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Beli**THE HIGH COURT OF SIKKIM : GANGTOK****WRIT PETITION (C) NO. 35 OF 2004**

In the matter of an application under Article 226 of the
Constitution of India

and

in the matter of

S. Narendra Kumar & Co.
a duly registered Partnership firm
having its registered office at
Krushal Commercial Complex,
G. M. Road,
Amar - Mahal Chembur (W),
Mumbai - 400 089
through Mr. Shailesh
S/o Rasiklal Shah,
Working with S. Narendra Kumar & Co.
as Commercial Manager
at registered office of the petitioner **Petitioner**

Versus

1. State of Sikkim
through the Secretary,
Department of Health Care,
Human Services and Family Welfare,
Government of Sikkim,
Gangtok.
2. Dr. D. K. Subba,
Food (Health) Authority
(Under Prevention of Food Adulteration Act, 1954),
Government of Sikkim,
Department of Health Care,
Human Services and Family Welfare,
Gangtok. **Respondents**

For the petitioner : Messrs D. T. Kharmate and K. T.
Bhutia, Advocates.

For the respondents : Messrs S. P. Wangdi, Advocate
General, J. B. Pradhan,
Government Advocate and Karma
Thinley, Assistant Government
Advocate.

**PRESENT: THE HON'BLE MR. JUSTICE N. S. SINGH, CHIEF JUSTICE (ACTING).
THE HON'BLE MR. JUSTICE A. P. SUBBA, JUDGE.**

Last date of hearing : 3rd March, 2005.

DATE OF JUDGMENT : 21st MARCH, 2005.


J U D G M E N T

A. P. Subba, J

By this petition filed under Article 226 of the Constitution of India, the petitioner has challenged the validity of notification no.10 HC-HS&FW/PFA dated 15.7.2004 issued by the Food (Health) Authority, Department of Health Care, Human Services and Family Welfare, Government of Sikkim, Gangtok, prohibiting the manufacture and/or sale of (1) Everest Chat Masala manufactured by Everest Company, (2)(a) Stick Candy Ice-cream and (b) Fancy stick juice in different colours in polythene pack in the State of Sikkim with immediate effect until further orders. The impugned notification has been issued by the concerned authority in exercise of powers conferred on it by clause (iv) of Section 7 of the Prevention of Food Adulteration Act, 1954 (hereinafter referred to as the "Act") read with Rule 3(1)(a) of the Sikkim Prevention of Food Adulteration Rules, 1991 (hereinafter referred to as the "Rules"). The present writ petition is confined to the ban on the item "Everest Chat Masala".


2. The petitioner is a registered partnership firm engaged in the manufacture and trade of various powdered spice preparation under the registered Trade Mark as "EVEREST". The "Everest Chat Masala" which is one of its products is manufactured under a licence obtained from the local Licensing Authority under Rule 50 of the Prevention of Food Adulteration Rules, 1955 and the same is valid as on the date of filing this petition. It has its manufacturing unit







located in Maharashtra. The petitioner sells its products including the "Everest Chat Masala" all over India including the State of Sikkim. It is stated that the "Everest Chat Masala" is a salty mixture generally and specially used for sprinkling the same upon fruits, salads or even juices and the same is consumed as taste booster or flavouring agent. This product is not subject to any statutory standard as it does not fall within the purview of Appendix "B" appended to Prevention of Food Adulteration Rules, 1955 which defines and prescribes standard of quality of different items. The product is only covered by a residuary category of food articles classified as "proprietary food" as defined under clause (b) of the explanation appended to Rule 37A of the above said Rules and as such no restriction of any kind has been prescribed for the formulation of this product except that the label of the product shall bear the names of the ingredients used for blending the same in descending order of the composition by weight or volume as the case may be. It is stated that the Food (Health) Authority of the State of Sikkim (respondent no.2) vide the impugned notification prohibited the manufacture and/or sale of "Everest Chat Masala" w.e.f. 15.7.2004 till further order thereby violating the fundamental rights of the petitioner guaranteed under Articles 14 and 19 of the Constitution of India. Hence the present petition under Article 226 of the Constitution of India.


