does not tend to cause breach of law and order – Commissioner's order is not an order contemplated under Chapter 10 of the IPC – Besides, the prohibitory order issued under Section 30 of the FSS Act would amount to offence only under Section 55 of the FSS Act – Action taken by the Police u/ss 372, 373, 188 & 328, IPC – declared to be illegal – complaints are quashed – Food Safety Officers are not prohibited from proceeding against applicants/petitioners under the provisions of Chapter X of the FSS Act. (Para 18)*

(B) *Interpretation of Statute – Food and Safety Standards Act, 2006 – Definition of term – 'Adultrant' – any material which is or could be employed for making the food unsafe or substandard, misbranded or would contain extraneous matter. (Para 5)*

(C) *Interpretation of Statute – Food and Safety Standards Act, 2006 – Definition of term – 'food' – any substance processed or otherwise which is intended for human consumption. (Para 5)*

(D) *Interpretation of Statute – Food and Safety Standards Act, 2006 – Definition of term – 'food additive' – any substance not*

normally consumed as a food by itself, but is intentionally added to food for certain purposes. (Para 5)

a (E) Interpretation of Statute – Food and Safety Standards Act, 2006 – Definition of term – 'unsafe food' – an article of food whose nature or substance or quality is so affected that it is rendered injurious to health. (Para 5)

b (F) Food and Safety Standards Act, 2006 – Section 38 – Powers of Food Safety Officer – Held, the Food Safety Officer Is empowered – to take sample of any food – seize any article of food which is found in contravention of the Act – keep such seized articles of food in safe custody – may even seize any adulterant found in possession of manufacturer, distributor or dealer etc. of articles of food – can also seize books of account and other documents. (Para 9)

c (G) Food and Safety Standards Act, 2006 – Section 42 – d Ambit – Designated Officer after scrutiny of report of Food Analyst would decide as to whether the contravention, if any, is punishable with imprisonment or fine only – If he finds that contravention is punishable with imprisonment, he should send his recommendations within fourteen days to the Commissioner seeking sanction for prosecution – In case, the Designated Officer finds that contravention is punishable only with fine, he would himself e adjudicate and dispose of such case. (Para 11)

f (H) Interpretation of Statute – Food and Safety Standards Act, 2006 – Section 42 – Scope – The provision makes destination between two types of contraventions; – contravention which is punishable with imprisonment and contravention which is punishable only with fine – Obviously, contraventions which are punishable with imprisonment are serious cases and only such cases are sent for adjudication in Court – Other cases are decided by designated officers themselves. (Para 11)

g (I) Interpretation of Statute – Food and Safety Standards Act, 2006 – Section 42 – Scope – Held, the Act ensures that only serious cases would be referred to adjudication in Court either in regular Court or in special Courts. (Para 11)

h (J) Interpretation of Statute – Food and Safety Standards Act, 2006 – Section 49 – Adjudicating Officer or the Tribunal should adjudge the quantum of penalty for committing offence of rendering any article of food injurious to health – the adjudication process for

*contraventions and penalty is generally an "in house proceeding".
(Para 12)*

(K) Interpretation of Statute – Food and Safety Standards Act, 2006 – Section 55 – Scope – directions of Food Safety Officer – Violation or breach – is not made punishable with imprisonment, it cannot be referred to Court – Such cases should therefore necessarily go before the adjudicating officer. (Para 14)

(L) Interpretation of Statute – Indian Penal Code, 1860– Sections 272 – "adulterated food" – Interpretation of –Held, would mean mixing any material to food which would make the food unsafe and substandard. (Para 14)

(M) Indian Penal Code, 1860– Sections 272 & 273– Gutka/ Pan Masala found in possession of the applicant/ petitioner – not sent for food analysis –No certificate issued by the Food Analyst that Gutka or Pan Masala is adulterated food – the contravention of the prohibitory order is not punishable u/s 272 & 273. (Para 16)

(N) Interpretation of Statute – Indian Penal Code, 1860– Section 188 – Interpretation of –It says that the culprit should administer to the victim – A substance which would be stupefied or poisonous with an intention to cause hurt to him – Possessing Gutka or Pan Masala or transporting Gutka or Pan Masala does not amount to administering it to any victim. (Para 17)

(O) Indian Penal Code, 1860– Section 188 – contempt of lawful authority of public servants – Food and Safety Standards Act, 2006 –Sections 26 & 30 – Indian Penal Code, 1860– Section 188 –Order of commissioner for prohibiting manufacture of scented supari, tobacco, kharra etc. – Violation of – Held, this disobedience apparently does not tend to cause breach of law and order – Commissioner's order is not an order contemplated under Chapter 10 of the IPC – the prohibitory would not permit any one to apply Section 188, IPC to such breach or violation – possessing or transporting Gutka or Pan Masala did not amount to offence u/s 328 – Section 188, IPC is not applicable. (Para 17& 18)

