

**BEFORE THE HON'BLE FOOD SAFETY APPELLATE TRIBUNAL**

**AT JAIPUR, RAJASTHAN**

APPEAL NO.FA/0015/2017

Ramesh Sindhi & Ors vs. Bhooram Ram Godara, FSO Barmer

APPEAL NO.FA/0052/2017

Chandra Prakash Sindhi & Ors Vs. State of Rajasthan & Anr.

APPEAL NO.FA/0059/2017

Sunil Kumar & Ors Vs. State of Rajasthan & Anr.

APPEAL NO.FA/0060/2017

Sunil Kumar & Ors Vs. State of Rajasthan & Anr.

APPEAL NO.FA/0061/2017

Pawan Kumar & Ors Vs. State of Rajasthan & Anr.

APPEAL NO.FA/0062/2017

Pawan Kumar & Ors Vs. State of Rajasthan & Anr.

APPEAL NO.FA/0064/2017

Haider Ali & Ors Vs. State of Rajasthan & Anr.

APPEAL NO.FA/0089/2017

Bhera Ram & Ors Vs. State of Rajasthan & Anr.

APPEAL NO.FA/0090/2017

Kailash Sharma & Ors Vs. State of Rajasthan & Anr.

APPEAL NO.FA/0112/2017

Ramesh Singh & Ors Vs. State of Rajasthan & Anr.

**AND**

APPEAL NO.FA/0091/2017

Anil Kumar & Anr Vs. State of Rajasthan & Anr.

APPEAL NO.FA/0092/2017

Anil Kumar & Anr Vs. State of Rajasthan & Anr.

APPEAL NO.FA/0093/2017

Anil Kumar & Anr Vs. State of Rajasthan & Anr.

APPEAL NO.FA/0025/2017

Manish Kumar & Ors Vs. State of Rajasthan & Anr.

**AMICUS BRIEF SUBMITTED BY**

**Adv. Gaurav Singh**

**Adv. Yuvraj Samant**

a) Whether procedure of Inquiry by Adjudicating Officer laid down in Rule 3.1 of Food Safety and Standard Rules 2011 envisage trial provided under Cr.P.C., 1973 ?

TRIAL UNDER CrPC,1973	PROCEDURE OF INQUIRY UNDER RULE 3.1 OF FOOD SAFETY AND STANDARDS RULES, 2011.
FIR is filed under <b>Section 154</b> .	<b>Rule 3.1.1(3)</b> provides that on Receipt of Communication from the designated officer the Food Safety Officer shall file the application for adjudication with Adjudicating Officer.
<b>Section 157-</b> Investigation by the Investigating officer.	<b>Rule 3.1.1(4)</b> provides that on receipt of application for adjudication from FSO, Adjudicating Officer shall commence inquiry proceedings.
<b>Section 228-</b> Framing of Charges.	<b>Rule 3.1.1(5)</b> provides that Adjudicating Officer can hold inquiry if offence is punishable under Section 50-58, 64-67 of the Food Safety and Standards Act,2006.
<b>Statement of the accused under Section 313-</b> Under this Section	<b>Rule 3.1.1(6)-</b> Adjudicating Officer shall issue notice and give the

<p>accused is allowed to explain any circumstances appearing in the evidences against him. He has the duty to furnish explanation in his statement regarding any incriminating material that has been produced against him.</p>	<p>persons the opportunity to make a representation in the matter.</p>
<p><b>Section 243-</b> Defense evidence- An opportunity is given to the accused to defend his case and to produce both oral and documentary evidence.</p>	<p><b>Rule 3.1.1(7)-</b> Every notice issued should indicate the nature of offence alleged- Sections of the Act- Date of Hearing- Copy of the report of Food Analyst shall also be annexed to the notice.</p>
<p>Under <b>Section 105</b> the magistrate has the power to issue summons.</p>	<p><b>Rule 3.1.1(8)-</b> Adjudicating Officer has to explain to the person- the offence, the provisions of act, rules in respect to which the contravention has taken place.</p>
<p><b>Section 232-</b> If, after taking the evidence for the prosecution, examining the accused and hearing the prosecution and the defence on the point, the Judge considers that there is no evidence that the accused committed the offence, the Judge shall record an order of acquittal.</p>	<p><b>Rule 3.1.1(9) -</b> Adjudicating officer shall give opportunity to the persons to produce such documents or evidence as he may consider relevant for the inquiry.</p>

<p><b>Section 235, 248, 255-</b> Courts are empowered to convict a person if upon perusal of evidences and arguments they are satisfied beyond reasonable doubt that the person has committed the offence alleged to be committed.</p>	<p><b>Rule 3.1.1(11)-</b> Adjudicating officer has the power to issue summons.</p>
	<p><b>Rule 3.1.2(2)-</b> If however, the Adjudicating Officer is satisfied that the person or persons or any of them against whom the inquiry has been conducted for the contravention of provisions of the Act, has or have not been proved beyond doubt, the Adjudicating Officer shall dismiss the case.</p>
	<p><b>Rule 3.1.2(1)-</b> If, upon consideration of the evidence produced before the Adjudicating Officer, the Adjudicating Officer is satisfied that the person or persons or any of them against whom the inquiry has been conducted, has become liable to penalty and/or any suitable administrative action under any of the sections referred to in Rule 3.1.1. (5) he may, by order in</p>

	writing, impose such penalty as he thinks fit, in accordance with the provisions of the relevant section or sections of the Act.
--	--

