

ORDER SHEET

LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Crl. Misc. No.17013/B/2023

Muhammad Ashraf

Vs

The State etc.

S.No. of Order/ Proceeding	Date of order/ proceeding	Order with the signature of the Judge and that of parties or counsel where necessary
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10.4.2023 Mr Muhammad Ejaz, Advocate, for the Petitioner.
Ms Rahat Majeed, Assistant District Public Prosecutor, with
Muhammad Safdar Ali/ASI.

Tariq Saleem Sheikh, J. – By this application, the Petitioner seeks post-arrest bail in case FIR No.17/2023 dated 7.1.2023 registered at Police Station Saddar Kamalia, District Toba Tek Singh, for an offence under section 22(1) of the Punjab Food Authority Act, 2011 (the “PFA Act”).

2. According to the FIR, the prosecution case is that the Petitioner has set up a milk collection centre at 54/2, Takra Kamalia. On 7.1.2023 at around 11:00 a.m., Asim Shabbir, Food Safety Officer (the “FSO”), examined the milk at that location and found it substandard. Consequent thereupon, he destroyed 480 litres of it. He sent the samples drawn from the stock to the laboratory, which confirmed that it was adulterated with fat other than milk fat.

3. The Petitioner’s counsel, Mr Muhammad Ejaz, Advocate, contends that the Public Analyst’s report is necessary to prosecute a person under section 22(1) of the PFA Act for selling or offering for sale adulterated food. In the present case, the FSO failed to collect milk samples in accordance with Rule 52 of the Punjab Pure Food Rules, 2011. As a result, the Public Analyst’s report dated 10.1.2023 cannot be relied upon. He further contends that the Petitioner is a first-time offender, and the offence he is charged with does not fall under the prohibitory clause.

4. The Assistant District Public Prosecutor contends that the statements of the PWs and the Public Analyst’s report *prima facie*

establish that the Petitioner has committed the alleged offence. She maintains that Rule 52 is directory, not mandatory, and its non-compliance has no bearing on the prosecution's case. She further states that the Petitioner has not brought any material on record that may suggest that the FIR against him is false. The fact that the offence under section 22(1) of the Act does not fall under the prohibitory clause does not automatically entitle the Petitioner to post-arrest bail. His illicit sale of adulterated milk impacts the general populace, making him ineligible for any indulgence from this Court.

5. Arguments heard. Record perused.

6. The Pure Food Ordinance, 1960 (the "1960 Ordinance"), consolidated and amended the law relating to the preparation and sale of foods in West Pakistan, which remained in force in the Punjab for more than five decades. On 6th July 2011, the Punjab Food Authority Act 2011 (the "PFA Act") was enacted but not immediately implemented. Section 1(3) of the Act provided that it shall come into force on such date as the Punjab Government may specify by a notification. It also authorized it to set separate dates for different areas. The PFA Act was enforced in the Lahore District only w.e.f. 2nd July 2012 vide Notification No.SOF-IV-II-7/2011 of even date. Thereafter it was gradually extended to more districts and, as of 2017, applied throughout the province.¹

7. In exercise of the powers conferred by section 37 of the 1960 Ordinance, the Governor of the Punjab framed the Punjab Pure Food Rules, 2011, vide Notification No. SRO(PH)1-47/68 dated 29th September 2011. They superseded the Punjab Pure Food Rules of 2007.

8. The PFA Act has repealed the Ordinance of 1960, but section 58(3) thereof has preserved the Punjab Pure Food Rules, 2011 (the "Food Rules"). The said provision is reproduced below for ready reference:

¹ Notification No. SOF(PFA)/11-5/2017(Expansion) dated 18th July 2017, issued by the Secretary Food Department, Government of the Punjab.

- 58. Repeal and savings.–**(1) ...
 (2) ...
 (3) The standards, safety requirements and other provisions of the repealed Ordinance or the rules made thereunder shall, to the extent of consistency with the Act, continue to remain in force till the standards, safety requirements are prescribed under the Act.
 (4) ...

9. In *Commissioner of Income Tax, Peshawar v. Islamic Investment Bank Ltd.* (2016 SCMR 816), the Supreme Court of Pakistan explained the effect of a saving clause as follows:

“When a statute repeals an earlier statute, and it is an unqualified repeal, then the effect of such repeal is that the earlier statute gets repealed in its entirety. However, where the Legislature intends to preserve any power or inchoate right in relation to the repealed statute, then a saving clause is incorporated in the repealing statute whereby certain provisions are preserved from getting repealed to the extent and with regard to the subject mentioned in the saving clause. The provisions of the repealed law that are so preserved are to be regarded as if the repealed statute was still in operation.”