(P) Indian Penal Code, 1860– Section 328 – Causing hurt by means of poison, etc., with intent to commit an offence – Scope – Manufacturing, possession, selling of Gutka & Pan Masala – Would not amount to administering poison. (Para 19)

(Q) Indian Penal Code, 1860– Section 328 – Causing hurt by means of poison, etc., with intent to commit an offence – Gutka or

a *Pan Masala – Applicability of – Indian Evidence Act, 1872 – Section 45 – Expert opinion – Report of Food Analyst – Absence of – Held, it cannot be said that Gutka and Pan Masala are stupefying, intoxicating or unwholesome drug– offering these items of Food would not amount to intention to cause hurt. – Sec. 328 not applicable. (Para 19)*

b (R) *Food and Safety Standards Act, 2006 –Section 30 – Prohibitory order passed under – Powers of Food Safety Officers – are empowered to seize articles found with any one in contravention of the prohibitory order. (Para 9)*

c **Facts:-** The petitioner was found transporting large quantities of pouches of tobacco, which is called 'Gutka', in a truck. The truck was stopped by Food Safety Officer who seized the goods and even lodged a police complaint alleging that the petitioner had committed violation of Government Notification, prohibiting certain acts pertaining to Gutka/Pan Masala and thereby committed offence punishable under Sections 26 and 30 of the Food and Safety Standards Act. He further alleged that the petitioner was also liable to be prosecuted and punished for offences punishable u/ss 272, 273, 188 and 328 of IPC. The Honourable Bombay High Court considered the question, what action in such situation is permissible in the light of provisions of the FSS Act, 2006? After discussing provisions of FSS Act and IPC it was held that action taken by the Police u/s 372, 373, 188 and 328 of the IPC was illegal. The Food Safety Officers were, however, not prohibited from proceeding against applicants/petitioners under the provisions of Chapter X of the FSS Act.

d **Law of relief:-** *The prohibitory order issued u/s 30 of the FSS Act will not amount to offence u/ss 188, 272, 273 or 328 IPC.*

e **Held:-** The Act defined term 'Adultrant'. It means, any material which is or could be employed for making the food unsafe or substandard, misbranded or would contain extraneous matter (ramnants of raw material, packaging material etc.).

f The Act also define term 'food'. It says that 'food' means any substance processed or otherwise which is intended for human consumption.

g The Act further defined term 'food additive'. This means, any substance not normally consumed as a food by itself, but is intentionally added to food for certain purposes.

This Act also defined term 'unsafe food'. It means, an article of food whose nature or substance or quality is so affected that it is rendered injurious to health. The definition gives various examples and reasons why food will be an articles of food would become unsafe food. (Para 5) a

On perusal of above quoted provision, it is clear that the Food Safety Officer Is empowered to take sample of any food, seize any article of food which is found in contravention of the Act, keep such seized articles of food in safe custody. He may even seize any adulterant found in possession of manufacturer, distributor or dealer etc. of articles of food. He could also seize books of account and other documents. (Para 9) b

This provision provides that Designated Officer after scrutiny of report of Food Analyst would decide as to whether the contravention, if any, is punishable with imprisonment or fine only. If he finds that contravention is punishable with imprisonment, he should send his recommendations within fourteen days to the Commissioner seeking sanction for prosecution. In case, the Designated Officer finds that contravention is punishable only with fine, he would himself adjudicate and dispose of such case. This provision makes destination between two types of contraventions; contravention which is punishable with imprisonment and contravention which is punishable only with fine. Obviously, contraventions which are punishable with imprisonment are serious cases and only such cases are sent for adjudication in Court. Other cases are decided by designated officers themselves. This means that, the Act ensures that only serious cases would be referred to adjudication in Court either in regular Court or in special Courts. (Para 11) c

It is thus clear that Food Safety Officers are empowered to seize articles found with any one in contravention of the prohibitory order passed under Section 30 of the Act. In all the cases, the Food Safety Officers found prohibited articles in possession of the petitioners and applicants and in all cases such articles were seized. (Para 12) d

This provision makes it clear that the contravention allegedly committed by the petitioners was subject matter for adjudication under the provisions of Chapter IX of the FSS Act, 2006. Since the violation or breach of direction is not made punishable with imprisonment, it can not be referred to Court. Such cases should therefore necessarily go before the adjudicating officer. Section 68 of e

the FSS Act, 2006 provides how Adjudication Officer would adjudicate such case and how he would decide quantum of penalty.

