

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

Mr. Justice Manzoor Ahmad Malik
Mr. Justice Syed Mansoor Ali Shah
Mr. Justice Amin-ud-Din Khan

C.P.1331-L/2017

*(Against the judgment of Lahore High Court, Lahore
dated 27.01.2017, passed in W.P. No.25124/2015)*

M/s. Lung Fung Chinese Restaurant, Lahore, etc.

.....***Petitioner(s)***

Versus

Punjab Food Authority, etc.

.....***Respondent(s)***

For the petitioner(s): Mr. M. Irfan Khan Ghaznavi, ASC.

For the respondent(s): Mr. Iftikhar Ahmad Mian, ASC.
Ch. Sultan Mahmood, ASC
Mr. Sheheryar Sultan, Secretary, Food
Department, Government of the Punjab
Mr. Razaqat Ali Niswana, D.G. Punjab Food
Authority
Anum Gulraiz Mir, Addl. Director Legal
Usman Samad, Assistant Director, Legal.

On Court's notice: Mr. Ahmad Awais, A.G. Punjab
Rana Shamshad Khan, Addl. A.G.


Date of hearing: 09.03.2021

JUDGMENT

Syed Mansoor Ali Shah, J.- On 08.08.2015, Food Safety Officer ("**FSO**") of the Punjab Food Authority visited LUNG FUNG, Chinese restaurant in Lahore. After carrying out inspection of six freezers installed in the restaurant, the FSO sealed the said restaurant on the same day allegedly invoking his powers under section 13 (1) (c) of the Punjab Food Authority Act, 2011 ("**Act**")¹. Later on the said restaurant was allegedly de-sealed on 17.08.2015 and the restaurant was served with an Improvement Notice under section 16 of the Act. The petitioner-restaurant and its proprietors challenged the act of sealing of the restaurant by FSO, the methodology of enforcement under the Act and the constitutionality and vires, *inter alia*, of the power of 'sealing' exercised by the FSO under section 13 (1) (c) of the Act.

¹ Published on 06.07.2011.

2. We have heard the learned counsel for the parties at some length and have examined the provisions of the Act. Brief facts are that the FSO upon examining the freezers installed in the kitchen *sealed* the premises (restaurant) vide sealing order dated 08.08.2015, which is reproduced hereunder for convenience and reference:-



GOVERNMENT OF THE PUNJAB
PUNJAB FOOD AUTHORITY

Form 18
ORDER OF SEALING
(Under section 13 (1) (c) (g) of the Punjab Food Authority Act, 2011)

The powers conferred under section 13 read with section 51 of the Punjab Food Authority Act, 2011, the undersigned has reason to believe that there are sufficient grounds for sealing of your premises. I being an authorized officer, hereby direct you to keep the following food stock sealed till such orders as may be issued subsequently in relation thereto:-

(Name of the Food Business Operator and address of the premises)
عتیق احمد ولد نذیر احمد
Lung Fund Chines Restaruant,
Kashmir Road, Near Governor House.

Sr. No.	Name of the product	Batch No.	No of Units	Qty. in KGs.
1.	Freezers		6	
2.				
3.				
4.				
5.				

- Fine was imposed last time;
- Workers were not wearing caps.
- Dirty washing area.
- Stagnant water on kitchen floor.
- Raw and cooked food stored together in freezer.
- Expired bread found of 24.07.2015;
- Poor premises hygiene.
- Flies found on uncovered food.

Even though the tenor of the above Order shows that only the food stock (i.e., in the six freezers) has been sealed but admittedly, on ground the entire restaurant was sealed. Later on the restaurant was allegedly de-sealed on 17.08.2015 and Improvement Notice under section 16 of the Act was served on the petitioner, which is reproduced hereunder:-

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3. Learned counsel for the respondents was unable to explain, on what grounds and under whose authority were the premises of the food business sealed and then de-sealed, under the Act. The respondents, in spite of our repeated queries failed to produce the de-sealing order or refer to the relevant law in this regard. They also failed to explain whether the law provided for any grounds or reasons for “sealing of premises” under section 13(1)(c) of the Act.