Moreover, Section 68(3) of the Food Safety and Standards Act, 2006 provides that-

*(3) The Adjudicating Officer shall have the powers of a civil court and-*

*(a) all proceedings before Adjudicating officer shall be deemed to be judicial proceedings within the meaning of sections 193 and 228 of the Indian Penal Code (45 of 1860).*

*(b) The adjudicating Officer shall be deemed to be a court for the purposes of sections 345 and 346 of the Code of Criminal Procedure, 1973 (2 of 1974).*

It is submitted that the Rule 3.1 of Food Safety and Standards Rules, 2011 (FSSR,2011 hereinafter) specifically provides the Designated Officer with the power to differentiate between cases which are punishable with imprisonment and which are punishable by fine only and in the latter case the officer can proceed forthwith according to the procedure envisaged, which is to be governed by the FSSR, 2011. Thereby clearly differentiating the procedure to be followed in case of punishment of imprisonment or in case of only fine being imposed on the contravener, for contravention of the provisions of the Food Safety and Standards Act, 2006 and the relevant rules. Therefore, it is submitted that the Procedure as envisaged under Rule 3.1 of FSSR, 2011 does not entail under its scope the concept of Trial as provided by the CrPC, and therefore the intention of the promulgator being to create a distinct process of enquiry from the

one under CrPC is quite evident on the face of the matter, thus it cannot be stated that the process of Trial under CrPC could be similar to the process of adjudication as enunciated under the Food Safety and Standards Act, 2006.

The above argument also finds support from the judgement of *Dharmendra Kumar v. State of Bihar*, decided by the Patna High Court in the Criminal Writ Case No. 119 of 2016, whereby the Court held that the scheme of the act clearly creates a distinction between prosecution in court and proceedings before adjudication officer.

**b) If provisions of Rule 3.1 of Food Safety and Standard Rules 2011 envisage regular trial, then what will be the procedure?**

It is humbly submitted that although the Rule 3.1 of FSSR, 2011 does not mandate a regular trial, it still has to ensure that the basic and overarching principles of law and rule of law is strictly complied with and in consonance with the scheme of Rule of Law, the Section 68 of FSSR, 2011 provides a reasonable opportunity for the person being complained against to be represented and heard. Further the rules also prescribe detailed procedures to be followed by the adjudicating officer with provisions that cannot be done away with and strict compliance of which is mandated. We also further rely on S.71 of the FSSA, 2006, though it provides the procedure and powers of the Tribunal, but taking into consideration that the Act has to be read as a whole in its entirety, it can be safely contended that since the procedure of the Tribunal, (being the Appellate Authority) has to be governed by Principles of Natural Justice and the Tribunal has been given the power to

regulate its own proceedings, in a similar manner it can be inferred that the Adjudicating officer is also to undertake the Adjudication Proceedings in accordance with the Principles of Natural Justice and hence the proceedings are not in stricto sensu governed by the CrPC or the CPC. Hence wherever there is a vacuum on procedure prescribed under the Act or relevant Rules then the Adjudicating process shall be governed by the overbearing Principles of Natural Justice.

**c) Whether Adjudicating Officer is empowered to depart from the procedure laid down in Rule 3.1?**

It is submitted that a departure from the procedure prescribed as under Rule 3.1 would definitely tantamount to irregularity in the proceedings however, there cannot be a water tight application of the above said norm and it has to be seen that if any deviation is done from the above procedure whether that would prejudice the interests of any of the parties in such a manner that it would vitiate the entire proceedings or it is of such a nature that it causes serious injury to the rights of the parties, which has to be evaluated on a case by case basis and a mere technical argument without any right being impacted of the interested parties, that slight departure from the established procedure has been done, therefore would not vitiate the proceedings so much so that they become void ab initio.

It is to be pointed out that CrPC which governs the process of Criminal Trial, which requires more stringent compliance with the procedure also distinguishes between irregularities which vitiates the proceedings and which do not, the relevant sections are Section 460 and 461 of the CrPC.

Reference for the above stated can be found in the judgement of *Reliance Retail Ltd. & Ors. v. State of Jharkhand*, W.P. (C) 885 of 2014, Jharkhand High Court.

**d) Is it mandatory for Adjudicating Officer to provide opportunity of cross-examination of any witness desired by the non-applicant (Contravener)?**

Section 71 of Food Safety and Standards Act, 2006 provides that the procedure of the tribunal shall be guided by the principles of natural justice, hence implying that the adjudication process before the Adjudication Officer would also have to comply with the grundnorm of Principles of Natural Justice.

It has been observed by the Hon'ble Scupreme in the case of *Ayub Khan Noorkhan Pathan v. State of Maharashtra & Ors*, AIR 2013 SC 58,

*“23. A Constitution Bench of this Court in State of M.P. v. Chintaman Sadashiva Vaishampayan, AIR 1961 SC 1623, held that the rules of natural justice, require that a party must be given the opportunity to adduce all relevant evidence upon which he relies, and further that, the evidence of the opposite party should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined by that party. Not providing the said opportunity to cross-examine witnesses, would violate the principles of natural justice.*

.....