a By no stretch of imagination, the cases in hand are required to be sent to Court. Such cases, in our view, would never be referred to Court mainly because the quantum of penalty does not include imprisonment. (Para 14)

b In order to find out as to whether food is unsafe due to presence of adulterant, it must be analyzed. Chapter VIII of the FSS Act, 2006 provides how an article of food is analyzed. This Chapter provides procedure for taking samples of food and analysis of such samples. The food Analyst would submit his report as to whether the food was mixed with adulterant etc. In our cases, Gutka/Pan Masala was not sent for food analysis. There is no certificate issued by the Food Analyst that Gutka or Pan Masala is adulterated food. Therefore, the contravention of the prohibitory order is not punishable under Sections 272 and 273 of the Indian Penal Code. (Para 16)

d The entire gamut of this provision is quite peculiar. It says that the culprit should administer to the victim. A substance cause hurt to him. Possessing Gutka or Pan Masala or transporting Gutka or Pan Masala does not amount to administering it to any victim. As said above, Guta or Pan Masala were not subjected to food analysis so far. On the other hand, the Commissioner simply opined that it could be injurious to health. He placed reliance on various reports which he received from time to time. He did not place reliance on report of food analysis appointed under the provisions of FSS Act, 2006. It could therefore be said that Gutka or Pan Masala could be poisonous. So, possessing or transporting Gutka or Pan Masala did not amount to offence under Section 328 of the Indian Penal code. In our view, this provision will not apply to the present cases. Section 188 of the Indian Penal Code is part of Chapter X, which deals with contempt of lawful authority of public servants. There are various provisions which are related to public servants and causing disobedience to their orders which would lead to obstruction, annoyance, injury to any person and breach of law and order. (Para 17)

h The Commissioner in this case indeed is a public servant and he has issued an order, and order is breached and disobeyed by the applicants and petitioners. But, this disobedience apparently does not tend to cause breach of law and order. The Commissioner's order is not an order contemplated under Chapter 10 of the IPC. Besides, the

prohibitory order issued under Section 30 of the FSS Act, 2006 and its violation, would amount to offence only under Section 55 of the FSS Act, 2006. This specific provision if made in a special enactment which is a code in itself. It would not permit any one to apply Section 188 of the Indian Penal Code to such breach or violation. Section 188 of the Indian Penal Code thus is not applicable to the facts of the case. (Para 18) a

By no stretch of imagination, manufacturing, possessing Gutka and Pan Masala would amount to administering poison. As said above, Gutka or Pan Masala are not subjected to food analysis. The commissioner opined that in its sale etc. is not in public interest. This opinion is based on various reports but not report of Food Analyst appointed under the provisions of the FSS Act. Therefore, it cannot be said that Gutka and Pan Masala are stupefying, intoxicating or unwholesome drug. Besides offering these items of Food would not amount to intention to cause hurt. The provisions of Section 328 of the Indian Penal Code to the present cases is therefore impermissible. (Para 19) b c

Counsel:- For Appellant(s): Mr. R.R. Mantri, Advocate. d
For Respondent(s): Mrs. A.V. Gondhalekar, A.P.P.

JUDGMENT

A.V. NIRGUDE, J.: - 1. All these Criminal Applications and Criminal Writ Petitions are taken up for final hearing by consent of all the parties, and since the point raised in all these cases is more or less similar, they are disposed of by this common judgment. For the purpose of disposal of the cases, we would utilise facts of Writ Petition No. 1027 of 2015 as representative. We understand that in most of the cases the facts are similar and the petitioners / applicants are similarly placed. e f

2. On 14th May, 2015, the petitioner was found transporting large quantities of pouches of tobacco which is called 'Gutka' in common parlance, pouches of pan-masala in a truck. The truck was stopped by respondent no. 4, who is Food Safety Officer of Osmanabad district. He alleged that he not only seized the goods but even lodged a police complaint alleging that the petitioner had committed violation of Government Notification, dated 15th May, 2014, prohibiting certain acts pertaining to Gutka/Pan Masala and thereby committed offence punishable under Sections 26 and 30 of the Food and Safety Standards Act, 2006 (in short, FSS Act, 2006). He further alleged that the petitioner was also liable to be prosecuted g h

a and punished for offences punishable under Sections 272, 273, 188
and 328 of the Indian Penal Code. The police registered offence vide
a Crime No. 70 of 2015 and arrested the petitioner. The petitioner
secured bail, but asserted that lodging of complaint and registration
of crime for offences punishable under provisions of Indian Penal
Code was illegal. According to them, the offence punishable under
Section 328 of the Indian Penal Code is not made out against
b them.