3. It is contended that the power to declare a substance which is found as injurious to health and to prohibit manufacture and sale of the same lies only with the Central Government under section 23 of the Act and no power is vested with the State Government in this regard. The scheme of the Act suggests that a decision to ban






an article of food 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 a broader policy which has been located only in the Central Government under Section 23(1-A)(f) and not in the State Food (Health) Authority. When the scheme of the Act is analysed in the light of its preamble it becomes clear that there is no independent source of power under Section 7(iv). 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(1-A) of the Act. The power of the State Authority being transitory in nature designed to meet local emergencies it has no power to make an order of prohibition either of permanent nature or enduring for such a long time as to be deemed to be permanent. It is also contended that clause (iv) of Section 7 and clause (c) of sub-Section (1) of Section 10 of the Act and their interplay unmistakably suggests that the powers conferred on the Food (Health) Authority and the Food Inspector being derived from the rule made in exercise of the powers under Section 24 of the Act are necessarily subservient to the powers derivable from the rules made under Section 23 of the Act and neither the Food (Health) Authority nor the Food Inspector can be said to have such powers which are available to the Central Government by prescription of rule in exercise of powers under Section 23(1-A)(f) of the Act. It is therefore contended that if the provisions of Section 7(iv) of the Act is not read down as conferring power on the Authority only to deal with an urgent situation the section would be conferring arbitrary powers on the authority.


4. In the counter-affidavit filed on behalf of the respondent, it was contended that the provisions of section 24 of the



Act and the rules framed thereunder by the State Government, namely, the Sikkim Prevention of food Adulteration Rules, 1991 vests the State Government with the power to prohibit manufacture or sale of food items injurious to health in public interest and accordingly the impugned notification has been issued by the respondent no.2 under the authority vested with it by law. It is stated that the impugned notification was issued in exercise of the powers conferred on the Food (Health) Authority of the State Government under clause (iv) of Section 7 of the Prevention of Food Adulteration Act, 1954 read with Rule 3(1)(a) of the Prevention of Food Adulteration Rules, 1991 on the basis of a report obtained from the public Analyst for the State of Assam and Sikkim at Guwahati on the sample of the "Everest Chat Masala" collected by the Food Inspector from the shop of one Arun Kumar Agarwal, C/o. Gupta Tea House, M. G. Marg, Gangtok and sent for chemical analysis in course of his routine inspection. It is stated that consequent upon the action initiated thereafter the department has already filed a complaint against the petitioner under Section 16 of the Prevention of Food Adulteration Act, 1954 before the Court of the Chief Judicial Magistrate, East and North Sikkim at Gangtok where it is now pending and as such, the petitioner can raise all the questions before the trial Court. It is also contended that the impugned notification has been issued under the provisions of law passed by the State Legislature and duly notified and the licence obtained by the petitioner falling within the ambit of the relevant clause of the notification questioning the validity of the notification now is hit by the principle of estoppel, acquisition and waiver. Accordingly it is contended that the present writ petition is not maintainable in its present form as well as in law.






5. We heard Shri D. T. Kharmate, learned counsel for the petitioner and Shri S. P. Wangdi, learned Advocate General on behalf of the State respondents.

6. Shri Kharmate in his submission raised number of points. For the sake of convenience, the main grounds of challenge urged by Shri Kharmate may briefly be summarised as follows:-

- (i) That under the Act power to declare a substance injurious to health and the power to issue an order of prohibition are vested only with the Central Government and not with the State Government.
- (ii) That the petitioner has been granted licence to manufacture the product under reference by the Local Licensing Authority under the relevant provision of the Rules and there being no violation of any of the terms and conditions so far it is not open to the State Food (Health) Authority to prohibit the manufacture and sale of the product by any administrative order.
- (iii) That the power of the State Government to frame Rules under Section 24 of the Act is extremely narrow and is limited to the field not covered by Section 23 of the Act.
- (iv) That the Act is concerned with Prevention of Adulteration of Food and not intended to prohibit any article used as food or otherwise.
- (v) That the impugned notification issued by the State of Sikkim operates extra-territorially and to that extent is ultra vires the power of the State.
- (vi) That the impugned notification which is administrative in nature interferes with the fundamental rights of the petitioner guaranteed under Articles 14 and 19 of the Constitution of India.


