WPL/1688/2015

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION (L) NO. 1688 OF 2015

M/s Nestle India Limited)
a Company incorporated under)
the provisions of the Companies)
Act, 1956 and having its)
registered Office at M-5A,)
Connaught Circus, New Delhi -)
110001) .....Petitioner.

Versus

1. The Food Safety and Standards)
Authority of India, having its)
Head Office at FDA Bhawan, Kotla)
Road, New Delhi – 110002 and)
having its Western Region)
office at Minitry of Health and)
Family Welfare, 902, Hallmark)
Business Plaza, Opp. Gurunanak)
Hospital, Bandra (East),)
Mumbai – 400051)
)
2. The Chief Executive Officer,)
The Food Safety and Standards)
Authority of India, FDA Bhawan,)
Kotla Road, New Delhi- 110002)
)
3. State of Maharashtra, through)
the Ministry of General)
Administration Department,)
Mantralaya, Mumbai – 400 032)
)
4. Commissioner of Food Safety,)
State of Maharashtra,)
Survey No.341, Bandra Kurla)
Complex, Madhusudan Kalkekar)
Marg, Bandra (East),)
Mumbai – 400 051.) ..... Respondents.

Mr. Iqbal Chagla, Senior Counsel alongwith Mr. Amit Desai, Senior Counsel, Mr. Riyaz Chagla, Mr. Rajesh Batra, Ms. Pallavi Shroff, Ms. Sonia Kukreja, Ms. Meghna Rajadhyaksha, Mr. Umang Singh i/b Ameya Gokhale of Shardul Amarchand Mangaldas & Co. for the Petitioner.

Mr. Anil Singh, Additional Solicitor General alongwith Mr. Advait M. Sethna, Mr. Firoz Shah, Mr. D.P. Singh, Miss Ruju Thakker for Union of India – Respondent No.1.

Mr. Mehmood Pracha alongwith Mr. T.W. Pathan, alongwith Ms. Pranali Dixit, i/b Ms Yogita Singh for Respondent No.2.

Mr. Darius J. Khambatta, Senior Counsel alongwith Ms. Geeta Shastri, AGP & Mr. Aditya Mehta for State of Maharashtra for Respondent Nos. 3 and 4.

Mr. Ahmad Abdi alongwith Mr. S.Y. Sharma and Mr. L.J. Mishra i/b Abdi & Co. for Intervenor consumer online Foundation.

CORAM: V. M. KANADE &
B. P. COLABAWALLA, JJ.

Date of reserving the judgment: 31/7/2015
Date of pronouncing the judgment: 13/8/2015

JUDGMENT: ***(Per V.M. Kanade, J.)***

1. Heard.

2. Rule. Rule is made returnable forthwith. Respondents waive service. By consent of parties, Petition is taken up for final hearing.

CHALLENGE:

3. Petitioner – Company is seeking an appropriate writ, order and direction for quashing and setting aside the order passed by the Chief Executive Officer – Respondent No.2 herein dated 05/06/2015 whereby Petitioner was directed to stop manufacture, sale and distribution etc of nine types of variants of noodles manufactured by them and also gave other directions by the impugned order which is at Exhibit-A to the Petition. Petitioner is also challenging the impugned order passed by the Commissioner of Food Safety, State of Maharashtra – Respondent No. 4 which is at Exhibit-B.

4. Petitioner has challenged these two impugned orders principally on the following five grounds:-

(i) Firstly, it was contended that the said two impugned orders have been passed in complete violation of principles of natural justice since Respondent Nos. 2 and 3 had not issued any show cause notice to the Petitioner and had not given any particulars on the basis of which they proposed to pass the impugned orders. It was contended that Petitioner's representatives were called by Respondent No.2 at his Office on 05/06/2015 and they were

informed about the result of analysis made by the Food Laboratories and, thereafter, the impugned order (Exhibit-A) was passed. It was contended that the said order was completely arbitrary, capricious and it was passed in undue haste.

(ii) Secondly, it was contended that the reports of the Food Laboratories on the basis of which the impugned order (Exhibit-A) was passed were either not accredited by NBAL or notified under section 43 of the Food Safety and Standards Act, 2006 (“the Act”) and even if some Food Laboratories were accredited, they did not have accreditation for the purpose of testing lead in the product.

(iii) Thirdly, it was contended that the product had to be tested according to the intended use and this was not done and, therefore, no reliance could be placed on the said reports.

(iv) Fourthly, the Petitioner contended that it had tested the samples of batches in its own accredited laboratory and the results showed

that the lead contained in the product was well within the permissible limits.

(v) Lastly, it was contended that there was no question of challenging the analysis made by the Food Analyst in the Food Laboratory by filing an appeal under section 46(4) of the Act since by the final impugned orders Respondent Nos. 1 and 2 had already pre-determined the issue and, therefore, Petitioner had no other option but to challenge the orders at Exhibit-A and Exhibit-B.

5. On the other hand, Respondent Nos. 1, 2 and 3 have made the following submissions:-

(i) Firstly, the Petitioner had an alternative remedy of filing an appeal under section 46(4) of the Act and, therefore, Petition should not be entertained.

(ii) Secondly, it was submitted that the show cause notice had been issued to the Petitioner asking the Petitioner to show cause why product approval which was granted to it should not be cancelled and the Petitioner,

instead of giving reply to the show cause notice and satisfying the Food Authority that there was nothing wrong in its product, had directly approached this Court by filing a Petition under Article 226 of the Constitution of India. Petition challenging the show cause notice therefore, it was urged, was liable to be dismissed.

(iii) Thirdly, it was submitted that the objection to the analysis by non-accredited /non-notified Food Laboratories was raised for the first time in rejoinder and was an afterthought. It was urged by the learned Senior Counsel for Respondent Nos.3 and 4 that there was suppression of material facts by the Petitioner and the results of the Laboratory from Pune were suppressed in the Petition filed by the Petitioner and therefore on that ground the Petition was liable to be dismissed.