3. It is an admitted fact that the FSS Act, 2006, empowered
Food and Safety Commissioner, State of Maharashtra, under Section
30 of the FSS Act, 2006, prohibiting sale, manufacture etc. of some
c commodities if he is satisfied that prohibition would be in "public
interest". Since 2013, the Commissioner has been promulgating year
to year order prohibiting manufacture of scented supari, tobacco,
kharra etc. for a period of one year. He also mentioned in the order
that the violation would entail penalty up to Rs.2,00,000/-. On the day
d of incident, the prohibitory order was in force. It is, therefore, clear
that admittedly the petitioners were found to have committed
violation of the prohibitory order. (In the case it was found that the
petitioner was transporting gunny bags containing Pan-masala
packages and tobacco pouches. Transporting such prohibited
committee apparently amounted violation of the prohibitory order
e and the petitioner was liable for certain penal action.)

4. The question is, what action in such situation is permissible
in the light of provisions of the FSS Act, 2006? In order to find out
answer to this question, one must read the provisions of the Food
Safety and Standards Act, 2006. This Act come into force in August,
f 2006. It consolidated the laws relating to food, and for establishing the
food, safety and standards authority of India. Said Act was made also
for laying down science-based standards for articles of food and to
regulate their manufacture, storage, distribution, sale and import.
One of the important object of this Act was to ensure that public at
g large should get safe and wholesome food. The Act incorporated
salient provisions of the Prevention of Food Adulteration Act, 1954
and is also based on international legislations, instrumentalities and
Codex Alimentaries Commission which related to food safety norms.
The Act contains detail statements of objects and reasons.

h 5. The Act defined term 'Adultrant'. It means, any material
which is or could be employed for making the food unsafe or

substandard, misbranded or would contain extraneous matter (remnants of raw material, packaging material etc.).

The Act also define term 'food'. It says that 'food' means any substance processed or otherwise which is intended for human consumption.

The Act further defined term 'food additive'. This means, any substance not normally consumed as a food by itself, but is intentionally added to food for certain purposes.

This Act also defined term 'unsafe food'. It means, an article of food whose nature or substance or quality is so affected that it is rendered injurious to health. The definition gives various examples and reasons why food will be an articles of food would become unsafe food.

The Act establishes Food Safety and Standards Authority of India. This authority is made a 'Body Corporate'. This authority would establish its offices at any place in India, but its head office would be at Delhi.

The Act also provides as to how food authority would be composed. It also provides duties and functions of food authority. One of the main duty of the food authority is that it shall regulate and monitor the manufacture, processing, distribution, sale and import of food so as to ensure sale and wholesome food. The authority is expected to regulate standards and guidelines in relation to articles of food and enforcing various standards notified under the Act. It would regulate limits of use of food additives, contaminants, pesticide residues etc. in food. The food authority would also provide scientific data to the Government in the matter of framing policy relating to foods safety and nutrition. The authority would collect and summarize relevant scientific and technical data relating to food consumption and exposer of individual to risk relating to the consumption of food prevalence by biological risk etc. It should also collect scientific data in respect of contaminants of food and in respect of risks involved in consumption of food etc. The Act then provided general provisions about articles of food which includes use of food additives and processing aids contaminants, pesticides etc. It also imposes special responsibilities on food business operators.

The Act thus provides various methods to provide safe and wholesome food for the society.

a 6. Chapter 7 of the Prevention of Food Adulteration Act, 1954, provides provision for enforcement of the Act. The topmost authority responsible for enforcement of the Act is the Food Authority at Center and State Safety Authority at State level.

b 7. Section 30 of the Act provides that a Commissioner of Food Safety of the State should be appointed for efficient implementation of Food Safety and Standards. The Commissioner is empowered to prohibit in the interest of public health, the manufacture, storage, distribution or sale of any article of food, either in the whole of the State or any part of it for a period of which would not exceed one year.

c Acting pursuant to these powers given to the Commissioner under Section 30 of the Act, in 2013, the Commissioner opined that "tobacco beetelnut, whether flavoured, scented or mixed with other ingredients such as; nicotine, heavy metals, anti-caking agents, silver leaf, binders, flavours, cents, fragrances, prohibited chemicals etc, d which is covered by definition of 'food' under the Act caused immense damage to the health of consumers." Therefore, he prohibited manufactures support, distribution or sale of Gutka or Pan Masala, containing either tobacco or necotine or Magnesium Carbonate as ingredients.