4. In this factual background, before examining the relevant provisions of the Act, it would be useful to have an understanding of the international key principles that are integral to the architecture of food laws. Consideration of these principles is in line with section 7(3) of the Act which provides that the Food Authority shall exercise its functions, as far as possible, in accordance with the well established scientific principles and international best practices. According to well established General Food Regulations of the European Union,² modern food safety legislation must protect the interests and concerns of consumers³ and the legitimate interests of food operators⁴. The constitution of the Food Authority under the Act (section 4) is therefore broad based and inclusive of all the competing interests: the Government, scientific experts, legislators, representatives of the food operators and of the consumers. Under international best practice, food safety legislation is required to be science based; reliant on risk analysis including: risk assessment & risk management; must maintain proportionality - finding solutions proportionate to health risks; achieve health protection on a preventive basis;⁵ and apply the precautionary principle, where required. The measures to be taken to protect health and food safety must be underpinned by strong science. It is for this reason that a Scientific Panel has been constituted under the Act (section 9) to formulate recommendations for the Food Authority on food standards, procedures, processes and guidelines in relation to technical aspect of food. The European

² General Food Regulations of the European Commission` EC Regulation No. 178(2002)

³ section 2(d) of the Act

⁴ section 2(k) *ibid*

⁵ *Principles of food safety legislation*, J. L. Jouve, Food Control. Vol. 9. No. 2-3. pp.75-81, 1998 Elsevier Science Ltd

Commission⁶ has been at the forefront of the development of risk analysis principles, including risk assessment & risk management, that must be undertaken in an independent, objective and transparent manner based on the best available science. Risk management is the process of weighing policy alternatives in the light of results of a risk assessment and selecting the appropriate actions necessary to prevent, reduce or eliminate the risk. In the risk management phase, the decision makers need to consider a range of other information in addition to the scientific risk assessment e.g., feasibility of controlling a risk; socio-economic effects; environmental impact⁷ and other techniques of risk analysis, such as cost/benefit analysis. Proportionality is normally understood as the right balance between ends and means. Action taken must be proportionate to real health risks involved. Wherever possible, health protection and food safety should be achieved on a preventive basis. In case where there is scientific uncertainty about the health risk attached to a food item, the use of precautionary principle has been imported from the world of environmental law into food laws to address such a situation. These principles are fully in line with our constitutional mandate and promote fundamental rights to fair trial (Article 10A), to business (Article 18) and to property (Article 23) of a food operator or a food business.

5. The objective of the Act is to establish the Punjab Food Authority to protect public health, provide safety and standards of food. There are three regulatory regimes under the Act that provide for food safety and public health: (i) powers enjoyed by Food Safety Officer; (ii) powers enjoyed by the Food Authority and (iii); powers of the Special Court. FSO, the field officer, who visits food businesses and food operators, enjoys the power to seize food, apparatus, etc. if it appears to him to be in contravention of the Act. Contraventions have been spelled out in the shape of offences e.g., selling adulterated food;⁸ manufacturing, selling, storing, distributing, importing and exporting of substandard or misbranded food⁹; or unsafe food;¹⁰ selling food using false advertisement¹¹; or preparing

⁶ Executive arm of the European Union.

⁷ The General Food Law Regulation by the European Food Safety Authority (EFSA)

⁸ section 22

⁹ section 23

¹⁰ section 24

and packing any food using false labeling¹² and keeping food under unhygienic and unsanitary conditions.¹³ The powers of seizure are invoked if there is a contravention of the Act by the FSO and is elaborately dealt with in section 13(3), (4), & (5) providing detailed mechanism whereby an aggrieved person can within seven days approach the Special Court against the said seizure. As opposed to seizure, the Act does not lay down any parameters or guidelines as to when the power of “sealing of premises” can be invoked by the FSO under section 13(1)(c). The provision is reproduced hereunder for reference;-

13. Powers of Food Safety Officer.- (1) A Food Safety Officer may-

(a) **take sample** of any food or any substance, which appears to him to be intended for sale, or has been sold as food;