(iv) Fourthly, it was submitted by the learned Counsel for Respondent No. 1 and 2 and adopted by Senior Counsel for Respondent Nos. 3 and 4 that the Petitioner was

destroying the evidence by burning manufactured goods in order to avoid further prosecution. It was also urged on behalf of Respondent Nos. 1 and 2 that the Food Authority had a discretion in prescribing the standards for proprietary food and that they were not bound even by the Regulations which were framed in respect of additives and contaminants which were found in proprietary foods.

(v) Fifthly, it was also urged that the Petitioner had violated the terms which were imposed upon it. It was submitted that in the application for product approval a representation was made by the Petitioner that the content of lead would be less than 1 ppm (parts-per-million). It was contended that therefore even if Regulations prescribe 2.5 ppm as the maximum amount of lead which was permissible, if the lead contained in the product of the Petitioner was above 1 ppm, the Food Authority could still ban the product since the lead contained in the Petitioner's product was contrary to the representation made by the Petitioner about the lead

content in its product. This was notwithstanding that the Regulations permitted lead upto 2.5 ppm

(vi) Sixthly it was urged on behalf of Respondent Nos. 1 to 3 that the Food Authority had to act in public interest and even if lead was found in one sample, exceeding the permissible limit, the order of prohibition could be passed in public interest.

(vii) Lastly, according to Respondent Nos. 1 and 2, the said order (Exhibit-A) had been passed under sections 10(5), 16(1), 16(5), 22, 26 and 28 of the Act. According to Respondent No.3, the order passed by it (at Exhibit-B) is under section 30 of the said Act.

These are the broad submissions which have been urged by either side, apart from other detailed arguments which were made by both, the Petitioner and the Respondents.

FACTS:

6. Brief facts which are germane for the purpose of

deciding this Petition are as under:-

7. Nestle S.A of Switzerland is a Company which is registered and incorporated under the Laws of Switzerland and is carrying on business of manufacture, sale and distribution of food products. Petitioner – Company is its subsidiary in India and is registered under the provisions of Companies Act, 1956. Petitioner is carrying on its business in India for more than 30 years.

8. One of the products which has been manufactured by the Petitioner is known as “MAGGI Noodles”. Petitioner had been manufacturing and selling this product for more than 30 years and at no time they had come to the adverse notice of the Food Authorities in the past and also at no point of time criminal prosecution was launched against the Petitioner either for violation of the old Act or the new Act after it came into force in 2006 till the impugned order of ban was passed on 05/06/2015. Petitioner manufactured 9 variants of these noodles which are known as under:-

Serial No.	**MAGGI Noodles Variants**
1.	● MAGGI Xtra Delicious Chicken Noodles
2.	● MAGGI Thrillin Curry Noodles
3.	● MAGGI Cuppa Mania Chilly Chow Masala YO
4.	● MAGGI Cuppa Mania Masala YO

5.	● MAGGI 2 Minutes Masala Noodles / MAGGI Hungroo Noodles
6.	● MAGGI Vegetable Multigrainz Noodles
7.	● MAGGI Vegetable Atta Noodles
8	● MAGGI Xtra Delicious Magical Masala Noodles
9.	● MAGGI 2 Minute Masala Dumdaar Noodles

These noodles are pre-cooked products. The purchaser is instructed to cook the noodles alongwith the taste maker which is separately packed inside the packed product and it has to be mixed in water and boiled for two minutes and, if necessary, the purchaser can add other vegetables to the noodles and consume them as a food supplement. Petitioner was granted license to manufacture these products even prior to the New Act coming into force in 2006. License was granted to the Petitioner under the old Act viz Prevention of Food Adulteration Act in the year 1983. After 2006, Petitioner continued to manufacture noodles and in the year 2012 certain advisories were issued by the Food Authority – Respondent Nos. 1 and 2 introducing a regime which was called a product approval regime. Petitioner, accordingly, applied for product approval and the product approval was granted to 8 out of the 9 variants of noodles.

9. So far as one of the Variants is concerned viz “MAGGI Oats Masala Noodles”, at the relevant time, when the said product was to be introduced in the market, the advisory viz

of obtaining product approval was stayed by the High Court in Writ Petition No.2746 of 2013 in the case of Vital Nutraceuticals & Ors vs. Union of India & Ors. According to the Petitioner, since the stay order was in operation, they did not apply for product approval. However, the judgment and order of this Court was stayed by the Apex Court by its order dated 13/08/2014 passed in SLP (Civil) No.8372-8374 of 2014 (Food Safety Standards Authority of India vs. Vital Nutraceuticals Private Limited & Ors)

10. The Petitioner, after the Apex Court granted stay to the order passed by this Court, applied for product approval. However, certain clarifications were sought by Respondent Nos. 1 and 2, which clarifications were given by the Petitioner within the prescribed period of 30 days. However, thereafter, Petitioner's application was not processed and it was closed without giving reasons.

CHRONOLOGY OF EVENTS IN RESPECT OF PRESENT DISPUTE:

11. Some time in the month of January, 2015, Food Inspector Barabanki, UP, became suspicious, after he saw packet of Maggi Noodles on which it was claimed that there was “No added MSG”. Since the Food Inspector became suspicious about the said claim, he sent the packet to Food

Laboratory viz State Food Laboratory, Gorakhpur in UP. The result of the analysis showed that there was MSG in the said product which was found in the said packet. He therefore informed Respondent Nos. 1 and 2 and the Petitioner. At the instance of the Petitioner, the said sample was sent to Referral Laboratory at Kolkata which is a Laboratory which again tests the product if there is a dispute about authenticity of the Food Laboratory analysis.

12. This product which was seized, was a packet containing Maggi Noodles manufactured on 15/01/2014. The shelf life of the product was nine months and there was a declaration made on the packet that the food can be best used for 9th months after the date of manufacture. The best use therefore was over on 15/09/2014. After the product was seized, on 22/01/2015 it was sent for analysis to the Referral Laboratory at Kolkata where it remained till 29/03/2015 and almost after 3 months the report was submitted.

13. The Referral Laboratory at Calcutta which was supposed to test the result regarding MSG found in the product also gave a report that the lead contained was 17 ppm which was much higher than the permitted lead content of 2.5 ppm as per the Regulations.