e 8. Judicial notice can be taken of the fact that earlier to 2012 in Maharashtra, there were number of business men who were engaged in manufacturing Gutka or Pan Masala containing tobacco etc. These products were sold freely to the members of public earlier.

f 9. The provisions of the FSS Act, 2006 made provisions for appointment of 'Designated officer' who would be in-charge of Food Safety administration for each district and 'Food Safety Officer'.The Act further provides as to what powers are given to the Food Safety Officer and designated Officer. Section 38 of the FSS Act, 2006 provides powers of Food Safety Officer. and in order to elaborate his g powers we would rather quote the provision itself. Section 38 of the Act reads as under:-

38. Powers of Food Safety Officer. - (1) The Food Safety Officer may -

h (a) take a sample -
(i) of any food, or any substance, which appears to him to be intended for sale, or to have been sold for human consumption; or

(ii) of any article of food or substance which is found by him on or in any such premises;

which he has reason to believe that it may be required as evidence in proceedings under any of the provisions of this Act or of the regulations or orders made thereunder; or **a**

(b) seize any article of food which appears to the Food Safety Officer to be in contravention of this Act or the regulations made thereunder; and **b**

(c) keep it in the safe custody of the food business operator such article of food after taking a sample;

and in both cases send the same for analysis to a Food Analyst for the local area within which such sample has been taken: **c**

Provided that where the Food Safety Officer keeps such article in the safe custody of the food business operator, he may require the food business operator to execute a bond for a sum of money equal to the value of such article with one or more sureties as the Food Safety Officer deems fit and the food business operator shall execute the bond accordingly. **d**

(2) The Food Safety Officer may enter and inspect any place where the article of food is manufactured, or stored for sale, or stored for the manufacture of any other article of food, or exposed or exhibited for sale and where any adulterant is manufactured or kept, and take samples of such articles of food or adulterant for analysis. **e**

(3) Where any sample is taken, its cost calculated at the rate at which the article is usually sold to the public shall be paid to the person from whom it is taken.

(4) Where any article of food seized under clause (b) of subsection (1) is of a perishable nature and the Food Safety Officer is satisfied that such article of food is so deteriorated that it is unfit for human consumption, the Food Safety Officer may, after giving notice in writing to the food business operator, cause the same to be destroyed. **f**

(5) The Food Safety Officer shall, in exercising the powers of entry upon, and inspection of any place under this section, follow, as far as may be, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) relating to the search or inspection of a place by a police officer executing a search warrant issued under that Code. **g**

(6) Any adulterant found in the possession of a manufacturer or distributor of, or dealer in, any article of food or in **h**

a any of the premises occupied by him as such and for the possession of which he is unable to account to the satisfaction of the Food Safety Officer and any books of account or other documents found in his possession or control and which would be useful for, or relevant to, any investigation or proceeding under this Act, may be seized by the Food Safety Officer and a sample of such adulterant submitted for analysis to a Food Analyst:

b *Provided that no such books of account or other documents shall be seized by the Food Safety Officer except with the previous approval of the authority to which he is subordinate.*

c (7) *Where the Food Safety Officer takes any action under clause*

(a) of sub-section (1), or sub-section (2), or sub-section (4) or sub-section (6), he shall, call one or more persons to be present at the time when such action is taken and take his or their signatures.

d (8) *Where any books of account or other documents are seized under sub-section (6), the Food Safety Officer shall, within a period not exceeding thirty days from the date of seizure, return the same to the person from whom they were seized after copies thereof or extracts there from as certified by that person in such manner as may be prescribed by the Central Government have been taken:*

e *Provided that where such person refuses to so certify and a prosecution has been instituted against him under this Act, such books of account or other documents shall be returned to him only after copies thereof and extracts there from as certified by the court have been taken.*

f (9) *When any adulterant is seized under sub-section (6), the burden of proving that such adulterant is not meant for purposes of adulteration shall be on the person from whose possession such adulterant was seized.*

g (10) *The Commissioner of Food Safety may from time to time issue guidelines with regard to exercise of powers of the Food Safety Officer, which shall be binding:*

Provided that the powers of such Food Safety Officer may also be revoked for a specified period by the Commissioner of Food Safety.

h On perusal of above quoted provision, it is clear that the Food Safety Officer Is empowered to take sample of any food, seize any

article of food which is found in contravention of the Act, keep such seized articles of food in safe custody. He may even seize any adulterant found in possession of manufacturer, distributor or dealer etc. of articles of food. He could also seize books of account and other documents. a