7. In reply to the above grounds of challenge raised by the petitioner, Shri S. P. Wangdi, the learned Advocate General, in his brief submission, stated that the substantive provisions of the Act were sufficient to empower the State Government to frame Rules and





to pass order of prohibition. According to him the provision contained in Section 7(iv) of the Act which deals with prohibition of manufacture, sale, etc. of certain articles of food, and that of Section 10 which deals with powers of Food Inspector under which the Food Inspector has been authorised to prohibit the sale of any article of food, with the previous approval of Local (Health) Authority or the Food (Health) Authority, invest the State Government with necessary powers and for locating the source of such power there was no need to go into the Rules. It was also his submission that the impugned notification was duly issued under the authority vested by law with the State Authority. Emphasis was laid on the fact that the product in question was banned in public interest after obtaining the opinion of a qualified Public Analyst to the effect that it was adulterated. It was stated that a criminal case initiated by filing a complaint against the petitioner is now in progress in the Court of Chief Judicial Magistrate (E & N) and that the petitioner can raise all the questions before the learned trial Court in the said proceedings.

8. In order to substantiate his main submission that the State Government had no such power to frame Rules concerning prohibition and to pass such order of prohibition Shri Kharmate referred to the provision of Sections 23 and 24 of the Act. It was his contention that the power of the State Government to make rules is dealt with by Section 24. This section clearly puts an embargo on the power of the State Government to make rules in the matter falling within the purview of Section 23 which authorises the Central Government to frame rules. Clause (A-1)(f) of Section 23 clearly provides that it is solely for the Central Government to frame rules with regard to prohibiting the manufacture or 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. Therefore, a reading of the above two sections at once make it clear that the area where the State Government may make rules and the area where the Central Government may only make rules are clearly demarcated.

9. To appreciate the above contention urged by Shri Kharmate, it is necessary to notice the relevant portion of Sections 23 and 24 of Prevention of Food Adulteration Act, 1954 which are as follows:-

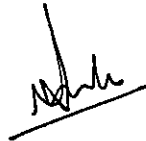
"23. Power of the Central Government to make rules.—(1) *The Central Government may, after consultation with the Committee and after previous publication by notification in the Official Gazette, make rules to carry out the provisions of this Act:*


.....
 (1-A) *In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any other following matters, namely:*

.....
 (f) *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 or sale of any article of food;*

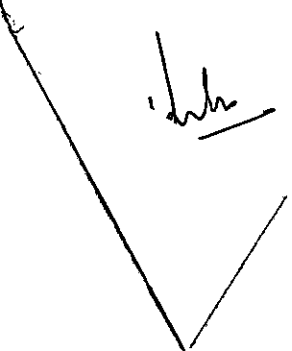

24. Power of the State Government to make rules.—(1) *The State Government may, after consultation with the Committee and subject to the condition of previous publication, make rules for the purpose of giving effect to the provisions of this Act in matters not falling within the purview of Section 23.* "


10. It is clear from the above provision that Section 23(1-A)(f) empowers the Central Government to make rules to carry out the provisions of the Act and providing for all or any of the matters enumerated therein which includes prohibiting the sale or defining





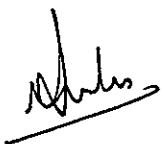
the conditions of sale of any substance which may be injurious to health when used as food or restricting in any manner its use as an ingredient in the manufacture of any article of food or regulating by the issue of licences the manufacture or sale of any article of food and Section 24 empowers the State Government to make rules mainly for the purpose of giving effect to the provisions of the Act but not in matters falling within the purview of Section 23. Therefore a plain reading of the above two provisions leave no room for doubt that the power to pass any order of prohibition in respect of any substance found injurious to health in public interest exclusively falls within the jurisdiction of the Central Government. However, at the same time we cannot overlook the provision contained in Section 7(iv) which, as contended by the learned Advocate General, empowers the Food (Health) Authority to prohibit sale of any article of food in the interest of public health and the provision of Section 10 which empowers the Local (Health) Authority having jurisdiction in the local area to authorise a Food Inspector to prohibit the sale of any article of food in the interest of public health. In view of this position the question that arises is whether the Food (Health) Authority and the Local (Health) Authority could be held to have powers in the matter which has been left to the Central Government to frame Rules and the State Government has been left with no such powers. As already noticed above, it is the submission of Shri S. P. Wangdi, the learned Advocate General, that these two provisions may be taken as the source of power for the State to make rules or pass order of prohibition without going into the Rules. It must be conceded that a plain reading of these provisions, namely, Section 7(iv) and Section 10 of the Act gives one the impression that power






