

न्यायालय अतिरिक्त जिला कलक्टर एवं अतिरिक्त जिला मजिस्ट्रेट बारां (राज.)

पीठासीन अधिकारी श्री वासुदेव मालावत (आर.ए.एस.)

प्रकरण संख्या एफ.एस.एस.एक्ट 10/2017

बचनवान

श्री राजेश कुमार रामचन्दानी, खाद्य सुरक्षा अधिकारी कार्यालय मुख्य चिकित्सा एवं स्वास्थ्य अधिकारी, बारां (प्रार्थी)

बनाम

1. श्री नितिन गोयल पुत्र श्री शिवकुमार गोयल (मौके पर मौजूद विक्रेता व मालिक), निवासी कोटा रोड़, बारां मै. गृहस्थी फेमिली शॉप उर्फ गृहस्थी डिपार्टमेन्टल स्टोर, कोटा रोड़ बारां
- 2- श्री रमेश सिंह रावत पुत्र श्री गुमान सिंह रावत (नोमिनी) निवासी N-III/13, LIC Flats, Sec-6, Vidhyadhar Nagar Jaipur M/s Coca Cola Hindustan, Coca Cola Beverags PVT. Ltd. Kaladhera Plant Plot No-SP-39/40, RICCO Industrial area, Kaladhera. Teh-Chomu Jaipur.
- 3- M/s Coca Cola Hindustan, Coca Cola Beverags PVT. Ltd. Kaladhera Plant Plot No-SP-39/40, RICCO Industrial area, Kaladhera. Teh-Chomu Jaipur.

(अप्रार्थीगण)

जुर्म अन्तर्गत धारा 26 की उप धारा 2 (ii) एफएसएस एक्ट 2006 रूल्स 2011

उपस्थिति :-

- 1- श्री राजेश रामचन्दानी खा.सु.अ. (प्रार्थी)
- 2- श्री महेश प्रकाश गौतम एडवोकेट (अप्रार्थीगण की ओर से)

निर्णय दिनांक 27.11.2017

प्रकरण श्री राजेश कुमार रामचन्दानी, खाद्य सुरक्षा अधिकारी, कार्यालय मुख्य चिकित्सा एवं स्वास्थ्य अधिकारी, बारां द्वारा इस आशय का पेश किया कि आवेदक खाद्य सुरक्षा अधिकारी दिनांक 23.05.2016 को मैसर्स गृहस्थी फेमिली शॉप उर्फ गृहस्थी डिपार्टमेन्टल स्टोर, कोटा रोड़ बारां पर पहुंचा। वहां पर श्री नितिन गोयल पुत्र श्री शिवकुमार गोयल (मालिक एवं मौके पर मौजूद विक्रेता) उपस्थित थे, जिसे परिचय दिया।

यह कि आवेदक द्वारा निरीक्षण करने पर पाया कि आम जनता को विक्रय हेतु खाद्य पदार्थ **Ready to serve Fruit Drink Mango Pulp (Maaza Mango)** 1.2 लीटर की बोतल के 2 कार्टून विक्रय हेतु रखे हुए थे। जिनमें मिलावटी व मिथ्याछाप का शक होने पर **Ready to serve Fruit Drink Mango Pulp (Maaza Mango)** विक्रेता से 1.2 लीटर की 04 बोतल वास्ते नमूना जांच उपस्थित गवाहान के समक्ष खरीदा, जिसकी कीमत विक्रेता को 360/- रुपये नगद देकर रसीद प्राप्त की, मौके पर नमूना लेने की सूचना देने हेतु फार्म सं. 5 ए की प्रतियां तैयार की जिस पर विक्रेता, गवाहान एवं स्वयं हस्ताक्षर किये। नियमानुसार फर्द रिपोर्ट तैयार की तथा पढ़कर विक्रेता, गवाहान को सुनाया तथा उनके हस्ताक्षर करवाकर स्वयं हस्ताक्षर किये। जिसकी प्रति आवेदन के साथ संलग्न है।

