

**HIGH COURT OF MADHYA PRADESH**  
**BENCH AT GWALIOR**  
**SINGLE BENCH**  
**BEFORE JUSTICE S.K.AWASTHI**  
**Misc. Cri. Case No. 258/2017**

Manoj Kumar Jain

**Versus**

State of MP

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Shri R.K.Soni, Advocate for the applicant.  
Shri Kuldeep Singh, Public Prosecutor for the  
respondent/State.  
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**Whether approved for reporting : Yes**

Law laid down	Relevant paras
<p>The definition of 'Food' under Section 3(j) of the Food Safety and Standards Act, 2006 provides that <i>any substance, whether processed, partially processed or unprocessed, which is intended for human consumption and is clearly wide enough to include 'gutkha' which is a substance intended for human consumption. Therefore, Paan Masala and Gutkha are 'food' within the meaning of Food Safety and Standards Act, 2006.</i></p>	<b>Paras 9</b>
<p>The provisions of The Cigarettes And Other Tobacco Products (Prohibition of Advertisement And Regulation of Trade And Commerce, Production, Supply And Distribution) Act, 2003 and Food Safety and Standards Act, 2006 have independent penal provisions and the Act of 2003 has no conflict with the provisions of the Act of 2006.</p>	<b>Para 12</b>

**ORDER**  
**(24.10.2017)**

The sole question which arises for consideration is whether 'gutkha' is a food article or not, under the provisions of Food Safety and Standards Act, 2006 (in short, 'Act of 2006')?

2. The applicant has preferred this application under Section 482 of the Code of Criminal Procedure to challenge the order dated 06.12.2016 passed by the Court of Judicial Magistrate First Class, Guna, in Criminal Case No. 1931/2013, whereby the application preferred under Sections 26, 27 of the Act of 2006 has been rejected by the Trial Court and the Trial Court has proceeded with the prosecution against the present applicant.

3. The facts leading to filing of the present case are that the Food Safety Officer (in short, 'FSO'), District Guna, carried out inspection of a food establishment which is involved in the sale of paan masala, 'gutkha', supari and other allied products. The FSO upon suspecting the quality of the food product to be sub-standard proceeded to purchase of 'Vimal Gutkha' and the same was forwarded to the State Food Testing Laboratory (in short, 'Lab') for its analysis. According to the report issued by the Food Analyst, the sample was found to be sub-standard, unsafe as also the same was misbranded. Consequently, a complaint was filed before the Competent Court and the Competent Court framed charges against the present applicant on 09.07.2015 for commission of offences punishable under Sections 26, 27 and 31 (1) read with Section 58, 59 and 63 of the Act of 2006. Subsequently, the applicant preferred an application under Sections 26, 27 of the Act of 2006 and

the bone of contention before the Trial Court was that the article in question is 'gutkha' and the same is not covered by the provisions of the Act of 2006 as there is a Special Act, namely, The Cigarettes And Other Tobacco Products (Prohibition of Advertisement And Regulation of Trade And Commerce, Production, Supply And Distribution) Act, 2003 (in short, 'Act of 2003'), which will prevail over the provisions of the Act of 2006 as the same is a Special Act. Therefore, it was argued before the Trial Court that the prosecution lodged under the Act of 2006 is misconceived and deserves to be dropped.

4. The Trial Court proceeded to observe that the contention about the applicability of the Act of 2003 is misconceived and the fact that once the Criminal Court proceeds to take cognizance in the matter, then there is no provision under the Act of 2006 or under Cr.P.C. for review of such order taking cognizance. Consequently, the application was dismissed and the matter was fixed for recording of Prosecution Evidence.

5. The rejection of the application has been assailed before this Court on the same very ground that the seized article is not a food article under the Act of 2006 and therefore, the prosecution lodged may be quashed. In support of this contention, the learned counsel for the applicant has placed heavy reliance upon the judgment pronounced by the Allahabad High Court in the case of ***Himachal Marketing Company v. State of Uttar Pradesh, 2012 FAJ 78 (Allahabad)***, wherein according to the applicant, the Allahabad High Court has concluded that 'gutkha' is not a food product.

6. *Per contra*, the learned counsel for the respondent pointed out that if the interpretation suggested by the

applicant is accepted, then the same would have drastic consequence on the public health because large number of people indulge in consumption of 'Gutkha' or allied products. Therefore, the application deserves to be dismissed.

