IN THE HIGH COURT OF SINDH AT KARACHI

Present: **Mohammad Ali Mazhar** and **Agha Faisal**, **JJ**.

CP D 7988 of 2018	:	Nadeem Mumtaz Raja vs. Sindh Food Authority & Another
CP D 8133 of 2018	:	Nadeem Mumtaz Raja vs. Sindh Food Authority & Another
For the Petitioner (in both petitions)	:	Mr. Bahzad Haider, Advocate
For the Respondents (in both petitions)	:	Mr. Ishrat Zahid Alvi Assistant Attorney General Mr. Sibtain Mehmood Additional Advocate General Mr. Jawad Dero Additional Advocate General Mr. Hussain Bukhsh Sario Advocate, Sindh Food Authority
Date of Hearing	:	31.05.2019
Date of Announcement	:	04.10.2019

JUDGMENT

Agha Faisal, **J**: The subject petitions seek to stifle prosecution by the Sindh Food Authority ("SFA") in the case where two young children, Ahmed [aged 1] and Muhammad [aged 5], died after having dined at the restaurant Arizona Grill. Since the facts and circumstances are common to both petitions, hence, they were heard conjunctively and shall be determined vide this common judgment.

2. Briefly stated, the facts and circumstances giving rise to the present petitions are as follows:

i. A mother and her two children dined at Arizona Grill and thereafter the two children died, professedly as a consequence of the food that they had consumed.

ii. The SFA reached the restaurant on the very day that the children died; obtained samples of the edible items available thereat; and sent the same for laboratory analysis.

iii. The petitioner, ostensibly a partner, claiming to own and operate various restaurants in Pakistan, including Arizona Grill, filed CP D 7988 of 2018 against the SFA (and the Province of Sindh) and sought the following relief:

1. Direct the Respondents its officials and representatives to act in accordance with law.
2. Direct Respondents to issue a statement that they have not sealed the Restaurant and that till their inquiry is completed, they should not be quoted as saying anything negative about the Restaurant.
3. Restrain the Respondents its officials and representatives, from feeding false stories to the media, not to leak any information about the inquiry being conducted into the matter.
4. Direct the Respondents its officials and representatives to conduct the inquiry impartially and in confidence.
5. Restrain the Respondents from getting the test of food samples from Lahore, the facility of which is not available with it at Karachi, as it would take 4/5 days in which the food will become rotten….

iv. Two days after the death of the children, the SFA apprehended a consignment of edibles including large quantities of meat, demonstrably expired since the year 2015 as per identification upon the packaging, which was being removed allegedly from a stock room / storage in the immediate vicinity of Arizona Grill.

v. CP D 8133 of 2018 was filed by the same petitioner in respect of this ancillary action of the SFA and the following relief was sought therein:

1. Declare that the Respondents, its officials and representatives have no jurisdiction to involve themselves in the matter of Petitioner throwing away imported American meat because “Steakhouse”, the food outlet for which the meat was meant does not carry any food business as defined in Sindh Food Authority Act 2016.
2. Direct the Respondents to de-seal the godown premises Mezzanine Floor, Plot No. 20 C, 2nd Zamzama Commercial Lane, Phase V, situated in DHA, Karachi.
3. Restrain the Respondents, its officials and representatives from taking any adverse action against the Petitioner for throwing away frozen American meat, which is Petitioner’s private property.

4. Restrain the Respondents, its officials and representatives from discussing, communicating with media or leaking any malicious information or allegation pertaining to the subject matter of instant petition….

vi. The SFA submitted that the results of the analysis of samples of edible items, obtained from Arizona Grill, had been received and the reports demonstrated abnormally high levels of pathogens including E.coli, that points to direct or indirect contamination with fecal matter. Laboratory reports, obtained from SGS Pakistan (Private) Limited, were filed before the Court demonstrating the detection of massive levels of E.coli and Pseudomonas Aeruginosa in the samples received from Arizona Grill and its stock room / godown. The reports also recorded the existence of Salmonella and represented that the magnitude of yeasts and molds was so high that in some cases it was "*too numerous to count*".

It was also placed on the record that the authority received information that the petitioner (and / or other owners of Arizona Grill) were attempting to surreptitiously remove edible items, stored for Arizona Grill in its neighboring stock room / storage, so as to prevent from the same being discovered by the law enforcement agencies. Acting upon the information the SFA apprehended consignment and recovered *inter alia* large quantities of meat, demonstrably carrying dates of expiration of the year 2015. The recovery of the expired items, including meat, was admitted by the petitioner.

vii. Subsequent to the submission of the replies by SFA, bulwarked by the laboratory reports, the petitioner sought to eschew the grounds / prayer invoked in the subject petitions and sought the Court's deliberation exclusively upon a new question, whether the Sindh Food Authority Act, 2016 ("SFA Act") was inapplicable in the cantonment areas in view of the Cantonment Pure Food Act, 1966 ("1966 Act").