14. Food Authorities were alarmed by the said results and

therefore they tested the samples from other batches in Delhi and 9 other States. We must mention here that out of the 9 Variants of MAGGI Noodles only 3 Variants were tested.

15. The Food Analyst gave a report and Respondent No.2 found that out of 72 samples which were tested, in 30 samples there was lead in excess of 2.5 ppm, though 42 samples showed that the lead content was within the permissible limits. Similarly in 7 States viz, (1) Delhi, (2) UP, (3) Tamilnadu, (4) Gujarat (5) Maharashtra, (6) Punjab (7) Meghalaya the lead content in the product of the Petitioner was found above 2.5 ppm, whereas in Goa and Kerala the lead content was found to be within the permissible limits. The said results were made known to Respondent No.2 on telephone on 04/06/2015.

16. According to the Petitioner, after reading the news items which were published in media regarding the excess lead in its product, Petitioner - Company immediately made an announcement on 4th June, 2015 and press release was given in which the Petitioner stated that though according to it its product was safe, the Petitioner was withdrawing its product from the market till its name was cleared. The following press release was given by the Petitioner – Company.

"PRESS RELEASE

NESTLE HOUSE , Gurgaon, 5th June, 2015, MAGGI Noodles are completely safe and have been trusted in India for over 30 years.

The trust of our consumers and the safety of our products is our first priority. Unfortunately, recent developments and unfounded concerns about the product have led to an environment of confusion for the consumer, to such an extent that we have decided to withdraw the product off the shelves, despite the product being safe.
We promise that the trusted MAGGI Noodles will be back in the market as soon as the current situation is clarified."

17. Thereafter, the Petitioner's representatives were called upon to meet Respondent No.2 on 05/06/2015 at 1 pm in the afternoon at his Office. According to Respondent No.2 when representatives of the Petitioner arrived, they were informed about the excess lead contained and misbranding of the product and explanation was asked from them. According to the Petitioner, no opportunity was given to the representatives of the Petitioner to give their explanation and there was only a general discussion and they were informed about the excess lead found in some of the samples. After the meeting was over on 05/06/2015, on the same day, the impugned order was passed by Respondent No.2 which is at Exhibit-A.

18. Respondent No.4 – Commissioner of Food Safety also passed the impugned order dated 6/6/2015 which is at Exhibit-B banning the product in the State of Maharashtra. In Maharashtra, 20 samples were taken out of which in 5, lead was found in excess of 2.5 ppm, whereas in other 15, lead was found within the permissible limits. Here also we must mention that only 4 Variants of MAGGI Noodles were tested and not all the nine Variants.

19. Being aggrieved by these orders dated 5/6/2015 (Exhibit-A) and dated 6/6/2015 (Exhibit-B), the Petitioner has filed the present Petition, challenging the same on various grounds.

20. Respondent No.1 filed their reply on 26/06/2015. Respondent No.2 filed their reply on 29/06/2015. Respondent No.3 and 4 filed their reply on 26/06/2015. Rejoinder was filed by the Petitioner on 10/07/2015. The affidavit in Sur-rejoinder was filed by Respondent No.2 on 28/07/2015 and by Respondent Nos. 3 and 4 on 16/07/2015 during the course of hearing.

21. When the Petition came up for hearing on ad-interim and interim relief, this Court, after hearing both sides, declined to to grant any ad-interim order in view of the press release which was given by the Petitioner on 4th June, 2015

and directed the parties to file their reply, rejoinder etc. so that the Petition could be disposed of finally at the stage of admission, taking into consideration the fact that apart from being a commercial dispute, the issue related to the safety of food that was being sold in the market for human consumption.

SCHEME OF THE ACT:

22. Before we consider the rival submissions, in our view, it would be necessary to take a brief look at the provisions of the Food Safety and Standards Act, 2006 and the Rules and relevant Regulations framed under the Act.

23. The present Act received the Assent of the President on 23rd August, 2006 and various provisions thereof came into force on various dates before 2007 and 2010. The Orders and Acts mentioned in the Second Schedule of the Act were repealed with effect from such date as the Central Government appointed in that behalf after the Act came into force. The Repealed Orders and Acts mentioned in the Second Schedule are as under:-

"*THE SECOND SCHEDULE*

(See section 97)

1. The Prevention of Food Adulteration Act, 1954 (37 of 1954)

2. The Fruit Products Order, 1955.

3. The Meat Food Products Order, 1973.

4. The Vegetable Oil Products (Control) Order, 1947.

5. The Edible Oils Packaging (Regulation) Order, 1998.

6. The Solvent Extracted Oil, De oiled Meal, and Edible Flour (Control) Order, 1967.

7. The Milk and Milk Products Order, 1992

8. Any other order issued under the Essential Commodities Act, 1955 (10 of 1955) relating to food."

24. The Statement of Objects and Reasons of the Act reveals that the Legislature felt that it was necessary to make the procedure for applying for license for manufacture and sale of food products easier and, at the same time, regulate the quality of food in order to ensure that the food which is supplied to the consumers is safe and wholesome. The Act makes provision for the purpose of framing regulations laying down the standards which have to be adhered to and followed by the manufacturers of food. Section 16(2) of the Act empowers the Food Authority to prepare regulations. These regulations assume force of law

after they are placed before both the Houses of Parliament under section 93 of the Act.

25. Perusal of various provisions of the Act disclose that the Food Authority and the Commissioner of Food as well as the designated Officer and Food Inspector have been given powers which can be exercised by them in ascending degree of coercion.

26. The Act also envisages various actions which could be taken by the Food Authority and which can be divided in three parts viz.

(i) Suspension, cancellation of license of the manufacture, sale and supply of food product.

(ii) Prohibition/ban which can be imposed on manufacture, sale and supply etc. of food product.

(iii) Launch criminal prosecution for violation of provisions of the Act and Rules and Regulations framed thereunder.

At the same time, the Act also imposes certain obligations and duties on the manufacturers etc. of food products and non-compliance of these obligations/duties can entail adverse civil as well as penal consequences.

27. The Act also creates a hierarchy of authorities and these authorities are given various powers to implement the provisions of the Act and Rules and Regulations framed thereunder.

28. The Act also provides for various remedies which are available for persons who are aggrieved by the action taken by the Authorities under the Act.