10. Section 41 of the FSS Act, 2006 provides special power of Food Safety Officer. Section 41 of of the FSS Act, 2006 reads as under : b
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41. Power of search, seizure, investigation, prosecution and procedure thereof.- (1) Notwithstanding anything contained in sub- section (2) of section 31, the Food Safety Officer may search any place, seize any article of food or adulterant, if there is a reasonable doubt about them being involved in commission of any offence relating to food, and shall thereafter inform the Designated Officer of the actions taken by him in writing: c

Provided that no search shall be deemed to be irregular by reason only of the fact that witnesses for the search are not inhabitants of the locality in which the place searched is situated. d

(2) Save as in this Act otherwise expressly provided, provisions of the Code of Criminal Procedure, 1973 (2 of 1974) relating to search, seizure, summon, investigation and prosecution, shall apply, as far as may be, to all action taken by the Food Safety Officer under this Act. e

The Food Safety Officer is given wide powers which are equivalent to powers of a police officer as per the provisions of the Code of Criminal Procedure relating to search, seizure, summon, investigation and prosecution. f

11. Section 42 of the Act is a very peculiar provision of the Act. It provides procedure in launching prosecution. Section 42 of the Food Safety and Standards Act, 2006, reads as under :-

42. Procedure for launching prosecution. - (1) The Food Safety Officer shall be responsible for inspection of food business, drawing samples and sending them to Food Analyst for analysis. g

(2) The Food Analyst after receiving the sample from the Food Safety Officer shall analyse the sample and send the analysis report mentioning method of sampling and analysis within fourteen days to Designated Officer with a copy to Commissioner of Food Safety. h

a (3) *The Designated Officer after scrutiny of the report of Food Analyst shall decide as to whether the contravention is punishable with imprisonment or fine only and in the case of contravention punishable with imprisonment, he shall send his recommendations within fourteen days to the Commissioner of Food Safety for sanctioning prosecution.*

b (4) *The Commissioner of Food Safety shall, if he so deems fit decide, within the period prescribed by the Central Government, as per the gravity of offence, whether the matter be referred to,-*

(a) *a court of ordinary jurisdiction in case of offences punishable with imprisonment for a term up to three years; or*

c (b) *a Special Court in case of offences punishable with imprisonment for a term exceeding three years where such Special Court is established and in case no Special Court is established, such cases shall be tried by a Court of ordinary jurisdiction.*

d (5) *The Commissioner of Food Safety shall communicate his decision to the Designated Officer and the concerned Food Safety Officer who shall launch prosecution before courts of ordinary jurisdiction or Special Court, as the case may be; and such communication shall also be sent to the purchaser if the sample was taken under section 40.*

e This provision provides that Designated Officer after scrutiny of report of Food Analyst would decide as to whether the contravention, if any, is punishable with imprisonment or fine only. If he finds that contravention is punishable with imprisonment, he should send his recommendations within fourteen days to the Commissioner seeking sanction for prosecution. In case, the
f Designated Officer finds that contravention is punishable only with fine, he would himself adjudicate and dispose of such case. This provision makes distinction between two types of contraventions; contravention which is punishable with imprisonment and
g contravention which is punishable only with fine. Obviously, contraventions which are punishable with imprisonment are serious cases and only such cases are sent for adjudication in Court. Other cases are decided by designated officers themselves. This means that, the Act ensures that only serious cases would be referred to adjudication in Court either in regular Court or in special Courts.
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12. Chapter IX of the FSS Act, 2006 provides provisions relating to offences and penalties. Section 48 of the FSS Act, 2006

mentions that in what way a person would render any article of food injurious to health. Section 49 of the FSS Act, 2006 provides that the Adjudicating Officer or the Tribunal should adjudge the quantum of penalty for committing offence of rendering any article of food injurious to health. Chapter IX further provides various penalties for selling sub-standard food, misbranded food, misleading advertisement etc. As said above, the adjudication process for such contraventions and penalty is generally an "in house proceeding". The Act provided that Adjudicating Officers would decide such cases, and in case of Appeal, a Tribunals specially established for such purpose which would decide such cases. The Act clearly provided, as said above, that only offences punishable with imprisonment are required to be sent to the Courts of adjudication. All remaining cases would be decided by the authorities appointed/established under the provisions of the Act. It appears that this system of adjudication is made for protecting the manufacturers, distributors, sellers etc. of food from lengthy litigation. Chapter X provides how adjudication of cases relating to contravention, involving penalty etc. would be decided. The Commissioner of Food Safety would empower designated Officer to compound offences in petty cases. This Chapter also provides how Food Safety Appellate Tribunal is established and its procedure. This Chapter further provides that Civil Court would have no jurisdiction in respect of any matter decided by the Adjudication Officer or Tribunal. This Chapter further provides that wherever the case is sent to Court, it would be decided as a summary case by a Judicial Magistrate, First Class. This Chapter also provides that in appropriate cases, Central Government or State Government may establish Special Courts and Special Public Prosecutors. Section 97 of the FSS Act, 2006 provides that this Act would repeal seven Acts including the Prevention of Food Adulteration Act, 1954 etc.