7. The most apt manner to deal with the contention canvassed by the learned counsel for the applicant would be to first discuss or dwell into judgment of the Allahabad High Court in ***Himachal Marketing Company (supra)***. It would be pertinent to mention here that the judgment of other High Courts are not binding although they have persuasive value and therefore, the same are required to be dealt with [**See: Pradeep J. Mehta v. CIT, (2008) 14 SCC 283**]. The placitum of the judgment cited by the learned counsel for the applicant is misleading and does not shade light upon the true purport of the judgment. The Allahabad High Court was dealing with an application for seeking release of seized 'gutkha' and the reasons cited for release of such article was the report of the Public Analyst that the 'gutkha' is not adulterated and the fact that the nature of gutkha is perishable and no fruitful purpose would be served by keeping the entire bulk of consignment containing 18,000 pouches of 'gutkha' seized. While doing so, the Allahabad High Court has referred to the judgment of the Hon'ble Apex Court in the case of ***Godavat Pan Masala Product Ltd. v. Union of India, (2004) 7 SCC 68***, and has observed in Para 12 that the Hon'ble Supreme Court did not accept the argument that Pan Masala could not be treated as food, although in the latter part of the judgment, neither there is any discussion on the implication of the judgment in the case of ***Godavat (supra)*** nor there is a

reason assigned for arriving at a finding that 'gutkha' being a Tobacco Product will not be covered under the Prevention of Food Adulteration Act, 1954; rather only in Para 16, a finding has been recorded but no reasoning in this respect has been assigned by the Allahabad High Court. Whereas it is a well-established proposition of law that a mere observation/passing reference, without reason by citing bare provisions or judgments on the issue, will not be a binding precedent. On this broad principle, the Hon'ble Apex Court in ***Municipal Corpn. of Delhi v. Gurnam Kaur, (1989) 1 SCC 101***, has held in following terms: -

*"11. Pronouncements of law, which are not part of the ratio decidendi are classed as obiter dicta and are not authoritative. With all respect to the learned Judge who passed the order in Jamna Das case [ Writ Petitions Nos. 981-82 of 1984] and to the learned Judge who agreed with him, we cannot concede that this Court is bound to follow it. It was delivered without argument, without reference to the relevant provisions of the Act conferring express power on the Municipal Corporation to direct removal of encroachments from any public place like pavements or public streets, and without any citation of authority. Accordingly, we do not propose to uphold the decision of the High Court because, it seems to us that it is wrong in principle and cannot be justified by the terms of the relevant provisions. A decision should be treated as given per incuriam when it is given in ignorance of the terms of a statute or of a rule having the force of a statute. So far as the order shows, no argument was addressed to the court on the question whether or not any direction could properly be made compelling the Municipal Corporation to construct a*

*stall at the pitching site of a pavement squatter. Professor P.J. Fitzgerald, editor of the Salmond on Jurisprudence, 12th Edn. explains the concept of sub silentio at p. 153 in these words:*

*“A decision passes sub silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind. The court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the court should not have decided in favour of the particular party unless it also decided point B in his favour; but point B was not argued or considered by the court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass sub silentio.”*

Thus, in the opinion of this Court, the judgment of Allahabad High Court will not aid the contention advanced by the learned counsel for the applicant.

8. Now, advertent to the issue whether ‘gutkha’ will qualify as food article under the Act of 2006 or not; it would be pertinent to reproduce Section 3 (j) of the Act of 2006, which is as under: -

*“Food means any substance, whether processed, partially processed or unprocessed, which is intended for human consumption and includes primary food to the extent defined in clause (zk), genetically modified or engineered food or food containing such ingredients, infant food, packaged drinking water, alcoholic drink, chewing gum, and any substance, including water used into the*

*food during its manufacture, preparation or treatment but does not include any animal feed, live animals unless they are prepared or processed for placing on the market for human consumption, plants, prior to harvesting, drugs and medicinal products, cosmetics, narcotic or psychotropic substances:*

*Provided that the Central Government may declare, by notification in the Official Gazette, any other article as food for the purposes of this Act having regards to its use, nature, substance or quality;"*

9. The portion of the definition reproduced hereinabove provides that any substance, whether processed, partially processed or unprocessed, which is intended for human consumption and is clearly wide enough to include 'gutkha' which is a substance intended for human consumption.