*30. The aforesaid discussion makes it evident that, not only should the opportunity of cross-examination be made available, but it should be one of effective cross-examination, so as to meet the requirement of the*

*principles of natural justice. In the absence of such an opportunity, it cannot be held that the matter has been decided in accordance with law, as cross-examination is an integral part and parcel of the principles of natural justice.”*

One more judgment of the Hon'ble Supreme Court is worth consideration here- In *Transmission Corpn. of A.P. Ltd. v. Sri Rama Krishna Rice Mill*, AIR 2006 SC 1445, the Supreme Court held:

*“In order to establish that the cross-examination is necessary, the consumer has to make out a case for the same. Merely stating that the statement of an officer is being utilised for the purpose of adjudication would not be sufficient in all cases. If an application is made requesting for grant of an opportunity to cross-examine any official, the same has to be considered by the adjudicating authority who shall have to either grant the request or pass a reasoned order if he chooses to reject the application. In that event an adjudication being concluded, it shall be certainly open to the consumer to establish before the Appellate Authority as to how he has been prejudiced by the refusal to grant an opportunity to cross-examine any official”.*

Similarly in *K.L. Tripathi v. State Bank of India & Ors.*, reported in (1984) 1 SCC 43, the delinquent employee challenged the order of dismissal on the ground of violation of principles of natural justice, as the delinquent employee was not afforded opportunity to cross-examine the witnesses. Holding that non-compliance to the principles of natural justice must cause some real prejudice to the delinquent officer, the Hon'ble Supreme Court has held thus;

31. *“Wade in his Administrative Law, Fifth Edition at pages 472-475 has observed that it is not possible to lay down rigid rules as to when the principles of natural justice are to apply: nor as to their scope and extent. Everything depends on the subject-matter, the application of principles of natural justice, resting as it does upon statutory implication, must always be in conformity with the scheme of the Act and with the subject-matter of the case. In the application of the concept of fair play there must be real flexibility. There must also have been some real prejudice to the complainant; there is no such thing as a merely technical infringement of natural justice. The requirements of natural justice must depend on the facts and the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter to be dealt with, and so forth.”*

The Hon'ble Supreme Court further held that,

34. *“.....Therefore, in our opinion, in the manner in which the investigation was carried out as a result of which action has been taken against him cannot be condemned as bad being in violation of the principles of natural justice. Had he, however, denied any of the facts or had questioned the credibility of the persons who had given information against him, then different considerations would have applied and in those circumstances, refusal to give an opportunity to cross-examine the persons giving information against him or to lead evidence on his own part to rebut the facts would have been necessary and denial of such opportunity would have been fatal. But such is not the case here as we have mentioned hereinbefore.”*

Further in *Aligarh Muslim University & Ors. v. Mansoor Ali Khan*, reported in (2000) 7 SCC 529, the Hon'ble Supreme Court after taking note of K.L.

Tripathi case observed that, *“since then, this Court has consistently applied the principle of prejudice in several cases.”* It was further observed that, *“there can be certain situations in which an order passed in violation of natural justice need not be set aside under Article 226 of the Constitution of India. For example, where no prejudice is caused to the person concerned, interference under Article 226 is not necessary.”*

Thus concluding, that right of cross examination is not a sine qua non in the adjudication proceedings before the Ld. Adjudication Officer, but when an application is made the Adjudication Officer has to keep in mind the aforesaid principle of prejudice before deciding the said application. The affected party will have a right to contest such a denial in appeal before the Ld. Tribunal, however it must show the prejudice caused to it, and the order of the Adjudication Officer cannot be set aside on mere technicality of the plea raised of refusal of a chance being given for cross examination, every matter would therefore have to be decided on its own merits.

**e) What is the effect of non-observance of any provision of Rule 3.1**

**Food Safety and Standard Rules 2011 by Adjudicating Officer?**

In light of the foregoing discussion made in the above points, it is submitted that unless the non-observance of the procedure mentioned under Rule 3.1 of The FSSR, 2011 by the Adjudicating Officer causes prejudice to any of the party, or has injured the party's defense on merits, or makes the compliance of substantive law impossible, the proceedings will not be vitiated.

**f) What is the effect of report of Expert Group submitted before Hon'ble Supreme Court of India in Writ Petition (Civil) No.681 of 2004 regarding labelling provisions of carbonated beverages as laid down in Food Safety and Standards (Packaging and Labelling) Regulations 2011?**

It is humbly submitted that the Expert Group was constituted under S. 13 of the FSSA, 2006, the report submitted was in terms thereof and the act still requires the Food Authority to constitute such groups/scientific panels on regular basis to evaluate and suggest standards keeping in line with the changing times. The effect of Expert Group report is same as that of other reports submitted under Section 13 by various other panels or groups as constituted from time to time. The particular report evaluated in general the prevalent practices at that point in time and held that the labelling provisions were in line with the Food Safety and Standards (Food Packaging and Labelling) Regulations 2011, the said conclusion was a general evaluation and cannot hamper the powers of any of the Authorities constituted under FSSA, 2006 to discharge their duties towards fulfilling the objectives of the Act and their duties in particular cases wherever any contravention is made out or examination of which is necessary. Further in the abovementioned case, the Hon'ble Supreme Court further laid down the overarching principles of the Food Safety Laws in the following words:

*“22. We are, therefore, of the view that the provisions of the FSS Act and PFA Act and the rules and regulations framed thereunder have to be interpreted and applied in the light of the Constitutional Principles, discussed above and endeavour has to be made to achieve an appropriate level of protection of human life and health. Considerable responsibility is cast on*

*the Authorities as well as the other officers functioning under the above mentioned Acts to achieve the desired results. Authorities are also obliged to maintain a system of control and other activities as appropriate to the circumstances, including public communication on food safety and risk, food safety surveillance and other monitoring activities covering all stages of food business.”*

Therefore keeping in mind, the fact that effective control mechanism needs to be made functional under the Food Safety Laws, the authorities have to act accordingly and make the laws more effective.

**g) In matters of carbonated/ fruit/ other similar drinks, is it necessary to disclose identity of added natural, nature-identical and artificial flavouring substances?**

Rule 2.2.2(5) of the Food Safety and Standards (Packaging and Labelling) Regulations, 2011) deals with the Declaration regarding Food Additives and Sub Clause (2) deals with addition of Colors and/or Flavours, Clause (b)(C)” Clause B itself states that the Label should specify the type of Flavouring Agent as per the Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011, wherein three types have been provided viz; Natural, Nature Identical and Artificial. Proviso to 2.2.2(5)(II)(c) under the Regulations specifically states that in case of Artificial Flavouring Substance, the Label shall declare the common name of the flavours used, whereas in case of Natural and Nature Identical the class name has to be mentioned, thereby casting a duty on the Manufacturer to mention specifically which category of Flavouring Substance does the product contain, failure to do so would essentially mean contravention of the

provisions of the Food Safety and Standards (Packaging and Labelling) Regulations, 2011.

The moot question to be considered therefore is what is meant by common name and class name, it is submitted that the Regulations and the Act are silent on the above mentioned two terms, but the same can be inferred from the Codex Stan 1-1985 (General Standard for the Labelling of Pre Packaged Foods), which under provision 4.2.3.4 states that “Flavour(s) and Flavouring(s)” can be used as Class Title for the said food additives and the expression “Flavours” may be qualified by words “natural”, “nature identical”, “artificial” or a combination of these in case multiple types are used.

Now coming to the issue of Common Names, it is to be brought to the notice of this Hon’ble Tribunal that the Joint FAO/WHO Expert Committee on Food Additives (JECFA) is a specific committee of experts belonging to WHO and FAO which was formed in the year 1956, a brief background of which is that the evaluation of food additives at the international level was initiated in 1955 as a result of a recommendation of the first Joint FAO/WHO Conference on Food Additives which decided that the two organizations should convene one or more expert committees to address the technical and administrative aspects of chemical additives and their safety in food (Joint FAO/WHO Conference on Food Additives, Report. FAO Nutrition Meetings Report Series, No. 11; WHO Technical Report Series, No. 107, 1956). The (JECFA) was first convened in 1956, and has met annually, with a few exceptions, since then. At its 44th meeting in 1995, JECFA considered a new approach to the safety evaluation of flavourings. This approach incorporated a series of criteria whose use enabled the evaluation of a large number of these agents in a consistent and timely manner. Starting with the 46th meeting in

1996, JECFA began evaluating flavourings in groups having similar chemical structures using the criteria and approach decided at the 44th meeting. From that time through the 65th meeting in 2005, the Committee has evaluated 1615 flavourings.

International Numbering System for Food Additives (INS) is intended as a harmonised naming system for food additives as an alternative to the use of the specific name, which may be lengthy. The INS does not include flavourings, which have a JECFA number as identifier.<sup>1</sup> However in case of Colors as the second proviso to Clause 2.2.2 (5) (c) clearly provides that the International Numerical Identification shall be indicated, but no such requirement is mandated for Flavours to mention the JECFA identification Number, there the regulations remain silent as to what would ideally be meant by the Common Name of the Artificial Flavouring Substance, although it would not be wrong to infer that the National Law of India has to be in consonance with the International Standards relating to Food Safety and Standards, therefore the common name of the Artificial Flavouring Substance as per the JECFA identification should be mentioned on the Label to comply with the objectives of the act.

Section 2.4.6.(3)(4) of the Food Safety and Standards (Packaging and Labelling) Regulation, 2011 states:-

*Any food product which contains only fruit flavours, whether natural flavours and natural flavouring substances or nature identical flavouring substances, artificial flavouring substances as single or in combination thereof, shall not be the word "ADDED" (NAME OF FRUIT) FLAVOUR shall be used in describing such a product;*

---

<sup>1</sup> Codex Alimentarius, CLASS NAMES AND THE INTERNATIONAL NUMBERING SYSTEM FOR FOOD ADDITIVES CAC/GL 36-1989. Adopted in 1989. Revision: 2008. Amendment: 2017.