It is thus clear that Food Safety Officers are empowered to seize articles found with any one in contravention of the prohibitory order passed under Section 30 of the Act. In all the cases, the Food Safety Officers found prohibited articles in possession of the petitioners and applicants and in all cases such articles were seized.

13. The questions that arises then is, whether in such cases Food Safety Officers should have gone to the Police Stations for lodging complaints, and, secondly, whether acts complained amounted to any offence punishable under provisions of the Indian Penal Code.

14. On careful perusal of provisions of Chapter IX and X of the FSS Act, 2006 and the prohibitory order issued by the Commissioner, it appears to us that contravention of prohibitory order would amount to "failure to comply with directions of Food Safety Officers" as contemplated in S.55, which provided penal action. Section 55 of the FSS Act, 2006, reads as under :-

55. Penalty for failure to comply with the directions of Food Safety Officer. - *If a food business operator or importer without reasonable ground, fails to comply with the requirements of this Act or the rules or regulations or orders issued thereunder, as directed by the Food Safety Officer, he shall be liable to a penalty which may extend to two lakh rupees.*

This provision makes it clear that the contravention allegedly committed by the petitioners was subject matter for adjudication under the provisions of Chapter IX of the FSS Act, 2006. Since the violation or breach of direction is not made punishable with imprisonment, it can not be referred to Court. Such cases should therefore necessarily go before the adjudicating officer. Section 68 of the FSS Act, 2006 provides how Adjudication Officer would adjudicate such case and how he would decide quantum of penalty. By no stretch of imagination, the cases in hand are required to be sent to Court. Such cases, in our view, would never be referred to Court mainly because the quantum of penalty does not include imprisonment.

15. The petitioner and applicants have stored/transported Gutka and Pan Masala in bulk quantity. They knew in most of the cases that the articles would be consumed in the State of Maharashtra. The question is, whether possessing such articles knowing that articles would be consumed in Maharashtra would amount to offence punishable under provisions of the Indian Penal Code. Sections 272 and 273 of the Indian Penal code read as under :-

"Section 272. *Adulteration of food or drink intended for sale.* - *Whoever adulterates any article of food drink, so as to make such article noxious as food or drink, intending to sell such article as food or drink, or knowing it to be likely that the same will be sold as food or drink, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.*

"Section 273. *Sale of noxious food or drink.* - *Whoever sells, or offers or exposes for sale, as food or drink, any article which has*

been rendered or has become noxious, or is in the state unfit for food or drink, knowing or having reason to believe that the same is noxious as food or drink, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both." a

Both these Sections deal with adulteration of article of food. The first question therefore is, whether Gutka or Pan Masala found in possession of the applicant / petitioner were "adulterated food". The Indian Penal Code does not define specifically what is food adulteration. However, we can assume that adulteration of food would mean mixing any material to food which would make the food unsafe and substandard. The Act comprehensively defines term 'adulterant' in Section 3(1) (A) of the FSS Act, 2006. It reads as under :- b

"adulterant" means any material which is or could be employed for making the food unsafe or sub-standard, mis-branded or containing extraneous matter." c

(zz) *"unsafe food" means an article of food whose nature, substance or quality is so affected as to render it injurious to health :--* d

(i) by the article itself, or its package thereof, which is composed, whether wholly or in part, of poisonous or deleterious substance; or e

(ii) by the article consisting, wholly or in part, of any filthy, putrid, rotten, decomposed or diseased animal substance or vegetable substance; or

(iii) by virtue of its unhygienic processing or the presence in that article of any harmful substance; or f

(iv) by the substitution of any inferior or cheaper substance whether wholly or in part; or

(v) by addition of a substance directly or as an ingredient which is not permitted; or g

(vi) by the abstraction, wholly or in part, of any of its constituents;

or

(vii) by the article being so coloured, flavoured or coated, powdered or polished, as to damage or conceal the article or to make it appear better or of greater value than it really is; or h

a (viii) by the presence of any colouring matter or preservatives other than that specified in respect thereof; or

(ix) by the article having been infected or infested with worms, weevils, or insects; or

b (x) by virtue of its being prepared, packed or kept under insanitary conditions; or

(xi) by virtue of its being mis-branded or sub-standard or food containing extraneous matter; or

(xii) by virtue of containing pesticides and other contaminants in excess of quantities specified by regulations.