to pass order of prohibition flows from these provisions. However, we would hasten to add that such an approach of reading a provision in isolation and culling out a meaning is not in conformity with the accepted principle of interpretation. It is a well-established principle of interpretation that a statute has to be read as a whole. Looked at from this point of view the submission of the learned Advocate General though seemingly correct does not seem to us to reflect the correct position of law. It has been laid down by the Hon'ble Supreme Court in the recent decision in *Godawat Pan Masala Products I.P. Ltd. vs. Union of India* (2004) 7 SCC 68 that 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 the other provision of the same Act so as to make a consistent, harmonious enactment of the whole statute. It has been observed that *"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."* (Para 47)

11. In view of the position of law as highlighted above, it is clear that the contention of Shri Wangdi cannot be accepted. The same is accordingly rejected.



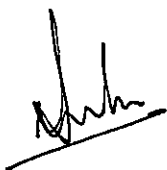


12. The above latest decision was also relied on by Shri Kharmate in support of all the grounds urged by him and as such further reference to the same decision is unavoidable for determination of other issues also. The various grounds urged by him have been already enumerated above. A further reference to the other observations and discussions of the Hon'ble Supreme Court in the above appeals and writ petitions is, therefore, not only essential but is of great advantage for arriving at appropriate conclusion on the other issues. The following observations, in particular, are relevant.

"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." (para 54)

"In our view the scheme of the Act suggests that a decision to ban an article injurious to health, when used as food or 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." (para 60)

Further observations of the Court which are relevant for the present purpose are as follows:-





"We cannot conceive of such wide-ranging powers 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 the Central Government for making the rules under Section 23 is subject to be 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 had 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." (para 70)

"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." (para 72)

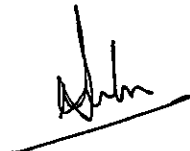
13. The Hon'ble Supreme Court on consideration of all aspects of the matter came to the final conclusion as follows:-


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.
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.

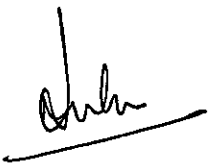
14. The above being the position of law as recently laid down by the Apex Court, we are of the view that the present Writ Petition is not devoid of merit. It is an admitted position that the respondent no.2 issued the impugned notification in purported exercise of power conferred by Section 7(iv) of the Act. As already noticed above, Section 7(iv) of the Act is not an independent source of power for the State (Health) Authority. Such source of power would be available to the State only from the valid Rules made by the State under Section 24 and such power is purely transitory in nature intended to deal with local emergencies. No doubt the Rules framed by the State in exercise of power under Section 24 gives power to the Food (Health) Authority to prohibit the sale or manufacture for sale,






storage, distribution of article of food for a specified period in the interest of public health. But as already indicated above, the Rules in question cannot be taken as valid in law in so far as the provision contained in Rule 3(1)(a) under which the impugned notification has been issued fall outside the ambit of Section 24 of the Act. It, therefore, follows that the impugned notification having been issued under the provision of Rules which are not valid in law cannot be sustained.

The further contention of the learned Advocate General as seen above is that the sale of the "Everest Chat Masala" was banned after obtaining expert opinion to the effect that it was adulterated. However, it appears that it would not be enough for the State Food (Health) Authority to have in its possession materials for initiating action for passing a ban order. In order that a ban order passed by the Authority is valid, the Authority must follow the procedure established by law and such action must also be consistent with the rules of natural justice. It has been observed by the Apex Court in para 76 of the above case that *"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."* In the present case also no such procedure was followed. Admittedly, the licence issued to the petitioner is still valid and operative and no notice has been served on the petitioner for cancellation or suspension of the same.