Carbonated Fruit Beverages or Fruit Drink means any beverage or drink which is purported to be prepared from fruit juice and water or carbonated water and containing sugar, dextrose, invert sugar or liquid glucose either singly or in combination. It may contain peel oil and fruit essences. It may also contain any other ingredients appropriate to the products.

The function of natural flavour or natural-identical and artificial substances in food is flavouring rather than nutritional. Natural flavours include the natural essence or extractives obtained from plants.

It is clear from the reading of the section 2.4.6 of Food Safety and Standards (Packaging and Labelling) Regulation, 2011 that in the case of carbonated/ fruit/ other similar drinks, it is necessary to disclose the added natural, natural-identical and artificial flavouring substance with the word “ADDED” and the flavour used in the carbonated/ fruit/ other similar drinks.

**h) What is the correct import of Section 3(p), 43 & 98 of FSSA 2006?**

**Section 3(p) of Food Safety and Standards Act, 2006 states:-**

*“food laboratory” means any food laboratory or institute established by the Central or a State Government or any other agency and accredited by National Accreditation Board for Testing and Calibration Laboratories or an equivalent accreditation agency and recognised by the Food Authority under section 43.*

Laboratory testing is an important process, which relies on scientific analysis to identify problems with food products. It provides analytical data on the quality of a product or production process to support quality control. The objective of quality control is to identify contaminants in raw material, or contamination after a product is

produced and before it is placed on the market. Additionally, laboratory testing is important for the research and development of new products. Another benefit of laboratory testing is compliance with regulations for both the import and export of food products to different countries. Food laboratories is designed to protect public health and the safety of consumers

**Section 43 of Food Safety and Standard Act, 2006 states:-**

***Recognition and accreditation of laboratories, research institutions and referral Food Laboratory.***

*(1) The Food Authority may notify food laboratories and research institutions accredited by National Accreditation Board for Testing and Calibration Laboratories or any other accreditation agency for the purposes of carrying out analysis of samples by the Food Analysts under this Act.*

*(2) The Food Authority shall, establish or recognise by notification, one or more referral food laboratory or laboratories to carry out the functions entrusted to the referral food laboratory by this Act or any rules and regulations made thereunder.*

*(3) The Food Authority may frame regulations specifying –*

*a) The functions of food laboratory and referral food laboratory and the local area or areas within which such functions may be carried out;*

- b) The procedure for submission to the said laboratory of samples of articles of food for analysis or tests, the forms of the laboratory's reports thereon and the fees payable in respect of such reports; and*
- c) Such other matters as may be necessary or expedient to enable the said laboratory to carry out its functions effectively.*

The test results of the food sample should come from a competent laboratory with appropriate technical expertise for analysis of the purity, or determination of the content, of many substances in mixture samples. The Food Safety and Standards Rule 2006 classifies Food Laboratories into two categories:-

- (i) Notified Laboratory – it means any of the laboratories notified by the Food Authority under sub-sections (1) and (2) of section 43 of the Food Safety and Standards Act, 2006.
- (ii) Referral Food Laboratory – it means any of laboratories established and/or recognized by the Food Authority by notification under sub section (2) of section 43 of the Food Safety and Standards Act, 2006.

In case of an appeal against the report of a Notified Laboratory before the Designated Officer, the Designated officer refers the matter to a Referral Food Laboratory. The referral food laboratory then analysis the food sample sent by the Designated Officer authorised by the food authority.

The function of the referral food laboratory is to maintain high standards of accuracy, reliability and credibility in the operation of

the laboratory and achieving and maintaining the required levels of accreditation and reliability.

**Section 98 of Food Safety and Standard Act, 2006** states:-

***Transitory provisions for food standards.***

*Notwithstanding the repeal of the enactment and Orders specified in the Second Schedule, the standards, safety requirements and other provisions of the Act and the rules and regulations made thereunder and Orders listed in that Schedule shall continue to be in force and operate till new standards are specified under this Act or rules and regulations made thereunder: Provided that anything done or any action taken under the enactment and Orders under repeal shall be deemed to have been done or taken under the corresponding provisions of this Act and shall continue in force accordingly unless and until superseded by anything done or by any action taken under this Act:*

This section states that any order listed under any of the following acts will remain in force until the government passes any new standard specifies under this act and any order passed under the following acts will be deemed to continue under this act.

The second schedule comprises of the following acts:-

1. The Prevention of Food Adulteration Act, 1954 (37 of 1954).
2. The Fruit Products Order, 1955.
3. The Meat Food Products Order, 1973.
4. The Vegetable Oil Products (Control) Order, 1947.
5. The Edible Oils Packaging (Regulation) Order, 1998.

6. The Solvent Extracted Oil, De oiled Meal, and Edible Flour (Control) Order, 1967.
7. The Milk and Milk Products Order, 1992.
8. Any other order issued under the Essential Commodities Act, 1955 (10 of 1955) relating to food.

In addition to the above discussion reference must be had to the judgment of *Nestle India Ltd. v. FSSAI & Ors*, W.P No. 1688 of 2015, High Court of Judicature at Bombay, where the court framed certain issues amongst them were :

“34. .... (VIII) Whether the analysis of the product manufactured by the Petitioner could have been made in the Laboratories in which the said product was tested by the Food Authority and whether these Laboratories are accredited Laboratories by the NABL and whether the reports submitted by these Laboratories can be relied upon?