c 16. In order to find out as to whether food is unsafe due to presence of adulterant, it must be analyzed. Chapter VIII of the FSS Act, 2006 provides how an article of food is analyzed. This Chapter provides procedure for taking samples of food and analysis of such samples. The food Analyst would submit his report as to whether the
d food was mixed with adulterant etc. In our cases, Gutka/Pan Masala was not sent for food analysis. There is no certificate issued by the Food Analyst that Gutka or Pan Masala is adulterated food. Therefore, the contravention of the prohibitory order is not punishable under Sections 272 and 273 of the Indian Penal Code.

e 17. The Police also applied provision of Section 188 of the Indian Penal Code. This provision reads as under :-

188. *Disobedience to order duly promulgated by public servant.*

f *Whoever, knowing that, by an order promulgated by a public servant awfully empowered to promulgate such order, he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction, shall, if such disobedience causes or tend to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any person lawfully employed, be punished with simple imprisonment for a term which may extend to one month or with fine which may extend to two hundred rupees, or with both;*

g
h *and if such disobedience causes or trends to cause danger to human life, health or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.*

Explanation- It is not necessary that the offender should intend to produce harm, or contemplate his disobedience as likely to produce harm. It is sufficient that he knows of the order which he disobeys, and that his disobedience produces, or is likely to produce, harm. a

The entire gamut of this provision is quite peculiar. It says that the culprit should administer to the victim. A substance cause hurt to him. Possessing Gutka or Pan Masala or transporting Gutka or Pan Masala does not amount to administering it to any victim. As said above, Guta or Pan Masala were not subjected to food analysis so far. On the other hand, the Commissioner simply opined that it could be injurious to health. He placed reliance on various reports which he received from time to time. He did not place reliance on report of food analysis appointed under the provisions of FSS Act, 2006. It could therefore be said that Gutka or Pan Masala could be poisonous. So, possessing or transporting Gutka or Pan Masala did not amount to offence under Section 328 of the Indian Penal code. In our view, this provision will not apply to the present cases. Section 188 of the Indian Penal Code is part of Chapter X, which deals with contempt of lawful authority of public servants. There are various provisions which are related to public servants and causing disobedience to their orders which would lead to obstruction, annoyance, injury to any person and breach of law and order. b c d e

18. The Commissioner in this case indeed is a public servant and he has issued an order, and order is breached and disobeyed by the applicants and petitioners. But, this disobedience apparently does not tend to cause breach of law and order. The Commissioner's order is not an order contemplated under Chapter 10 of the IPC. Besides, the prohibitory order issued under Section 30 of the FSS Act, 2006 and its violation, would amount to offence only under Section 55 of the FSS Act, 2006. This specific provision if made in a special enactment which is a code in itself. It would not permit any one to apply Section 188 of the Indian Penal Code to such breach or violation. Section 188 of the Indian Penal Code thus is not applicable to the facts of the case. f g

19. The next question is, whether manufacturing, possession, selling of Gutka and Pan Masala would amount to offence punishable under Section 328 of the Indian Penal Code. Section 328 of the Indian Penal Code reads as under :- h

a "328. Causing hurt by means of poison, etc., with intent to commit an offence. - Whoever administers to or causes to be taken by any person any poison or any stupefying, intoxicating or unwholesome drug, or other thing with intent to cause hurt to such person, or with intent to commit or to facilitate the commission of an offence or knowing it to be likely that he will thereby cause hurt, shall be punished with imprisonment of either description for a term b which may extend to ten years, and shall also be liable to fine."

By no stretch of imagination, manufacturing, possessing Gutka and Pan Masala would amount to administering poison. As said above, Gutka or Pan Masala are not subjected to food analysis. The commissioner opined that in its sale etc. is not in public interest. c This opinion is based on various reports but not report of Food Analyst appointed under the provisions of the FSS Act. Therefore, it cannot be said that Gutka and Pan Masala are stupefying, intoxicating or unwholesome drug. Besides offering these items of Food would not amount to intention to cause hurt. The provisions of Section 328 of d the Indian Penal Code to the present cases is therefore impermissible.

In view of all above discussion, we proceed to pass the following order :-

ORDER

e A) All Criminal Writ Petitions and Criminal Applications are allowed.

B) Action taken by the Police against petitioners / applicants under Sections 372, 373, 188 and 328 of the Indian Penal Code is declared to be illegal. Such complaints are quashed.

f B) The Food Safety Officers are not prohibited from proceeding against applicants / petitioners under the provisions of Chapter X of the Food Safety and Standards Act, 2006.

Result:- All Criminal Writ Petitions and Criminal g Applications allowed.

h