10. In somewhat similar circumstances, the Bombay High Court in the case of ***Dhariwal Industries Limited and Another v. State of Maharashtra and Others, (2013) 1 Mah LJ 461***, was confronted with the same issue regarding the nature of 'gutkha' and whether the same is covered under the definition of 'food' provided under the Act of 2006. The Bombay High Court arrived at the conclusion in the following manner: -

*"19. While the definition in the 1954 Act excluded drugs and water, the definition in the Food Safety Act, 2006 excludes animal feed, live animals, plants prior to harvesting, drugs and medicinal products, cosmetic, narcotic and psychotropic substance. Obviously, gutka and pan masala do not fall in any of these excluded categories. The expression "any substance which is intended for human consumption" in FSS Act, 2006 is also wider than the expression "any article used as food or drink for human consumption" in PFA Act, 1954. It is also pertinent to note that the definition of food in*

*the Act of 2006 specifically includes "chewing-gum" and any substance used into the food during its manufacture, preparation or treatment. Hence, even if gutka or pan masala were not to be ingested inside the digestive system, any substance which goes into the mouth for human consumption is sufficient to be covered by definition of food just as chewing-gum may be kept in the mouth for some time and thereafter thrown out. Similarly gutka containing tobacco may be chewed for some time and then thrown out. Even if it does not enter into the digestive system, it would be covered by the definition of "food" which is in the widest possible terms. The definition of "food" under section 2(v) of the PFA Act was narrower than the definition of food under Food Safety Act, still the Supreme Court in Ghodawat case held that pan masala and gutka were "food" within the meaning of PFA Act. The very fact that the petitioners themselves had obtained licences under the PFA Act and have also obtained licences under the Food Safety Act, 2006 is sufficient to estop them from raising the contention that gutka and pan masala do not fall within the definition of "food" under the Food Safety Act, 2006."*

11. Moving on, the next limb of the argument advanced by the learned counsel for the applicant is that 'gutkha' being a Tobacco Product will be governed by the provisions of the Act of 2003 and thus, by implication, any general law will be necessarily superseded by a special law occupying the same field. This Court does not find any substance in this contention for the reason that the perusal of provisions of the Act of 2003 goes to show that the same deals with regulation of Cigarette or other Tobacco Products, but in no manner whatsoever the Act of 2003 has any conflict with the provisions of the Act of 2006, meaning thereby that the Act of 2006 necessarily deals with adulterated or misbranded food articles whereas the Act of 2003 nowhere deals with



adulteration although the same remotely touches upon the question of misbranding.

12. In light of the above and abiding by the established legal proposition that the endeavor of Courts should be to harmonize two Acts seemingly in conflict (although the present is not the case of any conflict between two legislations), it is categorically held that even though the Act of 2003 specifically deals with Tobacco Products but the same is an additional legislation apart from the Act of 2006, which is to be followed by the Companies dealing in Tobacco Products used for chewing. However, there is no iota of doubt that in case of adulteration in Tobacco Products used for chewing, the Act of 2006 will have to be roped in for prosecuting the delinquent Companies or individuals and with respect to misbranding, the stipulations mentioned in both the Acts (Act of 2003 and Act of 2006) are to be strictly adhered to. To put it differently, it is held that the term 'misbranded food' defined under Section 3 (zf) provides for 'acts' which will constitute misbranding of food, but a legal entity or individual, dealing in Tobacco Products used for chewing, will, in addition to compliance under Act of 2006, also have to ensure that the conditions mentioned in Section 7, 8, 9, 10 etc. of the Act of 2003, are not violated. Obviously, it should not be understood that for violation of provisions of the Act of 2003, the penalty under Act of 2006 will be attracted because both the Acts have independent penal provisions, but at the same time these Acts shall have concurrent application with respect to Tobacco Products used for chewing and the Court is not required to choose one over the other for the reasons stated hereinabove.

13. Consequently, the contention raised by learned

counsel for the applicant is repelled for the reasons indicated above and it is observed that no illegality has been committed by the Trial Court in rejecting the application under Sections 26, 27 of the Act of 2006.

14. Resultantly, the instant application fails and is hereby dismissed. A copy of this judgment be sent to the Trial Court for information and necessary action.

**(S.K.Awasthi)**  
**Judge.**

**(yogesh)**