(IX) Whether reliance can be placed on the reports obtained by the Petitioner from its Laboratory and other accredited Laboratories?

(X) Whether the Food Analyst was entitled to test the samples in any Laboratory, even if it was not accredited and recognized by the Food Authority?”

The Hon'ble High Court in answering the above issues observed that :

*“92. There is no manner of doubt that this Court is not expected to see the correctness or otherwise of the reports given by the experts and, therefore, there cannot be any dispute regarding ratio of the judgments on which reliance has been placed by the learned Senior Counsel for Respondent Nos. 3 and 4 and the learned Additional Solicitor General*

*for Respondent No. 1. This Court, however, can see whether the samples have been properly analysed in terms of the mandatory provisions of the Act or not and, secondly, whether any reliance can be placed either on reports obtained by the Respondents or even for that matter on the reports obtained by the Petitioner.*

*93. It will be relevant to take into consideration the provisions of section 3(p) which defines the "food laboratory" and section 43 which gives power to the Food Authority to give recognition to laboratory and notify it. Section 3(p) and 43 of the Act reads as under:--*

*"3(p) "food laboratory" means any food laboratory or institute established by the Central or a State Government or any other agency and accredited by National Accreditation Board for Testing and Calibration Laboratories or any equivalent accreditation agency and recognised by the Food Authority under section 43."*

*"43. Recognition and accreditation of laboratories, research institutions and referral food laboratory.--(1) The Food Authority may notify food laboratories and research institutions accredited by National Accreditation Board for Testing and Calibration Laboratories or any other accreditation agency for the purposes of carrying out analysis of samples by the Food Analysts under this Act.*

*(2) The Food Authority shall, establish or recognise by notification, one or more referral food laboratory or laboratories to carry out the functions entrusted to the referral food laboratory by this Act or any rules and regulations made thereunder.*

*(3) The Food Authority may frame regulations specifying--*

*(a) the functions of food laboratory and referral food laboratory and the local area or areas within which such functions may be carried out;*

*(b) the procedure for submission to the said laboratory of samples of articles of food for analysis or tests, the forms of the laboratory's reports thereon and the fees payable in respect of such reports; and*

*(c) such other matters as may be necessary or expedient to enable the said laboratory to carry out its functions effectively."*

*Upon conjoint reading of both these sections quoted hereinabove, it is clear that under section 3(p), "food laboratory" is a laboratory which is either State or Central laboratory or any other allied laboratory which is accredited and recognized by NABL and by the Food Authority under section 43 of the Act. The laboratory, therefore, has to pass twin test before it can be said to be a recognized laboratory viz (i) it has to be accredited by NABL and over and above that (ii) it has also to be recognized by the Food Authority under section 43 of the Act. Sub-section (1) of section 43 makes it abundantly clear that only in that laboratory which is recognized by the Food Authority by Notification, food can be sent for analysis by the Food Analyst. Upon conjoint reading of the said two provisions, it is clear that the submission made by Mr. Khambata, the learned Senior Counsel for Respondent Nos. 3 and 4 is without any substance. Section 43(1) mandates that the Food Analyst has to analyse the food in a laboratory accredited by NABL and also recognized by the Food Authority and notified by it. It is apparent that therefore if there is non-compliance of the said provisions and if the food is tested in a laboratory which does not fall within the definition of section 3(p) and not recognized by the Food Authority, the analysis made in such laboratory cannot be relied upon. The Apex Court in *Pepsico India Holdings Private Limited vs. Food Inspector and Another* MANU/SC/0953/2010 : (2011) 1 SCC 176 has observed*

*that the provisions are mandatory. The Apex Court in this case held that provisions under section 23(1-A)(ee) of the Prevention of Food Adulteration Act, 1954 for testing the food samples/adulteration are mandatory and not directory. Though the said observation is made in respect of provisions of the Prevention of Food Adulteration Act, 1954 (which has now been repealed by FSS Act, 2006), even under the new Act, the provisions of section 43(1) will have to be held mandatory and not directory. This is more so when Section 43(1) is read with the definition of the words "food laboratory" in Section 3(p) of the FSS Act, 2006. The Apex Court in Pepsico India Holding Private Limited (supra) has observed in para 44 as under:--*

*"44. The High Court also misconstrued the provisions of Sections 23(1-A) (ee) and (hh) in holding that the same were basically enabling provisions and were not mandatory and could, in any event, be solved by the Central Government by framing the Rules thereunder, by which specified tests to be held in designated laboratories could be spelt out. Consequently, the High Court also erred in holding that the non formulation of rules under the aforesaid provisions of the 1954 Act could not be said to be fatal for the prosecution."*

*94. Further, if the provisions of sections 43 and 47 are considered, it can be seen that notified laboratories which are referred to in section 47(5) for analysing imported food are laboratories which are separately notified for testing imported food articles as can be seen from the Food Safety and Standards (Laboratory and Samples Analysis) Regulations, 2011. The contention of Mr. Khambatta, the learned Senior Counsel appearing on behalf of Respondent Nos. 3 and 4 that only imported food*