It is pertinent to record that the subject petitions do not contain any mention of the ouster of jurisdiction of the SFA, in

view of the 1966 Act, and this novel argument is completely alien to the pleadings filed by the petitioner.

3. Mr. Bahzad Haider, Advocate represented the petitioner and submitted that the SFA Act is a provincial law and does not apply in cantonment areas, wherein the 1966 Act continues to hold the field. It was further submitted that there is no penalty for causing injury or death in the 1966 Act but the said penal consequence was contained in the SFA Act. Learned counsel referred to Article 143 of the Constitution and submitted that in the event of any inconsistency between federal and provincial law, the federal law shall prevail. In this regard, he cited a judgment of the Honorable Supreme Court in case of *Cantonment Board Peshawar vs. District Sanitary and Food Inspector Peshawar & Others* reported as *1993 SCMR 941* ("*Cantonment Board Peshawar***"**). It was thus concluded that SFA Act is inapplicable in the cantonment areas and as a consequence thereof, SFA is incompetent to take any action pursuant to the deaths of the two children, reported to have died as a consequence of ingesting unsafe food.

4. Mr. Sibtain Mehmood, learned Additional Advocate General vociferously argued that the question being agitated by the petitioner appears to be an afterthought, since it is prima facie alien to the pleadings. Learned counsel submitted that the 18th Amendment to the Constitution has maintained the subject of food squarely within the provincial domain, hence, it is imperative that the said subject to be regulated by the statutory body contrived vide a special provincial statute. Learned counsel referred to the order dated 06.12.2018 of the Honorable Supreme Court in *Suo Motu Case 26 of 2018* ("*Bottled Water Case*") and sought to demonstrate therefrom that food is exclusively a provincial subject It was argued that the 1966 Act exists merely on paper and that no regulatory activity takes place thereunder, at least in so far as is apparent from the present facts and circumstances. Learned counsel submitted that the authority, pursuant to the 1966 Act, has demonstrably not taken any action in respect of the present case at any time since the death of two children till date. It was argued that the guilt or innocence of the accused remains to be proven before the competent

court of jurisdiction and present petitions are merely a ploy to subvert the due process of the law.

Learned counsel submitted that *Cantonment Board Peshawar* is entirely distinguishable in the present facts and circumstances as the said judgment dealt with the priority to be accorded in the event of an overlap between two statutes resulting in some conflict in their execution. It was argued that there was no overlap in the present facts and circumstances as admittedly the peril sought to be adjudicated was not covered vide the 1966 Act. It was further argued that in any event the said authority is distinguishable as the import of the 18th Amendment was not before the august Court at the said time.

Mr. Hussain Bukhsh Sario, Advocate appeared on behalf of the Sindh Food Authority and adopted the arguments advanced by the learned AAG. It was submitted that the petitioner was attempting to subvert the process of accountability as it was patently apparent that no action was taken to investigate the deaths of two innocent children pursuant to the 1966 Act till date.

5. Mr. Ishrat Zahid Alvi, learned Assistant Attorney General supported the newfangled argument of the petitioner and argued that the SFA Act was ousted in so far as the cantonment areas were concerned, in view of the 1966 Act. Learned counsel submitted that since the area where the restaurant was located fell within the remit of a cantonment, hence, the SFA did not have any jurisdiction to initiate and / or maintain any proceedings in such regard.

6. We have appreciated the arguments of the respective learned counsel and have also considered the law to which our surveillance was solicited. The factual controversies, relevant to the present petitions, are already under adjudication before the Court of first instance seized of the matter, therefore, we consider it appropriate to proffer no observations in such regard. The crux of the present determination is circumscribed to address the question as to whether in the present facts and circumstances the SFA has jurisdiction, by virtue of the SFA Act, to

initiate proceedings stemming from the death of two children, reportedly from ingestion of unsafe food.

7. The SFA Act was promulgated to provide safe, hygienic and healthy food as per set standards of the Government and to provide for establishment of the SFA, and to provide for matters connected therewith or ancillary thereto. Section 1(2) of the SFA Act stipulates that the said enactment would extend to the "*whole*" of the Province of Sindh and Section 59 explicates that provisions thereof shall have effect notwithstanding anything contained in any other law, for the time being in force.