29. The Act has defined the “food laboratory” for the purpose of carrying out analysis of food product in which the food is analysed by the Food Analyst and other authorities.

30. The Food Authority is given power to give final recognition to particular Laboratories having accreditation from NABL.

31. Chapter VIII of the Act deals with qualification, appointment and powers of the Food Analyst and also lays down the procedure of taking samples. Rules and Regulations framed under the said Chapter give further

details about the procedure and purpose for carrying out analysis of food products and the manner in which it has to be done.

32. Section 30 of the Act gives power to the Commissioner of Food Safety of the State and Food Authorities to take decisions in case of emergent situation and the procedure which is to be followed before passing the order under the said provision.

33. In the present case, according to the Petitioner, the analysis of food by Food Analyst was not in accordance with the Rules and Regulations and, secondly, the tests were not carried out in laboratory which was accredited by NABL and therefore the results declared on analysis made by the Food Analyst cannot be relied upon. Whereas, on the other hand, according to Respondent Nos. 1 to 3, these laboratories had an authority to carry out the analysis and therefore the Food Authority could rely on the analysis made by them.

34. From the rival submissions, issues which now fall for consideration before this Court can be summed up as under:-

ISSUES

(I) Whether the Writ Petition filed by the Petitioner – Company under Article 226 of the Constitution of India is maintainable, particularly when the impugned orders, according to the Respondents, are show cause notices and that the Petitioner has an alternative remedy of filing an appeal under section 46(4) of the Act?

(II) Whether there was suppression of fact on the part of the Petitioner and whether the Petitioner had made an attempt to destroy the evidence disentitling the Petitioner from claiming any relief from this Court?

(III) Whether Respondent No.2 could impose a ban on the ground that the lead found in the product of the Petitioner was beyond what the Petitioner had represented in its application for product approval, though it was below the maximum

permissible limit laid down under the Regulations?

(IV) Whether the Food Authority had an unfettered discretion to decide what are the standards which have to be maintained by the manufacturers of proprietary food and whether in respect of the proprietary food, the Food Authority was not bound by the permissible limits of additives and contaminants mentioned in the Regulations and the Schedules appended thereto?

(V) Whether in view of the provisions of Section 22, there was a complete ban on the manufacture of sale and products mentioned in the said section?

(VI) Whether there is violation of principles of natural justice on the part of Respondent Nos. 1 to 4 on account of the impugned orders being passed without issuance of show

cause notice and without giving the Petitioner an opportunity to explain the discrepancy pointed out by the Food Authority in respect of the product of the Petitioner?

(VII) What is the source of power under which the impugned orders were passed and whether such orders could have been passed under sections 10(5), 16(1), 16(5), 18, 22, 26, 28 and 29 of the Act?

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

(IX) Whether reliance can be placed

on the reports obtained by the Petitioner from its Laboratory and other accredited Laboratories?

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

(XI) Whether it was established by the Food Authority that the lead beyond the permissible limit was found in the product of the Petitioner and the product of the Petitioner was misbranded on account of a declaration made by the Petitioner that the product contained “No added MSG”?

(XII) Whether Respondent Nos. 2 to 4 were not justified in imposing the ban on all the 9 Variants of the Petitioner, though tests were conducted only in respect of 3 Variants and whether such ban orders are arbitrary,

unreasonable and violative of Article 14 and 19 of the Constitution of India?

REASONS AND FINDINGS:

FINDING ON ISSUE NO.(I)

(I) Whether the Writ Petition filed by the Petitioner – Company under Article 226 of the Constitution of India is maintainable, particularly when the impugned orders, according to the Respondents, are show cause notices and that the Petitioner has an alternative remedy of filing an appeal under section 46(4) of the Act?

35. The learned Counsels appearing on behalf of Respondents have raised a preliminary objection regarding maintainability of the Petition under Article 226 of the Constitution of India. It was urged by Mr. Darius Khambatta, the learned Senior Counsel appearing on behalf of State of Maharashtra and also by the learned Additional Solicitor General appearing on behalf of Respondent No.1 and Mr. Mehmood Pracha, the learned Counsel appearing on behalf of Respondent No.2 that the Petition has been filed prematurely and instead of approaching the Food Authority, Petitioner has filed this Petition in this Court under Article 226 of the Constitution of India. Mr. Darius Khambatta, the learned Senior Counsel appearing for State of Maharashtra submitted that if the Petitioner was aggrieved by the result

of samples which were tested in the Laboratory by the Food Analyst, the Petitioner could have challenged the same under section 46(4) of the Act. It was submitted by Mr. Mehmood Pracha the learned Counsel appearing for Respondent No.2 that, in fact, there was no ban order and only a show cause notice had been issued to the Petitioner as to why its product approval should not be cancelled and the Petitioner was asked to file reply within 15 days.

36. Mr. Anil Singh the learned Additional Solicitor General appearing on behalf of Respondent No.1 and Mr. Khambatta, the learned Senior Counsel appearing on behalf of Respondent Nos. 3 and 4 relied upon the judgment of the Division Bench of this Court in Aamir Khan Production Pvt. Ltd vs. Union of India in Writ Petition No.358 of 2010 alongwith Writ Petition No.526 of 2010 decided on 18/08/2010. It was submitted that in the said matter also show cause notices issued by the Competition Commission of India were challenged and the Division Bench after relying on the judgment of the Apex Court held that the Petitions were filed prematurely.

37. On the other hand, Mr. Iqbal Chagla, the learned Senior Counsel appearing on behalf of the Petitioner, after inviting our attention to the impugned order, submitted that the Food Authority – Respondent Nos. 1 and 2 had already directed the

Petitioner not to manufacture, sale, distribute Maggi Noodles and had given reasons why they felt that this ban order should be passed. He submitted that Respondent Nos. 1 & 2 therefore had finally determined the issue without giving any opportunity to the Petitioner by issuing show cause notice and, therefore, the impugned order was a ban/prohibition order and the Petitioner was entitled to challenge the same on various grounds under Article 226 of the Constitution of India which grounds would not have been available if appeal under section 46(4) would have been filed. It was also submitted that there was a clear violation of principles of natural justice and therefore, in such cases, Petitioner had a right to approach this Court under Article 226 of the Constitution of India.