आवेदक ने वास्ते नमूना जांच खरीदे हुए **Ready to serve Fruit Drink Mango Pulp (Maaza Mango)** के चार नमूना भाग में प्रत्येक भाग पर डी.ओ. के लेबल चिपकाये। प्रत्येक लेबल पर विक्रेता एवं गवाहान के हस्ताक्षर करवाये तथा स्वयं भी हस्ताक्षर किए। तथा नमूना को नियमानुसार सील्ड किया।

आवेदक ने कार्यालय पहुंच कर फार्म नं. 6 की छः प्रतियां नियमानुसार तैयार एक नमूना भाग मय फार्म नं. 6 की प्रति के सीलबन्द कर श्री सुरजमल च. श्रे. कर्मचारी द्वारा मुख्य खाद्य विश्लेषक जयपुर को जमा कराकर रसीद प्राप्त की। जो आवेदन के साथ संलग्न है।

आवेदक ने एक नमूना भाग मय फार्म नं. 6 की प्रति के सीलबन्द कर श्रीमान् डीओ मुख्य चिकित्सा एवं स्वास्थ्य अधिकारी, बारां को जमा कर रसीद प्राप्त की जो आवेदन के साथ संलग्न है।

आवेदक को अभिहित अधिकारी (खाद्य सुरक्षा) एवं मुख्य चिकित्सा एवं स्वास्थ्य अधिकारी, बारां के पत्र क्रमांक/एफएसएसए/2016/225 दिनांक 09.08.2016 के द्वारा ज्ञात हुआ कि राज्य केन्द्रीय जन स्वास्थ्य प्रयोगशाला, जयपुर से प्राप्त जांच रिपोर्ट क्रमांक L.S.1763/Act/2016/2760 दिनांक 03.08.2016 के अनुसार विक्रेता द्वारा वास्ते नमूना जांच विक्रय किया गया, **Ready to serve Fruit Drink Mango Pulp (Maaza Mango)** मिथ्याछाप (Mis Branded) होना पाया गया। जांच रिपोर्ट आवेदन के साथ संलग्न है।

खाद्य पदार्थ **Ready to serve Fruit Drink Mango Pulp (Maaza Mango)** मिथ्याछाप (Mis Branded) का अप्रार्थीगण ने निर्माण एवं विक्रय करके खाद्य संरक्षा एवं मानक अधिनियम 2006 की धारा 26 की उप धारा 2 (ii) का उल्लंघन किया है जिसका जुर्माना खाद्य संरक्षा एवं मानक अधिनियम 2006 की धारा 52 में निर्धारित है।

इस पर प्रकरण दर्ज रजिस्टर किया जाकर, अप्रार्थीगण को जर्ये सम्मन तलब किया गया। अप्रार्थीगण जर्ये अभिभाषक उपस्थित हुए तथा अप्रार्थी क्रम 1 व 2 की ओर से जर्ये अभिभाषक पृथक पृथक जवाब प्रस्तुत किये। जो संक्षेप में इस प्रकार हैं कि:-

- 1- That, the respondents are being prosecuted for alleged violation of Section 26 (2) (ii) of the Food Safety and Standard Act, 2006 (hereinafter referred to as "FSSA") and the Rules framed thereunder and punishable u/s - 52 of the FSSA.

31/11/2017  
बारां (राज.)

1. The applicant's case as alleged in the application is that the Food Safety Officer (hereinafter referred to as "FSO") visited the premises of seller/vendor/ Opposite Party no.1 on 23.05.2016 and took the sample of "Maaza" 1.2 litre (hereinafter referred to as "Sample") for analysis. Thereafter the sample was sent to the Food Analyst, Jaipur (hereinafter referred to as "FA") for analysis. The FA in its report dated 03.08.2016 opined that the sample was Misbranded under section 3 (1) (zf) (C) (i) of the FSSA as under;

*Ingredients - Water, Mango Pulp (19.5%), Sugar, Acidity Regulator (330), Acidity Regulator (330), and Preservative (202), Contains Permitted Synthetic Food Colour (110) and added Mango Flavours (Natural, Nature-Identical and Artificial Flavouring Substances). Contravention of Regulation No. 3.1.10 (1) of Food Safety and Standards (Food Products Standards and Food Additive) Regulations, 2011. Contains Fruit.*