*could be tested in the notified laboratories therefore cannot be accepted.*

*Sections 47(1) and 47(5) of the Act read as under:--*

*"47. Sampling and analysis.--(1) When a Food Safety Officer takes a sample of food for analysis, he shall - (a) give notice in writing of his intention to have it so analysed to the person from whom he has taken the sample and to the person, if any, whose name, address and other particulars have been disclosed;*

*(b) except in special cases as may be provided by rules made under this Act, divide the sample into four parts and mark and seal or fasten up each part in such a manner as its nature permits and take the signature or thumb impression of the person from whom the sample has been taken in such place and in such manner as may be prescribed by the Central Government:*

*Provided that where such person refuses to sign or put his thumb impression, the Food Safety Officer shall call upon one or more witnesses and take his signature or thumb impression, in lieu of the signature or thumb impression of such person;*

*(c)(i) send one of the parts for analysis to the Food Analyst under intimation to the Designated Officer;*

*(ii) send two parts to the Designated Officer for keeping these in safe custody; and*

*(iii) send the remaining part for analysis to an accredited laboratory, if so requested by the food business operator, under intimation to the Designated Officer:*

*Provided that if the test reports received under sub-clauses (i) and (iii) are found to be at variance, then the Designated Officer shall send one*

*part of the sample kept in his custody, to referral laboratory for analysis, whose decision thereon shall be final.*

*"47(5) In case of imported articles of food, the authorised officer of the Food Authority shall take its sample and send to the Food Analyst of notified laboratory for analysis who shall send the report within a period of five days to the authorised officer."*

*95. Similarly, so far as the food which is manufactured in India is concerned though it is not mentioned that it has to be tested in a notified laboratory, in view of definition of section 3(p) and more particularly the mandate given in section 43(1), the Food Analyst has to analyse the food only in such laboratory which is defined under section 3(p) and recognized by the Food Authority under section 43(1) of the Act.*

*96. It is not in dispute that the Laboratories in which these food samples were tested were either not accredited by NABL or not recognized by the Food Authority under section 43(1) of the Act or even if they were accredited or notified, they were not accredited to make analysis in respect of lead in the samples. There is no material on record to show whether the procedure of testing samples which is mentioned under the Act and Rules and Regulations framed thereunder has been followed. There is a grave doubt about the samples being tested at Avon Food Lab (Pvt.) Ltd. and even if they are so tested, prima facie, it does appear that procedure of testing the samples has not been followed. The contention of Mr. Pracha, the learned Counsel for Respondent No. 2 that in view of the Notification issued on 5/7/2011 even the State and Central Laboratories, though not notified, were entitled to test the samples, is incorrect. The said Notification reads as under:-*

***"No. 83-Dir (Enf.)/FSSAI/2011***

***Food Safety & Standards Authority of India***  
***(A Statutory Regulatory Body of Govt. of India) Ministry of***  
***Health & Family Welfare***  
***3rd Floor, FDA Bhawan, Kotla Road***

To,

*Food Safety Commissioner of all States/UTs*

*New Delhi-110002*

*Subject:--Clarification on the status of Public Labs functioning at Centre/State/UT after the promulgation of FSS Act, 2006 with effect from 5th August, 2011.*

*Section 43 of the FSS Act requires that all food testing under the Act will be done in NABL or any other FSSAI approved accredited lab. State Governments and UT Government have already been advised in this regard and the results of a 'gap analysis' commissioned by FSSAI in respect of the State Labs have been shared for appropriate action for the upgradation of the Labs to accredited standards. However, from the interaction with the State Governments it is clear that the process is likely to take some time and the labs will not be able to get accreditation before 5th August, 2011 when the FSS Act will become operational.*

*The matter has been examined and it is clarified that the existing Public Food Testing Laboratories which are testing food samples under PFA will continue to perform their function of food testing under Section 98 of FSS Act, 2006 till any notification is issued under Section 43 of FSS Act, 2006. The Central Food Laboratories at Kolkata, Pune and Mysore and FRSL, Ghaziabad will function as the referral laboratories.*

*Yours sincerely, (S.S. Ghonkrokta)*

*Director"*

*The said Notification clearly mentions that the said Notification had been issued till the Laboratories under the FSS Act, 2006 were accredited by NABL and recognized and notified by the Food Authority. It is an admitted position that in 2012 the several Laboratories have been so recognized by the Food Authority and notified by issuing Notifications. The contention of the learned Counsel for Respondent No. 2 is, therefore, not acceptable. The contention of Mr. Khambatta the learned Senior Counsel for Respondent Nos. 3 and 4 that this issue which was raised in rejoinder by the Petitioner was an afterthought, also cannot be accepted and, therefore, it is not possible to place reliance on the reports of the Food Analysts given by various States in respect of analysis of the samples of the product of the Petitioner and therefore decision taken by the Food Authority relying on these reports therefore will have to be set aside. On the same ground, it will not be possible to accept the reports of the samples which have been tendered on behalf of the Petitioner since there is no manner of knowing whether procedure has been properly followed or not. Issue No. (VIII) to (XI) are therefore answered in the negative.*

- i) Is it mandatory to provide copy of the analysis report under Section 46(4) of the FSSA 2006 and Rule 2.4.6 of FSSR 2011 separately to manufacturer of the Food Product?**

Section 46(4) of The Food Safety and Standard Act, 2006 states:-

46. Functions of Food Analyst.-

(1) On receipt of a package containing a sample for analysis from a Food Safety Officer or any other person, the Food Analyst shall compare the seal on the container and the outer cover with specimen impression received separately and shall note the conditions of the seal thereon: Provided that in case a sample container received by the Food Analyst is found to be in broken condition or unfit for analysis, he shall within a period of seven days from the date of receipt of such sample inform the Designated Officer about the same and send requisition to him for sending second part of the sample.