8. At the very onset it merits deliberation whether the SFA Act would be inapplicable in cantonment areas in view of the 1966 Act. The pertinent branch of the restaurant Arizona Grill is located within the remit of the Clifton Cantonment, which includes the areas of Parsi Colony, Qayyumabad, Neelam Colony, Upper Gizri, Lower Gizri, DHA, PNS Shifa, Bakhshan Village, P&T Colony, Dehli Colony, Punjab Colony, KDA Scheme 5 (Blocks 8 & 9), Pak Jamhooria Colony, MES Colony and Railway Colony per the Ministry of Defense notification SRO 207(I)/83 dated 27.02.1983 and published in the Gazette of Pakistan on 02.03.1983.

The geographical expanse of cantonment areas may be appreciated in its perspective by considering that Clifton Cantonment is merely one cantonment area in Karachi and the other such areas include Faisal Cantonment, Karachi Cantonment, Korangi Creek Cantonment, Malir Cantonment and Manora Cantonment. In addition hereto cantonment areas proliferate all over Sindh, including Chor Cantonment, Hyderabad Cantonment, Kashmore Cantonment, Pano Aqil Cantonment and Badin Cantonment.

If the cantonment areas of Sindh are to be excluded from the purview of the SFA Act then the necessary corollary thereof would be that the entire regulatory mechanism specifically promulgated for the regulation of the food sector of Sindh would be inapplicable to its most populated areas and densest commercial centers.

9. The starting point for this deliberation is the Constitution of Pakistan, Article 143 whereof (post amendment vide the 18th Constitutional Amendment) stipulates as follows:

> "Inconsistency between Federal and Provincial law — If any provision of an Act of a Provincial Assembly is repugnant to any provision of an Act of Majlis-e-Shoora (Parliament) which Majlis-e-Shoora (Parliament) is competent to enact, then the Act of Majlis-e-Shoora (Parliament), whether passed before or after the Act of the Provincial Assembly, shall prevail and the Act of the Provincial Assembly shall, to the extent of the repugnancy, be void."

It follows from a bare perusal of the aforementioned provision that the inconsistency sought to be addressed is between a provincial law and a federal law, that the Parliament is / was competent to enact. Article 142(a) states that the Parliament shall have the exclusive power to make laws with respect to any matter in the Federal Legislative List. Article 142(c) adds further clarity to the dichotomy of legislative powers and maintains that a Provincial Assembly shall, and the Parliament shall not, have power to make laws with respect to any matter not enumerated in the Federal Legislative List.

10. Learned counsel for the petitioner had relied upon Entry 2 in Part I of the Federal Legislative List, Fourth Schedule to the Constitution, to argue that the Parliament was competent to regulate the food sector in cantonment areas, to the exclusion of the provincial laws. The relevant entry reads as follows:

> "Military, naval and air force works; local self-government in cantonment areas, the constitution and powers within such areas of cantonment authorities, the regulation of house accommodation in such areas, and the delimitation of such areas."

11. It is observed that the entry of "*food*", or anything ancillary thereto, finds no mention in the Entry 2 of the Federal Legislative List as it stands today. We have had the occasion to consider the genesis of the relevant legislative entry, pertaining to cantonments, and consider it pertinent to record the verbiage thereof as enunciated vide the Government of India Act 1935 ("GOIA"), Constitution of 1956 ("1956 Constitution") and the Constitution of 1962 ("1962 Constitution") respectively.

GOIA

SEVENTH SCHEDULE
(Sections 100, 104)
Legislative Lists
List I-Federal Legislative List.

2. Naval, military and air force works; local self-government in cantonment areas the constitution and powers within such areas of cantonment authorities, the regulation of house accommodation in such areas, and, the delimitation of such areas.

1956 Constitution

FIFTH SCHEDULE
(Article 106)
Federal List

1. Defence of Pakistan and of every part thereof and all acts and measures connected therewith.

The Naval, Military and Air Forces of the Federation and any other armed forces raised or maintained by the Government of the Federation armed forces which are not forces of the Federation but are attached to or operating with any of the armed forces of the Federation; any other armed forces of the Federation, including civil armed forces.

Naval, Military and Air Force works.

Industries connected with defence; nuclear energy and mineral resources necessary for its production.

Delimitation of cantonment areas; local self-Government in cantonment areas; constitution, powers and functions, within such areas, of cantonment authorities; control of house accommodation (including control of rents) in such areas.

Manufacture of arms, firearms, ammunition and explosives.