38. In our view, there is much substance in the submissions made by Mr. Iqbal Chagla, the learned Senior Counsel appearing on behalf of the Petitioner. Perusal of the order clearly indicates that Respondent No.2, in its impugned order at Exhibit-A, had banned the product and had given reasons for doing the same. Respondent No.2 in the said order (Exhibit-A) has observed in para 7 as under:-

> "7. Keeping the aforesaid in view, without prejudice to the rights of the respective Commissioners of Food Safety and the Food Safety establishments of various States and Union Territories and

the consumers to file prosecutions against the Company for various violations, and in exercise of powers vested in the Food Authority under Section 16(1) of the FSS Act, read with the general principles enshrined under clauses (a), (b), (c), (f) and (g) of Sub-section (1) of Section 18, further read with the provisions contained in Sections 26 and 28 and the powers vested in me under Section 10(5) read with Section 29 of the FSS Act, 2006, the Company is hereby directed to :

(i) Withdraw and recall all the 09 approved variants of its Maggi instant Noodles from the market having been found unsafe and hazardous for human consumption, and stop further production, processing, import, distribution and sale of the said product with immediate effect;

(ii) As already agreed by the Company during the hearing in respect of the rectification of label and removal of “No added MSG”, the Company is directed to comply with the related labelling regulations in this behalf forthwith;

(iii) Withdraw and recall the food product, “Maggie Oats Masala Noodles with Tastemaker” for which risk/safety assessment has not been undertaken and Product Approval has not been granted.

(iv) In case any other food product falling under Section 22 of the Act is

being manufactured and marketed by the Company, for which risk assessment has not been undertaken by way of grant of product Approval/NoC by the FSSAI, the same be withdrawn from the market with immediate effect and the FSSAI be informed about such products within 24 hours of the receipt of this communication, and

(v) Take appropriate action to re-ascertain the safety of its products in compliance of the obligations cast upon the Company in terms of provisions contained in Section 26 of the Act under intimation to the FSSAI."

From the above observation, it is clear that contention of Respondent Nos. 1 and 2 that there was no ban order is totally incorrect since the order, in terms, imposes a ban on the Petitioner's production, sale etc of its product. Secondly, the penultimate para of the said order states that the Petitioner should show cause why its product approval should not be cancelled and the Petitioner should show cause within 15 days from the date of the said order. The said show cause notice also had been issued after the order banning the product was already passed in the preceding paragraph of the impugned order. Having passed the ban order, further show cause notice for cancellation of the product approval which was already granted, was only a consequential order. Lastly, as rightly pointed out by Mr. Iqbal Chagla, the learned Senior Counsel appearing on

behalf of the Petitioner, that the Petitioner had approached this Court under Article 226 of the Constitution of India inter alia on the ground of violation of principles of natural justice and the Petitioner was therefore entitled to approach this Court directly even assuming that an alternative remedy was available.

39. It is quite well settled that the alternative remedy by way of appeal is not always a bar in approaching the High Court under Article 226, particularly when the Petitioner challenges the order on the ground of violation of principles of natural justice. The Apex Court in *Whirpool Corporation v. Registrar of Trade Marks, Mumbai and others*[1] has observed in para 15 as under:-

> "15. Under Article 226 of the Constitution, the High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a Writ Petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. <u>But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental</u>

1 AIR 1999 SC 22

> Rights or where there has been violation of the principle of natural justice or where the order of proceedings are wholly without jurisdiction or the vires of an Act is challenged There is a plethora of case-law on this point put to cut down this circle of forensic Whirpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field."

It is, therefore, quite well settled that whenever allegation is made that there is violation of principles of natural justice the Petitioner is entitled to challenge the said order and, secondly, in the present case, the impugned order (Exhibit-A) cannot be strictly said to be a show cause notice since the order imposes a ban on manufacture, sale, distribution of 9 variants of Maggi Noodles. It, therefore, imposes a complete ban on the product.

40. In our view, ratio of the judgment in *Aamir Khan Production Pvt. Ltd.* (supra) will not apply to the facts of the present case since in that case the Petitioner had challenged the show cause notices and not the final order. Hence the ratio of the said judgment can be distinguished on facts.

41. In our view, therefore, Petition filed by the Petitioner under Article 226 of the Constitution of India is maintainable. **Issue No.(I)** is, therefore, **answered in the affirmative.**

FINDING ON ISSUE NO.(II)

(II) Whether there was suppression of fact on the part of the Petitioner and whether the Petitioner had made an attempt to destroy the evidence disentitling the Petitioner from claiming any relief from this Court?

42. During the course of arguments, Mr. Darius Khambatta, the learned Senior Counsel appearing on behalf of Respondent Nos.3 and 4 vehemently urged that the Petitioner had suppressed material facts from this Court and had not annexed the reports obtained by the Food Analyst after carrying out the analysis of the product of the Petitioner. It was urged that the Petitioner had tried to suppress this fact from the Court and therefore the Petitioner was not entitled to claim any relief from this Court. Secondly, it was submitted by Respondent Nos. 1 and 2 (and which argument was adopted by Mr. Khambatta) that the Petitioner had tried to destroy the evidence by burning all food packets without seeking permission from this Court. They submitted that on these two grounds, the Petitioner was not entitled to claim any relief from this Court as justice did not lie on the side of the Petitioner. They relied upon the judgment of Division Bench of this Court delivered by M.C. Chagla, C.J. in the *State of Bombay vs. Morarji Cooverji*[1]

1 (1958) BLR VOL LXI page 318

in support of this submission and more particularly upon the observations made by the Division Bench in the first paragraph on page 332.

43. On the other hand Mr. Iqbal Chagla, the learned Senior Counsel appearing on behalf of the Petitioner submitted that the said submission was palpably false and it indicated that the learned Senior Counsel appearing on behalf of Respondent Nos. 3 and 4 was not given the instructions properly. He submitted that so far as the first submission regarding suppression of fact is concerned, the said submission was incorrect. He submitted that the samples were tested by Analyst in Pune on 06/06/2015 and these reports were dispatched by post only on 10/06/2015. These reports were received by the Petitioner on 15/06/2015 and 17/06/2015. He submitted that the Petition was filed on 11/06/2015 and on that date the reports which were given by the Food Analyst were not available to the Petitioner and therefore they were not annexed. He submitted that reports of the Food Analyst which were available with the Petitioner were annexed to the Petition. He relied on the acknowledgement showing that the said reports were made available to the Petitioner after the Petition was filed.