(b) **seize** any food, apparatus or utensil which appears to the Food Safety Officer to be in contravention of this Act, the rules or the regulations;

(c) enter or **seal** any premises where he believes any food is prepared, preserved, packaged, stored, conveyed, distributed or sold, examine any such food and examine anything that he believes is used, or capable of being used for such preparation, preservation, packaging, storing, conveying, distribution or sale; (emphasis supplied)

No ground or any other legislative guideline has been given in section 13(1)(c) that permits or empowers the FSO to exercise his discretion and invoke the power of sealing. Section 13(1)(c) simply states that FSO can **seal** any premises where he believes any food is prepared, preserved, packaged, stored, conveyed, distributed or sold, examine any such food and examine anything that he believes is used, or capable of being used for such preparation, preservation, packaging, storing, conveying, distribution or sale. Nowhere does section 13(1)(c) provide when the sealing powers can be invoked. Further, the act of “sealing” is not supported by a remedial mechanism as in the case of seizure of food. Therefore, there is no legal remedy available to a food operator or food business¹⁴ after the premises¹⁵ have been sealed. There is also no provision for de-

¹¹ section 25

¹² section 26

¹³ section 27

¹⁴ section 2(i)

¹⁵ section 2(t)

sealing under the Act. More importantly, a similar power has been actually vested in the FSO under section 18 of the Act for passing *emergency prohibition orders* whereby a food operator can be restrained from carrying on food business. The difference is that within twenty-four hours the aggrieved party can approach the Food Authority for its redressal against such order (Section 18(2)). The so-called sealing power under section 13(1)(c) amounts to frustrating section 18 and the scheme of the Act. In the absence of any legislative policy or guideline clearly spelling out when the sealing can take place and there being no remedial process provided against sealing, the power of sealing in the hands of the FSO can easily be applied arbitrarily which cannot be permitted under our constitutional scheme, as any such act would offend fundamental rights under Articles 18, 23 and 25 of the Constitution. The power of sealing of premises by the FSO, in its present form, is therefore *ex facie* discriminatory. We, therefore, declare that the power of the FSO to “seal any premises” in section 13(1)(c) to be unconstitutional and illegal. Hence, the power to seal the premises of a food operator or a food business by the FSO is struck down. Reference to “sealing” in section 31(2) is also accordingly struck down. The rest of the provision [section 13(1)(c)] shall remain intact and continue to be enforceable. Any Rules, Regulations or SOPs promulgated under the Act dealing with “sealing of the premises” by the FSO in the absence of any sealing power under the Act are, therefore, *ultra vires* the Act and are also declared illegal and without any legal effect.

6. Other than the above, the FSO can also impose fines (subject to delegation of powers under section 51), issue Improvement Notice or issue Emergency Prohibition Orders. The relevant provisions are:

13 Powers of Food Safety Officer.– (1) A Food Safety Officer may–

- (a)
- (b)
- (c)**

(ca) impose fine on a food operator if the Authority has delegated such power to him;

read with Section 39((1)(d)) where a Food Authority can impose fine on the food operator which may extend to one million rupees:

16 Improvement notice.– (1) If a Food Safety Officer has reasons to believe that any food operator has failed to comply with any provisions of this Act, the rules or the regulations, he may serve an improvement notice upon the food operator–

(a) stating the grounds for believing that the food operator has failed to comply with any provisions of the Act or the rules or the regulations;

(b) specifying the matters which constitute the food operator's failure so to comply; and

(c) intimating the measures which the food operator should take in order to secure compliance with the relevant provisions of the law.

(2) If the food operator fails to comply with the improvement notice within the prescribed time, the Food Authority may cancel or suspended his licence or take such other action as it deems appropriate.

18. Emergency prohibition orders.– (1) If the Food Safety Officer is satisfied that the health risk condition exists with respect to any food business, he may, after serving a notice on the food operator and for reasons to be recorded in writing, restrain him from carrying on the food business with or without specifying conditions or period of such restraint.