- 1- At the outset the Respondents states and submits that the Respondents were not given the opportunity to file appeal against the report of Food Analyst as guaranteed under Section 46 (4) of FSSA and Rule 2.4.6 of the FSSR. Section 46 (4) and Rule 2.4.6 of the FSSR is reproduced below for ready reference:

**Section 46 (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.*

**Rule 2.4.6: Appeal to the Designated Officer:**

*When an appeal as provided under sub section 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, if so decides, within thirty days from the receipt of such appeal after considering the material placed before him and after giving an opportunity of being 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 copy of the analysis report from the Designated Officer. Report of the referral laboratory shall be final in this regard.*

- 1- That, the Respondents being the Food Business Operator as defined under Section 3(o) of the FSSA had the statutory right granted under Section 46 (4) of the FSSA and under Rule 2.4.6 (1) of the FSSR to get the 2nd part of the sample analyzed by the referral laboratory (whose report is final and supersedes the report of the Food Analyst) which has been denied in the instant case and in view thereof the instant application for adjudication is liable to be dismissed by this Hon'ble Court.

1. At the further outset, the Respondents would like to state that for the following reasons which are without prejudice to each other, the report of the Food Analyst is vague, untenable and erroneous and cannot be relied upon. In view thereof the instant adjudication proceedings initiated based upon the Food Analyst Report is liable to be dismissed by this Learned Court.

- i) The Laboratory wherein the sample in the instant case has been tested/analyzed is not accredited by NABL nor it has been recognized by the Food Authority under Section 43 of the FSSA Act hence the analysis made in the aforesaid laboratory cannot be relied upon.

- ii) 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. 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. Section 43(1) mandates that the Food Analyst has to analyze 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. Reliance is placed on judgment passed by Hon'ble Bombay High Court in *Writ Petition (L) No. 1688/2015; M/s Nestle India Ltd - vs - The Food Safety and Standards Authority of India & Others.*

- i) As per Rule 2.4.2 (5) of the FSSA Rules and Section 42 (2) of the FSSA Act, the Food Analyst is liable to send its report within 14 days of the receipt of the sample whereas in the instant case the Food Analyst had received the sample on 24.05.2016

whereas the report is dated 03.08.2016 e.g. beyond 14 days, which is in contravention of Rule 2.4.2 (5) of the FSSA Rules and Section 42 (2) of the FSSA. Rule 2.4.2 (5) of the FSSA Rules and Section 42 (2) of the FSSA are reproduced below for ready reference:

*Rule 2.4.2 (5) of the FSSA Rules - On receipt of the sample, the Food Analyst shall analyze or cause to be analyzed the sample and send the analysis report mentioning the method of analysis. The analysis report shall be as per Form VII A and four copies of the same shall be sent to the Designated Officer under whose jurisdiction the Food Safety Officer functions or the purchaser of the article of food. The analysis report shall be signed by the Food Analyst and such report shall be sent within fourteen days of the receipt of the sample by the Food Analyst.*

*Section 42 (2) of the FSSA Act - The Food Analyst after receiving the sample from the Food Safety Officer shall analyze the sample and send the analysis report mentioning method of sampling and analysis within fourteen days to Designated Officer with a copy to Commissioner of Food Safety.*

i) That, as per the proviso of Rule 2.4.2 (6) of the FSSA Rules in case the sample cannot be analyzed within fourteen days of its receipt, the Food Analyst shall inform the Designated Officer ("DO") and the Commissioner of Food Safety giving reasons and specifying the time to be taken for analysis however, in the present case there is nothing on record to show that the aforesaid rule has been complied by the Food Analyst for giving the report beyond 14 days and hence the Food Analyst report is liable to be discarded by this Learned Court and the same cannot be relied upon.

ii) The Food Analyst Report is vague, untenable and erroneous and cannot be relied upon. The opinion of the Food Analyst failed to substantiate the finding about contravention of Regulation No. 3.1.10(1) of Food Safety and Standards (Food Products Standards and Food Additive) Regulations, 2011 (hereinafter referred to as "Food Additives Regulations").

iii) The Food Analyst report failed to substantiate the opinion and / or provide any rationale as to how the label declaration is in contravention of Regulation No. 3.1.10(1) of the Food Additive Regulations.

iv) For ready reference Regulation 3.1.10 (1) of Food Safety and Standards (Food Products Standards and Food Additive) Regulations, 2011 is reproduced below:

1) *Flavoring Agents:*

*Flavoring agents include flavor substances, flavor extracts or flavor preparations, which are capable of imparting flavoring properties, namely taste or odour or both to food.*

*Flavoring agents may be of following three types;*

(i) *Natural Flavor's and Natural Flavoring Substances means flavor preparations and single substance respectively, acceptable for human consumption, obtained exclusively by physical processes from vegetables, for human consumption*

(ii) *Nature-Identical Flavoring Substances means substances chemically isolated from aromatic raw materials or obtained synthetically; they are chemically identical to substances present in natural products intended for human consumption, either processed or not*

(iii) *Artificial Flavoring Substances means those substances which have not been identified in natural products intended for human consumption either processed or not;*

In compliance of the aforesaid regulation as the sample product "Maaza" contains three types of flavoring agents hence it is mentioned on the label accordingly.

1) It is pertinent to mention herein that Table 8 of Appendix -A of the Food Additives Regulation, which is concerned with the list of permissible additives for use in Fruit drinks, in Entry E (Flavours), expressly permits a manufacturer to add natural, nature identical and artificial flavoring substances to food products categorized as 'Carbonated Fruit Beverage or Fruit Drink' as per Good Manufacturing Practices. As the sample product "Maaza" is a mango based fruit drink, hence it is permitted to contain natural, nature-identical and artificial flavors in its composition as per the Food Additives Regulations.

2) That, Regulation 2.2.2 (5) (ii) of Packaging and Labelling Regulations states about Addition of Colours and / or Flavours. Regulation 2.2.2 (5) (ii) (b) of Packaging and Labelling Regulations which deals with label declaration in case of extraneous addition of flavouring agents is reproduced below for ready reference;

*Regulation 2.2.2 (5) (ii) (b) - Extraneous addition of flavouring agents to be mentioned on the label.*

Where an extraneous flavouring agent has been added to any article of food, there shall be written just beneath the list of ingredients on the label attached to any package of food so flavoured, a statement in capital letters as below:

CONTAINS ADDED FLAVOUR (specify type of flavouring agent as per Regulation 3.1.10(1) of Food Safety and Standards (Food product standards and food additive) Regulation, 2011

Regulation 2.2.2 (5) (ii) (c) of Packaging and Labelling Regulations which deals with label declaration in case both colour and flavor are used in the product is reproduced below for ready reference;

©In case both colour and flavour are used in the product, one of the following combined statements in capital letters shall be displayed, just beneath the list of ingredients on the label attached to any package of food so coloured and flavoured, namely : –

CONTAINS PERMITTED NATURAL COLOUR(S) AND ADDED FLAVOUR(S)

OR

CONTAINS PERMITTED SYNTHETIC FOOD COLOUR(S) AND ADDED FLAVOUR(S)

OR

CONTAINS PERMITTED NATURAL AND SYNTHETIC FOOD COLOUR(S) AND ADDED FLAVOUR(S)

In view of the above, the label declaration of the product "Maaza" is in compliance with Regulation 3.1.10 (1) of the Additives Regulations read with Regulation 2.2.2 (5) (ii) (b) & 2.2.2 (5) (ii) (c) of Packaging and Labelling Regulations and as such no case of misbranding is made out as alleged in the Food analyst report.

1. That, without prejudice to the above, the respondent's states that the respondents are the Food Business Operator under the FSSA and in view thereof the respondents have a statutory right to get the fourth part of the sample analyzed by an accredited laboratory under Section 47(1)(c)(iii) of FSSA and Rule 2.4.1 [10(iii)] and Rule 2.4.5(1) of FSSR.

Section 3 (n), Section 3 (o), Section 47 of FSSA, Rule 2.4.1 [10(iii)] and Rule 2.4.5(1) of FSSR are reproduced hereunder:

Section 3(n) "food business"

"food business" means any undertaking whether for profit or not and whether public or private, carrying out any of the activities related to any stage of manufacture, processing, packaging, storage, transportation, distribution of food, import and includes food services, sale of food ingredients.

Section 3(o) "food business operator"

'food business operator' in relation to food business means a person by whom the business is carried on or owned and is responsible for ensuring the compliance of this Act, rules and regulations made thereunder.