10. The PFA Act aims to protect public health, provide for food safety and standards, and establish the Punjab Food Authority.² Section 56 of the Act empowers the Provincial Government to frame rules for carrying out the purposes of the Act, and section 57 authorizes the Food Authority to make regulations. The Government has not drawn any new Rules under section 56 of the Act so far. Resultantly, the Food Rules of 2011 mentioned above continue to hold the field.

11. Rules 50 and 51 of the Food Rules of 2011 outline the method for taking food samples and packing them for analysis. Rule 52 specifies the quantity of a sample that must be provided to the Public Analyst. It reads as follows:

52. Quantity of sample.– The quantity of a sample to be supplied for analysis to a Public Analyst shall not be less than specified below:

Article of food	Approximate quantity to be supplied
Milk	250 ml
Desi Ghee, Butter	150 ml/gm
Khoya, Dahi	250 gm
Edible oils & fats	150 ml

² Preamble of the PFA Act.

Tea	125 gm
Atta, Maida, Suji, Basan	200 gm
Sugar, honey, gur, shakar or other sweeteners	250 gm
Prepared food	500 gm
Aerated carbonated water	500 ml
Banaspati	500 gm
Spices	200 gm
Cereal & cereal product (other than Atta)	250 gm
Saffron	15 gm
Bakery products	500 gm
Confectionary	300 gm
Ice-cream, cream, condensed milk, cheese	250 gm
Silver leaf	1 gm
Baby foods	450 gm
Milk powders	450 gm
Syrups, sherbets, fruit and vegetable concentrates	250 ml
Foods not specified	500 gm/ml

12. It is by now well settled that the Rules validly made under a statute have the same effect as the statute itself and are enforced as such. The Supreme Court of India highlighted this point in ***State of Uttar Pradesh and others v. Babu Ram Upadhyaya*** (AIR 1961 SC 751) as under:

“Rules made under a statute must be treated for all purposes of construction or obligation exactly as if they were in the Act and are to be of the same effect as if contained in the Act, and are to be judicially noticed for all purposes of construction or obligation.”

In view of the above, the same principles that are followed for the construction of statutes are used to interpret the Rules.

13. In general, where the law specifies a mode of performing a duty, it must be performed in that particular manner or not at all. This canon stems from the maxim *expressio unius est exclusio alterius*. However, the question arises as to whether failure to follow the prescribed procedure renders the entire action or proceedings invalid. There is no principle of universal application to classify a

provision as mandatory or directory. It depends upon the intent of the Legislature rather than the phraseology used. Maxwell writes:

“It is impossible to lay down any general rule for determining whether a provision is imperative or directory. ‘No universal rule’, said Lord Campbell L.C., ‘can be laid down for the construction of statutes as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of court of justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed’. And Lord Penzance said: ‘I believe, so far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter, consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory.’”³

14. Ordinarily, the words “shall” or “must” show that the Legislature intended to make the provision mandatory. In contrast, the word “may” would indicate that it wanted to make it directory. However, they are often used interchangeably. In *Province of Punjab, and others v. Murree Brewery Company Limited and another* (2021 SCMR 305), the Supreme Court of Pakistan approvingly cited *May George v. Special Tehsildar and others*,⁴ which laid down the following non-exhaustive guidelines for determining whether a provision is mandatory or directory:

- “(a) While determining whether a provision is mandatory or directory ... the court has to examine the context in which the provision is used and the purpose it seeks to achieve;
- (b) To find out the intent of the Legislature, it may also be necessary to examine serious general inconveniences or injustices which may be caused to persons affected by the application of such provision;
- (c) Whether the provisions are enabling the State to do some things and/or whether they prescribe the methodology or formalities for doing certain things;
- (d) As a factor to determine legislative intent, the court may also consider, inter alia, the nature and design of the statute and then which would flow from construing it, one way or the other;
- (e) It is also permissible to examine the impact of other provisions in the same statute and the consequence of non-compliance with such provisions;

³ Maxwell on The Interpretation of Statutes (Twelfth Edition) at p.314

⁴ (2010) 13 SCC 98

- f) Phraseology of the provisions is not by itself a determinative factor. The use of the words ‘shall’ or ‘may’, respectively, would ordinarily indicate imperative or directory character, but not always;
- g) The test to be applied is whether non-compliance with the provision would render the entire proceedings invalid or not;
- h) The court has to give due weightage to whether the interpretation intended to be given by the court would further the purpose of law or if this purpose could be defeated by terming it mandatory or otherwise.”