Secondly, he submitted that so far as the submission regarding destruction of evidence is concerned, the same is

also palpably incorrect because the Petitioner had, from the date the impugned ban order was passed, in coordination and according to the direction given by the Food Authority, taken steps to destroy its product. He invited our attention to the minutes of the meetings which were held from time to time with Respondent No.2, which were signed by the Petitioner and Respondent No.2 which clearly gave direction to the Petitioner to destroy all food packets and preserve only 2000 cases which was later on modified and the Petitioner was asked to preserve 750 cases.

44. We have perused the tracking record of the Postal Department and also seen the the acknowledgement of the reports by the Petitioner, which clearly indicate that these reports were received after the Petition was filed by the Petitioner on 11/06/2015. Tracking reports and the acknowledgements also clearly indicate that the said reports were received by the Petitioner much later and, in any case, they were not received before the Petition was filed. The submission made by Mr. Khambatta, the learned Senior Counsel appearing on behalf of Respondent Nos. 3 and 4 regarding suppression of fact, therefore, is not correct. Incidentally, in the afternoon session of the day, Mr. Khambatta candidly then pointed out that his submission regarding suppression of fact was not correct and he had made the said submission on instructions and later on he

realized from the record which was available that the said submission was not well founded.

45. So far as the submission regarding destruction of evidence is concerned, in our view, the said submission is also without any substance. It is obvious that Respondent Nos.1 to 4 have not given proper instructions to their respective Counsel who were appearing on their behalf. The minutes of various meetings which were produced by the Petitioner clearly indicate that the Petitioner had taken every step as per the directions given by the Food Authority. The minutes of the meetings which had been tendered across the bar and which were not disputed and which were admitted by the Counsel appearing for Respondent Nos. 1 and 2 indicate that the Petitioner was directed to destroy the food packets which were manufactured by the Petitioner. The minutes of the meeting held on 08/06/2015 prepared by the Food Safety and Standards Authority of India dated 09/06/2015 are as under:-

"Proceedings of the meeting are as follows:

1. M/s. Nestle India Limited briefed the CEO, FSSAI about the action taken on the recall procedure. Representatives from Nestle India Limited informed that there were around 40 crore packets of the products which were required to be recalled from 39 lakh direct outlets and 88 lakh indirect outlets. A stock of about 17,000 tonne was with Nestle India Limited and approximately

10,000 tonne was with various distributors and in the retail market.

2. They apprised about the action taken on recall by stating that approximately 400-600 tonne material wold be destroyed on a daily basis at five locations identified for destruction, commencing from 08th June, 2015. It was also informed that these products would be transported in closed sealed containers for destruction at the designated locations. The destruction will take place in the incinerators of the identified cement plants keeping in view the environmental requirements. A site-wise report regarding the products destroyed along with the photographs will be submitted on a daily basis.

3.....
4.....
5.....
6.....”

The minutes of the meetings indicate that, though, initially, the Petitioner was asked to preserve 2000 cases, the Petitioner was then directed to reduce it to 750 in the said minutes.

The minutes of weekly review meeting held on 20/07/2015 with the representatives of M/s Nestle India, have been signed by Respondents and representatives of the Petitioners and in Clause 4 of the said minutes of the meeting it has been observed as under:-

“4. M/s Nestle also enquired about the decision regarding storing of 750 cases

> and mirror samples for FSSAI which are currently stored at the company's Moga manufacturing unit. It was informed to the representative that a decision shall be communicated to them at the earliest."

There is, therefore, absolutely no substance in the submissions made by the learned Senior Counsels appearing on behalf of Respondent Nos. 1 and 4 that there was suppression of fact and an attempt to destroy the evidence by the Petitioner.

46. We are surprised at the vehemence with which the Petition is opposed by Respondent Nos. 1 to 4 because the Food Regulator is not expected to take an adversarial stand in such matters. **Issue No.(II)** is therefore **answered in the negative.**

FINDING ON ISSUE NO.(III)

> **(III)** Whether Respondent No.2 could impose a ban on the ground that the lead found in the product of the Petitioner was beyond what the Petitioner had represented in its application for product approval, though it was below the maximum permissible limit laid down under the Regulations?

47. Mr. Mehmood Pracha, the learned Counsel for Respondent No.2, vehemently urged that the obligation was

cast on the Petitioner or the food manufacturer to manufacture the food which was safe and wholesome and an element of trust therefore was created on the basis of assurances given by the manufacturer. He submitted that if the trust was broken, the Food Authority could then act and impose the ban on the product of the manufacturer. He submitted that the Petitioner had made representation in its application for product approval that the lead contained in its product, both, in the noodles and taste maker, was less than 0.1 ppm. He submitted that the Food Authority could impose a ban on the Petitioner's product if it was found that the lead contained was more than 0.1 ppm though the permissible limit was 2.5 ppm. He submitted that the Food Authority could so order the ban because the representation which was made by the Petitioner in its application for product approval was incorrect and though the permissible limit may be 2.5 ppm and the lead contained was less than 2.5 ppm, yet, such a ban order could be imposed and justified. He invited our attention to the averments made in the reply of Respondent No.1 to that effect in para 13. It would be fruitful to reproduce the said paragraph wherein it is mentioned as under:-