Section 47. Sampling and Analysis.

(1) When a Food Safety Officer takes a sample of food analysis, he shall –

(c) (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.

2.4 : Sampling and Analysis

2.4.1: Procedure for taking sample and manner of sending it for analysis –

The Food Safety Officer while taking sample of food for analysis under clause A of sub section 1 of Section 38 and Section 47 (except 47 (5)) of the Act, shall also follow the procedure specified hereunder :-

(10) The containers of the samples shall be dispatched forthwith in the following manner:

(i) xxx xxx xxx

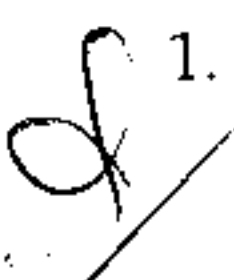
(ii) xxx xxx xxx

(iii) the sealed container of the remaining fourth part of the sample and a copy of memorandum in Form VI shall be sent to an accredited laboratory along with fee prescribed by the Authority, if so requested by the Food Business Operator, under intimation to the Designated Officer

Provided .....

2.4.5: Food Business Operator's right to have the food analyzed:

1. In case the Food business operator from whom the sample has been taken or the person whose name and address and other particulars have been disclosed under Rule 2.5 of these rules,




desires to have the fourth part of the sample analyzed, he shall request the Food Safety Officer in writing to send the sample to any NABL accredited /FSSAI notified laboratory for analysis under intimation to the Designated Officer.

2. It is pertinent to mention herein that the respondents being the Food Business Operator within the meaning of FSSA and has a statutory right under the aforementioned provisions to get the sample analyzed by the accredited laboratory as clearly mentioned in Rule 2.4.5(1) of FSSR and the applicant by not giving opportunity to the respondents, had violated the statutory right of the respondents provided under the FSSA and FSSR.
3. In view of the above, it is clear that all declarations have been made in accordance with the Food Safety & Standards (Packaging & Labelling) Regulations 2011 and Food Safety and Standards (Food Products Standards and Food Additive) Regulations, 2011, and therefore, no case of misbranding is made out and hence the report of the Food Analyst basis which the instant application for adjudication has been filed is liable to be dismissed by this Hon'ble Court.
4. That, being aggrieved by the above Adjudication Application filed in this Hon'ble Court and the entire proceeding initiated by the applicant, the Respondents are seeking for dismissal of the application on the following amongst other grounds which are set out herein below which are without prejudice to each other:

**GROUND**

- a) For that, the instant Adjudication Application filed is ex-facie illegal and hence it is liable to be dismissed in order to secure the ends of justice.
- b) For that, the application and the documents appended thereto taken on face value do not make out any prima-facie case against the present respondents.
- c) For that, the Respondents had the statutory right granted under Section 46 (4) of the FSSA and under Rule 2.4.6 (1) of the FSSR to get the 2nd part of the sample analyzed by the referral laboratory (whose report is final and supersedes the report of the Food Analyst) which has been denied in the instant case and in view thereof the instant application for adjudication is liable to be dismissed by this Hon'ble Court.
- d) For that, the Food Analyst had failed to apply the Food Additives Regulations in its proper perspective and in view thereof the report of the Food Analyst is erroneous, misconceived and hence cannot be relied upon.
- e) For that, the Laboratory wherein the sample in the instant case has been tested/analyzed is not accredited by NABL nor it has been recognized by the Food Authority under Section 43 of the FSSA Act hence the analysis made in the aforesaid laboratory cannot be relied upon.
- f) For 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. 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. Section 43(1) mandates that the Food Analyst has to analyze 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.
- g) For that, as per Rule 2.4.2 (5) of the FSSA Rules and Section 42 (2) of the FSSA Act, the Food Analyst is liable to send its report within 14 days of the receipt of the sample whereas in the instant case the Food Analyst had received the sample on 24.05.2016 whereas the report is dated 03.08.2016 e.g. beyond 14 days, which is in contravention of Rule 2.4.2 (5) of the FSSA Rules and Section 42 (2) of the FSSA.
- h) For that, the opinion of the Food Analyst failed to substantiate the finding about contravention of Regulation No. 3.1.10(1) of Food Additives Regulations. The Food Analyst report failed to substantiate the opinion and / or provide any rationale as to how the label declaration is in contravention of Regulation No. 3.1.10(1) of the Food Additive Regulations.