(2) The Food Safety Officer shall, within twenty four hours of the action taken under sub-section (1), report such action to the Food Authority which may, after serving a notice on the food operator and for reasons to be recorded in writing, confirm, modify or set aside the order of the Food Safety Officer.

All these powers enjoyed by the FSO provide a supporting remedial forum for the aggrieved party. These provisions not only meet the requirement of Article 10A of the Constitution regarding fair trial and due process, but they also give the FSO the choice to make risk analysis and then adopt a proper risk management strategy by either issuing a Notice of Improvement or imposing a fine or taking a more stern action by seizing the food item which contravenes the provisions of the Act or if the risk to human health is imperative, to issue Emergency Prohibition Order and restrain the food operator from carrying on food business under section 18. The enforcement interventions by the FSO under the Act are laid out in a manner that highlight the concept of proportionality and must be applied in this spirit on case to case basis.

7. The second regulatory regime is under the Food Authority itself. Section 7 lays down the powers and functions of the Food Authority, which are reproduced hereunder for reference:-

"S 7. Powers and functions of the Food Authority.–

(1) The Food Authority shall regulate and monitor the food business in order to ensure provision of safe food.

(2) Without prejudice to the provisions of sub-section (1), the Food Authority may–

(a) formulate standards, procedures, processes and guidelines in relation to any aspect of food including food business, food labelling, food additive, **and specify appropriate enforcement systems;**

(b) specify procedures and guidelines for setting up and accreditation of food laboratories;

(c) formulate method of sampling, analysis of samples and reporting of results;

(d) specify licensing, prohibition orders, recall procedures, improvement notices or prosecution;

(e) determine terms and conditions of service of its employees;

(f) provide scientific advice and technical support to the Government in matters relating to food;

(g) collect and analyze relevant scientific and technical data relating to food;

(h) establish a system of network of food operators and consumers to facilitate food safety and quality control;

(i) organize training programmes in food safety and standards;

(j) promote general awareness as to food safety and standards;

(k) levy fee for registration, licensing and other services;

(l) certify food for export;

(m) perform any other prescribed function; and

(n) do any other thing which is necessary for the discharge of its functions under this Act.

(3) The Food Authority shall exercise its functions, as far as possible, in accordance with the well-established scientific principles and international best practices."

(emphasis supplied)

The Food Authority issues licenses, imposes fines and also sits as an appellate authority over the Emergency Prohibition Orders passed by the FSO. Relevant provisions are as under:

15 Licensing of food business.– (1) A person shall not use any place for food business except under the prescribed registration or licence.

(2) The Food Authority may, in the prescribed manner, exempt a class of food operators from obtaining compulsory registration or licence under this section.

18. Emergency prohibition orders.– (1) If the Food Safety Officer is satisfied that the health risk condition exists with respect to any food business, he may, after serving a notice on the food operator and for reasons to be recorded in writing, restrain him from carrying on the food business with or without specifying conditions or period of such restraint.

(2) The Food Safety Officer shall, within twenty four hours of the action taken under sub-section (1), report such action to the Food Authority which may, after serving a notice on the food operator and for reasons to be recorded in writing, confirm, modify or set aside the order of the Food Safety Officer.

39. Jurisdiction of the Food Authority – (1) On information received from any source, the Food Authority may, for reasons to be recorded in writing-

- (a)
- (b)
- (c) impose fine on the food operator which may extend to one million rupees.

Read with section 45: where these fines can be recovered as arrears of land revenue.

The Food Authority or its officers can also register criminal cases or file a criminal complaint for the contravention of the Act.

8. The third regulatory regime is under the Special Court. Offences and Penalties provided under Chapter IV including selling food against the law; or relating to substandard or misbranded food; unsafe food; false advertisement and false labeling; unhygienic or unsanitary conditions¹⁶ or passing Prohibition Orders, are dealt with by the Special Court¹⁷:-

17 Prohibition orders.– If any food operator is convicted of an offence under this Act and the Court is satisfied that the health risk exists with respect to the food business, the Court, may impose the following prohibitions–

(a) a prohibition on the use of a process, treatment, premises or equipment for purposes of the food business; or

(b) a prohibition, with or without specifying period of prohibition, on the food operator to conduct or operate the food business.