> "13. The said product with its 9 approved variants are admittedly covered under Section 22 of the FSS Act and which, being non-standardised, have to undergo risk and safety assessment from the Food Authority through the

process of product approval. The petitioner's company had submitted the composition of the 'Noodle Cake' along with the composition of 'Tastemaker' for each variant as part of the Product Approval applications. The package contains the 'Noodle Cake' and the 'Tastemaker' is placed inside the main package as a sealed Sachet, which is removable as an independent pack once the main package is opened. As such, both are liable to be tested separately. The Certificate of Analysis (CoA) furnished with the application for Maggi 2-Minute Noodles Masala variant showed 0.0153 ppm lead as against the maximum permissible limit of 2.5 ppm. The petitioner is trying to create confusion by making reference to different standards prescribed for 'Lead' under the FSS regulations, fully knowing that the Standards prescribed in the FSS Regulations cannot be applied to a Section 22 Product on a selective basis. Once it is Section 22 Product, the Safety assessment is undertaken on the basis of averments made in the application. The petitioner Company cannot go back on its own commitments in the application wherein it annexed the Codex Standards for Instant Noodles (wherein the maximum permissible limits for lead is far less than the limit prescribed under the FSS Act, 2006 Rules and Regulations). Even, if assumed, but not admitted, that the certificate of analysis was for the entire product, then the final product should have lead content of 0.0153 ppm or as promised in PA Applications. The contention of the petitioner that the product should be tested in the form as it is finally ready for consumption is not tenable because the final consumption ready product would include water therein which is not being supplied by the petitioner company as part of the product."

48. We are surprised and astonished at the stand taken by Mr. Pracha, the learned Counsel appearing on behalf of Respondent No.2 which is also reflected from the averments made in the affidavit in reply filed by Respondent No.1. The said submission is preposterous to say the least. The Scheme of the Act and provisions of the Rules and Regulations framed thereunder clearly indicate that the Regulations have been framed by the Food Authority giving various standards which are to be maintained by the food manufacturers. Most of these Regulations were placed before both the Houses of Parliament and they were approved. It is difficult to understand as to how such a submission therefore could be made which does not find any support from the provisions of the Act and the Rules and Regulations framed thereunder. If this is the interpretation which is sought to be made by Respondent No.2 then there is something inherently wrong in the manner in which the Rules and Regulations are being interpreted by the Food Authority. Such interpretation cannot be given by any standard or cannons of interpretation or rules of interpretation which have been formulated by the Apex Court over the last six decades. If the arguments of Mr. Pracha are to be accepted, it would effectively mean that for proprietary foods, the FSS Regulations would not apply and the food authority granting the product approval would decide what would be the limits

prescribed for additives, contaminants and other substances that may be contained in a proprietary food. To our mind, this argument is wholly fallacious and would run contrary to the provisions of Section 22 of the Act itself. Section 22 inter alia deals with proprietary foods and explanation (4) to the said section defines "proprietary and novel food". The proviso appearing after explanation (4) clearly stipulates that such food should not contain any of the foods and ingredients prohibited under the Act and the regulations framed thereunder. If we are to accept the argument of Mr. Pracha, this proviso would be rendered otiose. The said submission is therefore wholly without merit and stands rejected. **Issue No.(III)** is therefore **answered in the negative.**

FINDING ON ISSUE NO.(IV)

(IV) Whether the Food Authority had an unfettered discretion to decide what are the standards which have to be maintained by the manufacturers of proprietary food and whether in respect of the proprietary food, the Food Authority was not bound by the permissible limits of additives and contaminants mentioned in the Regulations and the Schedules appended thereto?

49. Mr. Mehmood Pracha, the learned Counsel appearing on behalf of Respondent No.2, taking his argument further from the point which he has argued on the earlier question, then

seriously contended that in respect of proprietary food, the Food Authority had an unfettered discretion to decide what standards have to be maintained by the manufacturers of proprietary food and the Food Authority was not bound by permissible limits of additives/contaminants mentioned in the Schedule given in the Act. We are again amazed and astonished by the submission made by the learned Counsel for Respondent No.2. The FSS Act no doubt gives power to the Food Authority to regulate and monitor the manufacture, storage, distribution, sale and import of food and for that purpose can frame Regulations under section 16(2) of the Act. After the Regulations so framed under section 92 of the Act, they are to be placed before both the Houses of Parliament under section 93 of the Act for approval and once the Regulations so framed are approved by both the Houses of Parliament then it cannot be said that the Food Authority has an unfettered discretion to decide what are the standards which are to be maintained by the manufacturers of proprietary food.

50. It is not in dispute that the product which is manufactured by the Petitioner viz Maggi Noodles is proprietary food. The limits of quantities and contaminants, heavy metals etc. also are prescribed under the Regulations which are framed under section 92 of the Act and this is applicable even in the case of proprietary food. Limit of

various additives including contaminants is mentioned in the said Regulations. Limit of lead is also mentioned in the said Regulations. If the submission made by the learned Counsel for Respondent No.2 is accepted then these Regulations which are framed as per the procedure prescribed under section 93 namely of placing the same before both the Houses of Parliament wold be rendered otiose. If this submission is to be accepted, it would mean that the Food Authority is not bound by the Regulations which are framed and approved after they are placed before both the Houses of Parliament and become lawful Regulations, having the force of law and it would also mean that the Food Authority is a law unto itself and which can take any decision according to its discretion. In fact, in exercise of powers conferred by Section 92(2)(i) read with Sections 20 and 21 of the Food Safety and Standards Act, 2006, Regulations have been framed regarding contaminants, toxins and residues known as the *Food Safety and Standards (Contaminants, Toxins and Residues) Regulations, 2011.* Regulation 2.1.1.(2) *inter alia* stipulates that no article of food specified in column (2) of the Table appended thereto can contain any metal specified in excess of quantities specified in the corresponding entry in column (3) thereof. At Sr. No.1 of the said table is lead and under the column Article of Food at (iii), there is an entry which states "*Foods not specified*". As far as this entry is concerned, under the Regulations, the lead level permissible

is up to 2.5 ppm. If the argument of Mr. Pracha is to be accepted that in respect of proprietary food (i.e. in respect of foods where no standards have been set out) the food authority had unfettered discretion to decide what standards have to be maintained by the manufacturers of proprietary food for lead, Entry (iii) in the table appended to Regulation 2.1.1.(2) would be rendered otiose. These Regulations specifically contemplate different tolerance level of lead in different products. As a residuary item "*foods not specified*" finds place at item (iii) of Sr. No.1 of the table appended to regulation 2.1.1.(2) and specifies the permissible limit of lead in "*foods not specified*" would be 2.5 ppm. Such a proposition is therefore absolutely unacceptable. **Issue No. (IV)** is therefore **answered in the negative.**

FINDING ON ISSUE NO.(V)

(V) Whether in view of the provisions of Section 22, there was a complete ban on the manufacture of sale and products mentioned in the said section?