(2) The Food Analyst shall cause to be analysed such samples of article of food as may be sent to him by Food Safety Officer or by any other person authorised under this Act.

(3) The Food Analyst shall, within a period of fourteen days from the date of receipt of any sample for analysis, send:-

(i) where such sample is received under section 38 or section 47, to the Designated Officer, four copies of the report indicating the method of sampling and analysis; and

(ii) where such sample is received under section 40, a copy of the report indicating the method of sampling and analysis to the person who had purchased such article of food with a copy to the Designated Officer: Provided that in case the sample can not be analysed within fourteen days of its receipt, the Food Analyst shall inform the Designated Officer and the Commissioner of Food Safety giving reasons and specifying the time to be taken for analysis.

(4) An appeal against the report of Food Analyst shall lie before the Designated Officer who shall, if he so decides, refer the matter to the referral food laboratory as notified by the Food Authority for opinion.

Section 46(3)(i) provides that the Food Analyst shall give four copies of the report indicating the method of sampling and analysis to the Designated Officer. Out of these four copies the Designated Officer keeps two copies of analysis report for further action, one copy of the report is to be sent to the Food Safety Officer for record and one copy of the report is to be send to Food Business Operator from whom the sample was taken. The manufacturer does not receive any copy of the report from the designated officer. The manufacturer can only get the information of the report from the Food Business operator, who receives a copy of the report from the Designated Officer.

Rule 2.4.6 of Food Safety and Security Rule,2011 States:-

- Appeal to the Designated Officer

When an appeal as provided under subsection 4 of section 46 is preferred to the Designated Officer by the Food Business Operator against the report of the Food Analyst, the Designated Officer, shall if he so decides, within thirty days from the receipt of such appeal after considering the material placed before him and after giving an opportunity to Food Business Operator to be heard shall forward one part of the sample to the referral lab. Such appeal shall be in Form VIII which shall be filed within 30 days from the date of the receipt of the copy of the analysis report from the Designated Officer. Report of the referral laboratory shall be final in this regard.

If the manufacturer Under Section 46(4) appeals against the report of the Food Analyst to the Designated Officer and the Designated Officer refers the matter to the referral food laboratory. The referral food laboratory then analyses the sample referred by the designated officer and sends a copy of the report to the same officer and the manufacturer receives a certificate of analysis by the referral food laboratory. The manufacturer does not receive

a copy of the report from referred food laboratory, he only gets a certificate stating that analysis being done of a particular sample provided by the designated officer.

**(j) Whether Food Analyst or Referral Food Laboratory can give report in different format than provided under the Food Safety and Standards (Laboratory and sample analysis) Regulations 2011?**

**Section 46 (3) of Food Safety and Standards Act, 2006** states:-

*The Food Analyst shall, within a period of fourteen days from the date of receipt of any sample for analysis, send :*

- (i) where such sample is received under section 38 or section 47, to the Designated Officer, four copies of the report indicating the method of sampling and analysis; and*
- (ii) where such sample is received under section 40 , a copy of the report indicating the method of sampling and analysis to the person who had purchased such article of food with a copy to the Designated Officer.*

The Food analyst shall give the copies of the report as provided under section 46 (3) (i) & (ii) in accordance with regulation (ii) of 2.3.1 of Food Safety and Standards (Laboratory and Sample Analysis) Regulations, 2011.

Regulation (ii) of 2.3.1 of Food Safety and Standards (Laboratory and Sample Analysis) Regulation, 2011 states:-

*After test or analysis, the certificate thereof shall be supplied forthwith to the sender in Form B.*

This report of the Food Analyst indicates the Quality Characteristics, Name of the Method of the Test Used and analysis. This is the format prescribed under Food Safety and Standards (Laboratory and Sample Analysis) Regulation, 2011.

Regulation 2 of 2.2.2 of Food Safety and Standards (Laboratory and Sample Analysis) Regulation, 2011 States:-

*The certificate of analysis to be provided by the referral food laboratory shall be as per Form A.*

This report of the referral laboratory indicates the Quality Characteristics, Name of the Method of the Test Used and analysis. Hence it is pertinent that all the mandated information as per the above regulations and as enunciated under the format shall be provided but a mere technicality in form of the structure of report cannot come in the way of administration of the Act and its regulations.

Further cue can be had from the discussions had above from Point a to e.

AMICUS CURIAE

Adv. Gaurav Singh

Adv. Yuvraj Samant

Date: 22.06.2018

Place: Jaipur