1962 Constitution

THIRD SCHEDULE
Article 131
MATTERS WITH RESPECT TO WHICH THE CENTRAL LEGISLATURE HAS EXCLUSIVE POWER TO MAKE LAWS

1. Defence of Pakistan and of each part of Pakistan, including--

(a) The Defence Services of Pakistan, any other armed forces (including civilian armed forces) raised or maintained by the Central Government of Pakistan and any other armed forces attached to or operating with any of the armed forces of Pakistan;

(b) Military, naval and air force works;

(c) Industries connected with defence;

(d) The manufacture of arms, firearms, ammunition and explosives; and

(e) Cantonment areas, including--

(i) The delimitation of such areas;

(ii) Local self-government in such areas, the constitution of local authorities for such areas and the functions and powers of such authorities; and

(iii) The control of housing accommodation (including control of rents) in such areas.

It is gleaned from appraisal of the foregoing that the relevant legislative entry, in the Federal Legislative List, has remained consistent throughout our Constitutional history and contains no mention of "*food*" or anything ancillary thereto.

12. We now proceed to chronologically catalogue the legislative competence in the field of "*food*".

It may be noteworthy to record that GOIA encompassed three legislative lists, i.e. Federal, Provincial and Concurrent. There was no mention of "*food*" in either the Federal or the Concurrent list and the entry "*adulteration of foodstuffs …*" was placed specifically within the ambit of the Provincial Legislative List.

The 1956 Constitution also contained three legislative lists, and just as was the case pursuant to GOIA, the entry "*adulteration of foodstuffs …*" was included precisely within the provincial domain.

The 1962 Constitution contained a Federal List and Article 132 empowered the Central Legislature to make laws with respect to any matter listed in the Third Schedule thereto. Article 133 stipulated that the Provincial Legislature shall have the domain to make laws for the Province with respect to any matter not enumerated in the Third Schedule. A perusal of the Third Schedule to the 1962 Constitution demonstrated that no entry related to "*food*" was contained therein.

The Constitution of 1973 ("Constitution"), pre 18th Amendment, contained two legislative lists, i.e. Federal and Concurrent. Pursuant to Article 142 thereof a Provincial Assembly, to the exclusion of the Parliament, had the competence to make laws with respect to any matter not listed in the two legislative lists. The 18th Amendment to the Constitution abolished the Concurrent List and the amended Article 142 bestowed sole domain upon the Provincial Assembly to make laws with respect to any item not enumerated in the Federal Legislative List. It is pertinent to record that no entry pertaining to "*food*" was enumerated in the pre 18th Amendment Federal and Concurrent Lists and further that

no such entry is enumerated in the post 18th Amendment Federal Legislative List.

13. The question of non-enumerated powers was considered precisely in a Division Bench judgment of this Court in *Azfar Laboratories (Private) Limited vs. Federation of Pakistan & Others* reported as *PLD 2018 Sindh 448* ("*Azfar Laboratories*"), wherein *Munib Akhtar J.* articulated that non-enumerated entries / powers did not disappear into some undifferentiated mass of legislative power and that they remained what they had been before: distinct and discrete legislative fields. It was further elaborated that GOIA had three lists and the exclusive provincial list contained 54 legislative entries. Inasmuch as these did not find their way into the Lists of the present Constitution, they became non-enumerated competences on 14.08.1973. They did not thereby fuse into one mass in which the individual competences ceased to be distinguishable. Consequently now there exist enumerated competences set out in the Federal List, which are exclusive to the Federation, three enumerated competences which are concurrent, criminal law, criminal procedure and evidence per Article 142(b), and a whole host of un-enumerated competences which are exclusive to the Provinces.

14. It would thus follow that "*adulteration of food*" remained a provincial legislative subject since the dawn of independence. This observation is also bulwarked by the factum that the earlier West Pakistan Pure Food Ordinance 1960 ("Ordinance"), promulgated to regulate the preparation and sale of food, was also a provincial law with respect to the then province of West Pakistan. Upon the re-demarcation of provinces vide the Constitution, the aforesaid law was adapted by the respective provinces, via individual enactments, and the fiat relevant for the present purposes is the Sindh Adaptation of Laws Order 1975.

The honorable Supreme Court has rendered specific observations with regard to the legislative competence in respect of "*food*" in the *Bottled Water Case*, wherein it has been maintained that "*food*" is a provincial subject under the Constitution of the Islamic Republic of Pakistan.

15. At this juncture it is appropriate to consider the implication of *Cantonment Board Peshawar*, wherein it was held that the provisions of the Ordinance, as adapted in the then North West Frontier Province, are inconsistent with the provisions of the 1966 Act, hence, in view of the precepts of Article 143 of the Constitution the provincial statute was required to give way to the Federal statute.