¹⁶ See Sections 22, 22A, 23, 24, 25, 26 and 28 of the Act.

¹⁷ section 40

9. On the whole, the Act can only be put to an effective use to achieve its goal of food safety and protection of human health if the key principles of scientific knowledge, risk analysis, proportionality and precautionary principle are kept in mind by the FSO and the Food Authority. Additionally, the FSO must be of the requisite qualification as provided under section 13 of the Act, he must be abreast with the latest food and health science to be able to make intelligent and smart risk analysis of the risk and danger to food and healthy safety in any given situation. For example in the present case, the food in the freezers of the petitioner restaurant could have been seized or fine imposed or an Improvement Notice issued. Any drastic step by the Food Authority or its officers that is not based on scientific risk analysis or is not proportionate to the health hazard involved, can cause huge economic and financial loss to the food business by bringing the business of a food operator to a crushing halt, thereby offending the constitutional rights to business and property of a food operator or food business. If the contravention under the Act can be remedied through a less harsh mechanism provided under the law, taking of a more drastic step should be avoided. This is a balancing act the Food Authority has to undertake to meet the international food law principle of *proportionality*.

10. Section 38 of the Act deals with publication in the newspapers and provides that after the conviction under the Act has attained finality, the Food Authority with the permission of the Special Court can publish the name of the food operator or food business in the newspapers or in any other mode for information. This clearly bars the Food Authority and its officers to publicize any proceedings taken against a food business or a food operator under the Act unless the conviction has attained finality and there is permission granted by the court for its publication. The Food Authority and FSOs, therefore, cannot release any information during the pendency of the proceedings under the Act. This is also in line with the requirement of due process and fair trial. Any violation of section 38 would make the FSO or any other officer of the Food Authority liable to departmental action. It is also noted with concern that the Act mandatorily provides for the inclusion of several females in the composition of the Food Authority under section 4. We asked the concerned Secretary, of the Government of

the Punjab, if the requirement of gender balance has been complied with. The Secretary assured us that section 4 has been given full effect to and the composition of the Authority is complete in accordance with the law.

11. Reliance in the impugned judgment by the High Court on the *precautionary principle* to justify the sealing of the premises in the present circumstances is somewhat misplaced. The precautionary principle (Article 7 of the General Food Law) refers to specific situations where: (i) there are reasonable grounds for concern that an unacceptable level of risk to health exists the available supporting information and (ii) data are not sufficiently complete to enable a comprehensive risk assessment to be made. When faced with these specific circumstances, decision makers or risk managers may take measures or other actions based on the precautionary principle, while seeking more complete scientific and other data. Such measures are provisional until the time when more comprehensive information concerning the risk can be gathered and analysed.¹⁸ This principle has no application where the food items inspected by the FSO are found to be adulterated, substandard or misbranded, unsafe or suffer from false advertisement or false labeling or are kept under unhygienic and unsanitary conditions. There is no scientific uncertainty about such contravention and can easily be checked on the spot on in a food laboratory. Precautionary principle is to be applied where the health and food safety risk attached to a food item is scientifically uncertain and creates doubt of health risk, in such a case, till such time that there is scientific certainty, such a food item can be seized or recalled as the case maybe. This is an important principle but has no application to the present case and has been incorrectly relied upon by the High Court in justifying an unconstitutional provision of law.

¹⁸ The precautionary principle gained its prospective status as overarching principle for (national and international) environmental policy-making with the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro (1992). The following circumscription of the precautionary principle in Article 15 of the Rio Declaration became the standard terms of reference for future debates: “Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”

12. For all the above reasons we set aside the impugned judgment and declare the power to seal the petitioner restaurant by the Food Safety Officer under section 13(1)(c) vide Order dated 08.08.2015 to be unconstitutional and illegal. We, therefore, convert this petitions into an appeal and allow the same in the above terms.

Judge

Judge

Announced
Islamabad,
13th April, 2021.

Judge

Judge

Approved for reporting
Iqbal