15. In ***Province of Punjab through Conservator of Forest, Faisalabad, and others v. Javed Iqbal*** (2021 SCMR 328), the Supreme Court of Pakistan held that the Legislature’s intent, not the language used to express that intent, determines whether a particular provision is directory or mandatory. To unravel that intention, the court should consider the provision’s object and purpose, the consequences of construing it one way or the other, and whether its non-compliance creates inconvenience or injustice. The Supreme Court stated:

“There are three fundamental tests, which are often applied with remarkable success in the determination of this question. They are based on considerations of the scope and object, sometimes called the scheme and purpose, of the enactment in question, on considerations of justice and balance of convenience and on a consideration of the nature of the particular provision, namely, whether it affects the performance of a public duty or relates to a right, privilege or power in the former case the enactment is generally directory, in the latter mandatory.”

16. In ***The State, through Regional Director ANF v. Imam Bakhsh and others*** (2018 SCMR 2039), the Supreme Court stated that some rules are vital and go to the heart of the subject and therefore cannot be broken; others are only directory and a breach of them can be overlooked if there is substantial compliance. Some sections of a statute may be mandatory while others may be directory. It is also possible that a certain portion of a provision, obligating something to be done, is mandatory in nature whilst another part of the same provision is directory due to the guiding legislative intent behind it. Even parts of a single provision or rule may be mandatory or directory. In each case, the court must look to the subject matter and consider the importance of the provision disregarded and the

relation of that provision to the general object intended to be secured. The Supreme Court approvingly cited Crawford who states that “as a general rule, [those provisions that] relate to the essence of the thing to be performed or to matters of substance, are mandatory, and those which do not relate to the essence and whose compliance is merely of convenience rather than of substance, are directory.”

17. I have already mentioned that the objective of the PFA Act is to protect public health. To this end, it provides for food safety and food standards and establishes a comprehensive enforcement mechanism. Sampling and credible laboratory analysis are pivotal in realizing the objective and purpose of the PFA Act. Therefore, section 21 of the Act empowers the Food Authority to establish a food laboratory or recognize or accredit one. Part VII of the Food Rules provides for appointing a Public Analyst, outlines his duties and deals with other ancillary matters.

18. Rule 52 of the Food Rules of 2011 lists food items and prescribes the minimum quantity required for preparing a sample in each case. There is a statutory presumption that the specified amount is the minimum requirement for an authentic Public Analyst’s report. Since the prosecution of several offences under Chapter IV of the PFA Act depends on that report, I hold that Rule 52 is mandatory. Any other conclusion will not only prejudice an accused at the trial but also defeat his right to a fair trial guaranteed under Article 10-A of the Constitution of the Islamic Republic of Pakistan, 1973.

19. In the present case, the FSO did not send the requisite quantity of milk sample to the Public Analyst, which should have been at least 250 ml per Rule 52. Therefore, the report dated 10.1.2023 is open to a serious challenge. This makes the Petitioner’s case one of further inquiry within the meaning of section 497(2) Cr.P.C.

20. The offence under section 22(1) of the PFA Act with which the Petitioner has been charged does not fall within the prohibitory clause of section 497 Cr.P.C. In ***Tariq Bashir and others***

v. *The State* (PLD 1995 SC 34), the Supreme Court of Pakistan held that in such cases, the grant of bail is a rule, and refusal is an exception. This principle was reaffirmed in *Muhammad Tanveer v. The State and another* (PLD 2017 SC 733), *Arslan Masih and others v. The State and others* (2019 SCMR 1152), *Abdul Saboor v. The State and another* (2022 SCMR 592), *Nazir Ahmad alias Bhaga v. The State and others* (2022 SCMR 1467), and *Muhammad Nawaz alias Karo v. The State* (2023 SCMR 734). There are no exceptional circumstances to withhold bail in the instant case.

21. Lastly, the Petitioner has been behind bars since 27.2.2023. The police do not require him for further probe. His continued incarceration would not advance the prosecution's case.

22. In view of the above, I *accepted* this application vide short order of even date and admitted the Petitioner to post-arrest bail subject to his furnishing bail bonds in the sum of Rs.200,000/- (Rupees two hundred thousand) with one surety in the like amount to the satisfaction of the trial court.

(Tariq Saleem Sheikh)
Judge

Naeem

Approved for reporting

Judge