In our view, with utmost respect to the august Supreme Court, *Cantonment Board Peshawar* is distinguishable in the present facts and circumstances.

At the very onset it is observed that the legislative competence of the Parliament to make laws regarding "*food*" was wanting in the absence of any relevant entry in the then Federal Legislative List. It has been demonstrated supra that the relevant federal legislative entry in the 1962 Constitution, regarding cantonments, there was no mention of "*food*" or anything ancillary thereto and contrarily "*food*" was squarely a provincial subject. The judgment under consideration was delivered post promulgation of the Constitution and the very article relied upon, being Article 143 categorically explicates that the resolution of repugnancy *inter se* could only be determined between a provincial law and a law that the Parliament was competent to enact. In the present facts and circumstances the issue of repugnancy between the SFA Act and the 1966 Act would not arise without there being a positive determination as to whether the Parliament was competent to enact the 1966 Act.

The august Court considered the impact of Article 268, which provides for the continuation of existing laws until altered, and as a consequence thereof treated the 1966 Act, having been promulgated subsequent in time to the Ordinance, as subsisting law. The aforesaid provision stipulates that upon promulgation of Constitution all existing laws would continue in force, so long as applicable and with the necessary adaptations, until altered, repealed or amended by the appropriate legislature. Even if perceived precedence of the 1966 Act over the Ordinance was to be entertained for argument's sake, the same would have no *mutatis mutandis* impact upon promulgation of the SFA

Act, as the same is demonstrably enacted by a provincial legislature competent to make such law and further that the said enactment contains the provision to give it overriding effect over any other law for the time being in force. Therefore, the corollary hereof would be that even if the 1966 Act was to be treated as existing law even then it would not displace a subsequent law enacted by the appropriate legislature, as the language of Article 268 itself contemplates the said scenario.

The 18th Amendment to the Constitution was a watershed in demarcating the dichotomy of authority between the federating units. The domain of the provinces was highlighted and ensconced in further Constitutional guarantees. This development, in the Constitutional history of Pakistan, was also not a factor at the time that *Cantonment Board Peshawar* was delivered.

16. We have heard extensive arguments suggesting that the 1966 Act is dormant and exists merely on paper. Mr. Jawad Dero, learned AAG, had enunciated that no action whatsoever was ever taken in respect of the deaths of the two children pursuant to the 1966 Act till date, hence, there was no issue of one authority replacing another to take the same remedial measures. It was argued before us that the present effort to denude the SFA of its jurisdiction was a ploy intended to obviate the possible culpability of those responsible for the deaths of two children. While we proffer no observation upon the merits of the case, this line of argument has laid bare another major point of distinction between the 1966 Act and the SFA, being the penal consequence for death of a consumer due to unsafe food.

The SFA provides that a food operator, who manufactures for sale, stores, sells, distributes, imports or exports any unsafe food, shall be liable where such unsafe food results in complete disability or death of a person, to imprisonment for a term which may extend to imprisonment for life and fine which shall not be less than two million rupees. It is further extrapolated that in case of injury or death of a consumer due to unsafe food, the Court, in addition to any other penalty under the SFA Act, shall direct the food operator to pay compensation to the consumer or, as the case may be, the legal heirs of the consumer,

an amount which is not less than one million rupees in case of complete disability or death.

The legislature in its wisdom appears to have taken cognizance of the grave risk associated with the proliferation of unsafe food and in such regard has appropriated penal consequences, intended to be remedial and deterrent. On the other hand the 1966 Act contains no independent consequence for causing death due to unsafe food.

Notwithstanding our observations with regard to the primacy of the SFA Act on a Constitutional plane, it is observed that there is no repugnancy between the two enactments in so far as the present proceedings are concerned as the 1966 Act does not cater for an incident of death having been caused as a consequence of unsafe food.

17. The writ jurisdiction of this Court is intended primarily to safeguard the fundamental rights enshrined in the Constitution. The learned counsel for the petitioner has been unable to demonstrate the infringement of any fundamental right of the petitioner that would merit the exercise of jurisdiction by this Court. On the contrary stifling the actions of an authority, at a nascent stage of proceedings initiated in the interests of the general public, would be contrary to the interests of justice. The adjudication process is merely at the initial stage at the present time and we see no justification for the said process to be quashed.

18. In view of the reasoning and rationale herein encapsulated we are of the considered view that the petitioner has been unable to make out a case for intervention of this Court in the exercise of its Constitutional jurisdiction and as a consequence thereof the present petitions, including all pending applications, are hereby dismissed.

JUDGE

JUDGE

Khuhro/PA