  
अतिरिक्त निदेशक (संयोजक)  
द्वारा (संयोजक)

- i) For that, the label declaration of the product "Maaza" is in compliance with Regulation 3.1.10 (1) of the Additives Regulations read with Regulation 2.2.2 (5) (ii) (b) & 2.2.2 (5) (ii) (c) of Packaging and Labelling Regulations and as such no case of misbranding is made out as alleged in the Food analyst report.
- j) For that, the respondents being the Food Business Operator as per the definition under the FSSA and has a statutory right under the aforementioned provisions to get the sample analyzed by the accredited laboratory as clearly mentioned in Rule - 2.4.5(1) of FSSR and the FSO by not giving that opportunity to the respondents had violated the statutory right of the respondents provided under the FSSA and FSSR and as such the instant adjudication proceeding is liable to be dismissed by this Hon'ble Court.
- k) For that, in view of the reasons mentioned above, it is clear that all declarations have been made in accordance with the Food Safety & Standards (Packaging & Labelling) Regulations 2011 and Food Safety and Standards (Food Products Standards and Food Additive) Regulations, 2011, and therefore, there can be no case of misbranding on this account is made out and hence the report of the Food Analyst basis which the instant application for adjudication has been filed is liable to be dismissed by this Hon'ble Court.
- 1) For that, the Apex Court in *Municipal Corporation of Delhi - vs - Kacheroo Mal reported in AIR 1976 SC 394 / 1976 CrLJ 336* has held that "the report of the Public Analyst, does not mean that this ipse dixit would be conclusive and binding on the court. To treat it so, would be to leave the determination of the guilt of the accused to the whims and fancies of the Public Analyst. The Act would not countenance such abdication of its judicial, function by the court, leaving the case-as it were-to be tried by the Analyst. It is for the Court weigh his opinion and reach its own finding".
  - 2) For that, the falsity of the allegation as alleged in the Food Analyst Report and in the instant Adjudication Application is apparent from the facts submitted above and as such the instant case is liable to be dismissed.
  - 3) For that, the sanction for prosecution by the designated Officer suffers from non - application of mind on the part of the designated officer and as such the instant adjudication application is liable to be dismissed by this Hon'ble Court.
  - 4) For that, the Respondents would suffer irreparable loss of reputation and otherwise, if the instant adjudication application is not dismissed.
  - 5) For that, allowing the instant adjudication application to continue against the Respondents even when the allegations in the Food Analyst Report / Adjudication Application do not make out any offence would tantamount to a gross abuse of the process of Court.
  - 6) For that, in view of the aforesaid facts and circumstances, the alleged contravention of provisions of the FSSA, FSSR and the Food Additives Regulations has not been proved beyond doubt and hence the instant case is liable to be dismissed by this Hon'ble Court under Rule - 3.1.2 (2) of the FSSR.
5. The present Respondents craves leave to add, alter or amend any of the foregoing grounds and reserves its right to cross examine the witnesses of the applicant and submitting its defense evidence.
  6. The present Respondents, therefore, prays:
    - a) That, this Hon'ble Court be pleased to dismiss the application and the entire proceedings.
    - b) That, the Food Analyst be called for cross examination.
    - c) That, the Respondents be allowed to cross examine all witnesses as mentioned by the Applicant in the adjudication application;
    - d) That, the respondents be allowed to produce and examine defense witnesses.
    - e) Pass such and further order/orders as this Learned Court may deem fit and proper in the interest of justice.