The impugned notification which was brought out suddenly also does not clarify as to why emergent steps were required to be taken.

15. In view of the above, we have no hesitation to hold that the impugned notification which has been issued without a valid authority and also without following well-recognised principles of natural justice is bad in law and is liable to be struck down as it is violative of fundamental rights of the petitioner guaranteed under Articles 14 and 19 of the Constitution of India.

16. In the result, the writ petition is allowed and the impugned notification is quashed as bad in law.

17. No order as to costs.



(**A. P. Subba**)
Judge
21-03-2005

N.S. Singh, C.J. (Actg.)

17. Concurring the observations and findings of Brother Justice A.P. Subba, I hereby render my judgment in the following order:-

Section 23 of Prevention of Food Adulteration Act, 1954 (for short, the Act) deals with the power of the Central Government to make rules in terms of the provisions of law prescribed in the Act 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 or sale of any article of food and whereas Section 24 of the Act deals with the power of the State Government to make rules for the purpose of giving effect to the provisions of the Act in matters

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not falling within the purview of Section 23. This clearly shows that the power to make rules for prohibiting the sale or for defining the conditions of sale of any substance as highlighted under Section 23 is not vested upon the State Government. At this juncture it is highly relevant to give reference to rule 3 of the Sikkim Prevention of Food Adulteration Rules, 1991 (for short, Rules of 1991) which is quoted below:

3. POWERS AND DUTIES OF FOOD (HEALTH) AUTHORITY :

- (1) The Food (Health) Authority besides being responsible for general superintendence of the administration and enforcement of the Act and the rules made thereunder, shall have the following powers and duties, namely :-
 - (a) he shall have powers to prohibit the sale or manufacture for sale , storage, distribution of article of food in the interest of public health in the whole of state or any area by Notification and for a period as may be specified therein;
 - (b) he may from time to time delegate in writing all or any of his powers and functions under the Act or these rules to any subordinate authority;
 - (c) he shall arrange the training of food inspector, when necessary;
 - (d) he shall review the position of the implementation of the Act and suggest such measures deemed fit from time to time for smooth and effective implementation of the Act and the rules.
- (2) Appeals against the order passed by the Food (Health) Authority shall lie with the State Government whose decision shall be final.
- (3) If the Food (Health) Authority finds any manufacturing firm or establishment being maintained in a poor sanitary and unhygienic conditions, he shall have the power to suspend the Licence and shall issue instruction according to the guidelines made by the Directorate of Health Services of the State for the purpose for compliance. On compliance of such instructions to his satisfaction, he may revoke the order of the suspension of the license."

By virtue of Rule 3(1)(a) the Food (Health) Authority shall have powers to prohibit sale or manufacture for sale, storage, distribution

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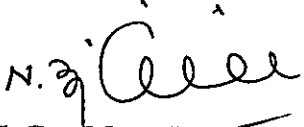


of article of food in the interest of public health in the whole of state or any area by Notification and for a period as may be specified therein, which according to me it amounts to usurping the power of the Central Government which can only make rules prohibiting the sale or defining the conditions of sale of any substance which may be injurious to health etc., under Section 23 of the Act. Section 24 of the Act does not in any way empower the State Government to make such provisions prohibiting sale or manufacture for sale, as has been done in the related Rules of 1991.

18. In the case in hand, the state respondents issued the impugned notification dated 15.7.2004 by invoking the provisions of clause (iv) of Section 7 of the Act read with Rule 3(1) (a) of the Rules of 1991 thus prohibiting the manufacture or stock or sale of the following items in the State of Sikkim in the interest of public health with immediate effect until further orders:-

1. Everest Chat Masala
Manufactured by Everest Company.
2. Stick candy ice-cream
3. Fancy stick juice in different colours in polythene pack.

19. According to me, the impugned notification is not tenable in the eye of law as the same is violative of the mandatory provisions of Sections 23 and 24 of the Act. This court need not go more into depth in the matter as suffice is made with the above observation to quash the impugned notification and accordingly, the impugned notification is hereby quashed thus allowing the writ petition.


(N.S. Singh)
Chief Justice (Acting)
21-03-2005