हमने बहस प्रार्थी की सुनी। दौराने बहस प्रार्थी ने आवेदन में अंकित तथ्यों को दोहराया तथा कथन किया कि अप्रार्थीगण द्वारा विक्रय किया जा रहा खाद्य पदार्थ खाद्य पदार्थ **Ready to serve Fruit Drink Mango Pulp (Maaza Mango) मिथ्याछाप (Mis Branded)** का अप्रार्थीगण ने निर्माण एवं विक्रय करके खाद्य संरक्षा एवं मानक अधिनियम 2006 की धारा 26 की उप धारा 2 (ii) का उल्लंघन किया है जिसका जुर्माना खाद्य

दस्तावेज  
अधीन (राज्य)





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 mentioned under the Act and Rules and Regulations framed which is 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 New Delhi-110002 Dated : 5th July, 2011

To,

Food Safety Commissioner of all States/UTs

Subject :- Clarification on the status of Public Labs functioning at Centre/State/UT after the promulgation of FSS Act, 2006 with effect from 5 th 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, WPL/1688/2015 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....)*

h) That, without prejudice to the above, the Respondent states and submits that, the above order/letter dated July 5, 2011 issued by FSSAI stating - "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." renders the provisions of FSSA nugatory and is against the settled position that the Laboratories and method of analysis under erstwhile PFA Act was undefined and not prescribed, and therefore, reports of

such undefined labs could not be relied upon and could not be read in evidence, as held by **The Hon'ble High Court of Kerala in the matter of K.N Sadanandan Vs. Food Inspector and in the matter of V. Prasanth Vs. Food Inspector.**

- i) It is further submitted that, since year 2012, several Laboratories accredited by NABL have been recognized and notified by the Food Authority by issuing Notifications. The Public Health Laboratory, Jaipur has not been recognized and notified by Food Authority in any of its notifications, as above. Therefore, the report of unrecognized laboratory as that of State Central Public Health Laboratory, Jaipur cannot be relied upon and read in evidence in the instant matter.
- j) That, the FSO did not notice violation of the said labelling requirement at the time of sampling, and therefore, the FSO did not mention anything in Form VA and FARD REPORT drawn at the time of sampling. In view thereof, the Food Analyst opinion cannot be relied upon. Reliance is placed on Judgment and Order passed by Hon'ble High Court of Himachal Pradesh in the matter of **Ganga Ram Vs. State of HP reported in 2011(2) FAC 77.**
- k) The Respondent states and submits that, all declarations have been made in accordance with the Food Safety & Standards (Packaging & Labelling) Regulations 2011, and therefore, there can be no case of misbranding on this account, and hence, the report of the Food Analyst basis which the instant Application for Adjudication has been filed is liable to be dismissed by this Hon'ble Court.

l) The Respondent states and submits that, the report of the Food Analyst does not mean that this ipse dixit would be conclusive and binding on this Learned Court. It is for this Learned Court to weigh the food analyst opinion and reach its own finding. Reliance is placed on the below mentioned judgments;

➤ **Apex Court in Municipal Corporation of Delhi - vs - Kacheroo Mal reported in AIR 1976 SC 394 / 1976 CrLJ 336**

m) The Respondent states and submits that, the FSO and Food Analyst have not been examined in the instant case to prove the case of prosecution, as also, the analysis report on which the entire case of the prosecution is based upon.

n) That, as per Rule - 3.1.1 (5) of the FSSA Rules, the Adjudicating Officer shall have the power to hold an enquiry for purpose of adjudicating offences and further as per Rule - 3.1.1 (11) of the FSSA Rules, the Adjudicating Officer is empowered to summon and enforce the attendance of any person acquainted with the facts and circumstances of the case to give evidence. It is pertinent to mention herein that as per Rule - 3.1.2 (1) of the FSSA Rules, the Adjudicating Officer upon consideration of the evidence produced in enquiry proceedings, shall pass the order in accordance with law. In the present case, the Respondent in its reply prayed for examination of all Prosecution witness including FA whose report has been relied upon by FSO in the Adjudication Application and opportunity to cross examine FA be given to the Respondent, and that, a separate application to this effect was also filed by the Respondent. However, to no avail application of the Respondent praying for cross examination of Prosecution witnesses including FA and DO has not been rejected inspite of the fact that Food Analyst report is a report of expert but unless and until such reports are proved by those experts they cannot be read in evidence. Reliance is placed on the following judgment:

➤ **M/s Cargill India Pvt. Ltd. Vs. State of Uttrakhand reported in 2016(1) FAC 417**

o) That, as per Section 68(2) of the FSSA Act, the Adjudicating Officer shall after giving the person charged a reasonable opportunity for making representation in the matter and thereafter the Adjudicating Officer is

required to make an enquiry into all relevant facts particularly the reliability of the Food Analyst/Referral Lab report submitted by the Food Safety Officer, and thereafter to pass the order accordingly in accordance with law. The term reasonable opportunity has been defined by Hon'ble Apex Court in the matter of Khem Chand V. UOI reported in AIR 1958 SC 300 as ".....(b) an opportunity to defend himself by cross-examining the witnesses produced against him and by examining himself or any other witnesses in support of his defence....."

Reliance is further placed on the following judgments:

➤ 2016 CriLJ 3386; Ramakant Gupta - vs - The State of Chhattisgarh and Ors.

p) That, the report of FA could not be relied upon without there being any notes of analysis conducted by him. Admittedly, the FA commenced the analysis of the sample on 27.05.2016 and the same was concluded on 20.06.2016, and thereafter, the FA issued its report on 03.08.2016. Without the notes of the analysis, the FA report is of no assistance to the Hon'ble Court in holding that the sample contravenes the provisions of FSSA and its Rules & Regulations. It is pertinent to mention herein that, if the analysis is carried prior to the signing of the report, the notes of the analysis which were prepared at the time of analysis becomes the main evidence and not the certificate which is issued by the Lab., subsequently. In fact, in the absence of notes of analysis the report of FA has no value, and therefore, the instant adjudication application is liable to be dismissed being devoid of merits and evidence. Reliance is placed on Criminal judgment passed by Hon'ble Bombay High Court in Appeal No. 1124 of 1976.

q) The Respondent states and submits that, in view of the aforesaid facts and circumstances, the alleged contravention of provisions of the Food Safety and Standards (Food Products Standard and Food Additive) Regulation has not been proved beyond doubt, and hence, the instant case is liable to be dismissed by this Hon'ble Court under Rule - 3.1.2 (2) of the FSSR.

r) That, admittedly, Respondent No. 1 is not the manufacturer of the sample and consequently the respondent is not responsible/liable for the label declaration of the sample.

s) That, admittedly, Respondent No. 1 sold the food article in question in the same condition as it was purchased hence Respondent No. 1 is not liable in view of Section 80 (B) (2) (d) of the FSSA and in view thereof the adjudication application is liable to be dismissed by this Learned Court.

t) That, the Respondent craves leave to add, alter or amend any of the foregoing grounds at the time of hearing. अतः अप्रार्थीगण के विरुद्ध उक्त कार्यवाही निरस्त करने की कृपा करें।

हमने उभयपक्ष की बहस पर मनन किया व पत्रावली का आद्योपान्त अवलोकन किया, अप्रार्थी के पास से वास्ते नमूना जांच लिया गया, खाद्य पदार्थ **Ready to serve Fruit Drink Mango Pulp (Maaza Mango) मिथ्याछाप (Mis Branded)** होना पाया गया है। उक्त कृत्य खाद्य सुरक्षा एवं मानक अधिनियम 2006 एवं विनियम 2011 की धारा 26 की उपधारा 2 (ii) के अन्तर्गत अपराध की श्रेणी में आता है। जिसका जुर्माना खाद्य सुरक्षा एवं मानक अधिनियम 2006 एवं नियम 2011 की धारा 52 के तहत, अप्रार्थी कम 1 को 5000/- तथा अप्रार्थी कम 2 व 3 को कुल 145000/- महायोग 1,50,000/- अक्षरे एक लाख पचास हजार रुपये मात्र के आर्थिक जुर्माने के दण्ड से दण्डित किया जाता है। अप्रार्थीगण उक्त राशि पृथक पृथक जर्गे चालान बैंक में निर्धारित मद 0210 चिकित्सा एवं लोक स्वास्थ्य, 04 लोक स्वास्थ्य, 800 अन्य प्राप्तियां, 03 खाद्य सुरक्षा कानून के अन्तर्गत अनुज्ञा पत्र शुल्क आदि में जमा करवाये।

निर्णय आज दिनांक 27.11.2017 को हमारे द्वारा लिखाया जाकर खुले न्यायालय में सुनाया गया।



( वासुदेव मालावत )  
न्याय निर्णयन अधिकारी एवं  
अति० जिला मजिस्ट्रेट, बारां (राज.)