51. Mr. Mehmood Pracha, the learned Counsel appearing on behalf of Respondent No.2 submitted that section 22 imposes a complete ban on the manufacture, sale etc of the products mentioned in the said section and it was only after the approval was granted by the Food Authority, the said categories of food could be manufactured, sold etc by

anyone. He submitted that almost 95% of standardized food has been regulated by the Regulations. He submitted that in respect of standardized food, the quality of food was clearly prescribed under these Regulations. He invited our attention to the products like milk etc in the said Regulations. He submitted that, however, 5% of the products were products which were mentioned in section 22 viz. proprietary food etc which were not regulated since those products were incapable of being regulated. He submitted that in respect of traditional food such as 'Samosa', 'Bhel' etc., by virtue of Advisories these traditional foods were exempted from maintaining any specific standards. However, the other foods could be manufactured only after the product approval was granted and the standards which were required to be maintained would be determined only by the Food Authority and no one else.

52. On the other hand, Mr. Iqbal Chagla, the learned Senior Counsel appearing on behalf of the Petitioner, submitted that the said submission was unfounded and unacceptable. He submitted that section 22, on its proper interpretation, prohibits only those categories of food contained therein as may be notified by the Central Government and, in fact, the Central Government has notified various foods and ingredients as being prohibited. Reliance was placed on the Food Safety and Standards (Prohibition and Restrictions)

Regulations, 2011. It was submitted that if the contention of the Food Authority was to be accepted then various categories of food including organic food was completely prohibited. It was submitted that prohibition by the Act on any category of food could not be raised by the Food Authority by virtue of its administrative orders viz by granting product approval. It was submitted that, thus, if the said interpretation was to be accepted then the prohibition imposed by virtue of the statute on some of the products could be raised by the Food Authority on the basis of its administrative orders. He submitted that such interpretation should not be given to section 22.

53. In our view, the submission made by Mr. Mehmood Pracha, the learned Counsel appearing on behalf of Respondent No.2 and the interpretation which is sought to be given to section 22 is without any legal foundation and it has to be stated to be rejected. It would be relevant in this context to see the provisions of section 22 of the Act which read as **under:-**

> "22. Genetically modified foods, organic foods, functional foods, proprietary foods, etc..-Save as otherwise provided under this Act and regulations made thereunder, no person shall manufacture, distribute, sell or import any novel food, genetically modified articles of food, irradiated food, organic foods, foods for special dietary uses, functional foods, neutraceuticals, health supplements, proprietary foods and such other

articles of food which the Central Government may notify in this behalf.

Explanation.--For the purposes of this section,--

(1) "foods for special dietary uses or functional foods or nutraceuticals or health supplements" means:

(a) foods which are specially processed or formulated to satisfy particular dietary requirements which exist because of a particular physical or physiological condition or specific diseases and disorders and which are presented as such, wherein the composition of these foodstuffs must differ significantly from the composition of ordinary foods of comparable nature, if such ordinary foods exist, and may contain one or more of the following ingredients, namely:--

(i) plants or botanicals or their parts in the form of powder, concentrate or extract in water, ethyl alcohol or hydro alcoholic extract, single or in combination;

(ii) minerals or vitamins or proteins or metals or their compounds or amino acids (in amounts not exceeding the Recommended Daily Allowance for Indians) or enzymes (within permissible limits);

(iii) substances from animal origin;

(iv) a dietary substance for use by human beings to supplement the diet by increasing the total dietary intake;

(b) (i) a product that is labelled as a "Food for special dietary uses or functional foods or nutraceuticals or health supplements or similar such foods" which is not represented for use as a conventional food and whereby such products may be formulated in the form of powders, granules, tablets, capsules, liquids, jelly and other dosage forms but not parenterals, and are meant for oral administration;

(ii) such product does not include a drug as defined in clause (b) and ayurvedic, sidha and unani drugs as defined in clauses (a) and (h) of section 3 of the Drugs and Cosmetics Act, 1940(23 of 1940) and rules made thereunder;

(iii) does not claim to cure or mitigate any specific disease, disorder or condition (except for certain health benefit or such promotion claims) as may be permitted by the regulations made under this Act;

(iv) does not include a narcotic drug or a psychotropic substance as defined in the Schedule of the Narcotic Drugs and Psychotropic Substances Act, 1985(61 of 1985) and rules made thereunder and substances listed in Schedules E and EI of the Drugs and Cosmetics Rules, 1945;

(2) "genetically engineered or modified food" means food and food ingredients composed of or containing genetically modified or engineered organisms obtained through modern biotechnology, or food and food ingredients produced from but not containing genetically modified or engineered organisms obtained

through modern biotechnology;

(3) "organic food" means food products that have been produced in accordance with specified organic production standards;

(4) "proprietary and novel food" means an article of food for which standards have not been specified but is not unsafe:

Provided that such food does not contain any of the foods and ingredients prohibited under this Act and the regulations made thereunder.

On proper and plain reading and interpretation of section 22 of the Act and after hearing the learned Senior Counsel Mr. Chagla for the Petitoner and the learned Counsel Mr. Pracha for Respondent No.2 at some length, we find, at least prima facie, that there is considerable force in the arguments advanced by Mr. Chagla the learned Senior Counsel appearing on behalf of the Petitioner. In the facts of the present case, however, we find that product approval has, in fact, been granted to 8 out of 9 Variants of MAGGI Noodles manufactured by the Petitioner. In this view of the matter, the issue as to what would be the interpretation of section 22 does not really arise for consideration before us in the facts of the present case and, therefore, we leave it open to be argued in an appropriate case. The **Issue No.(V)**, therefore, **does not arise**.

54. We find that in number of cases which have come before us, this is a standard argument which has been advanced on behalf of the Food Authority, though we find that in support of the orders which are passed banning any food article or restraining the manufacturer from importing consignment after it has reached the customs warehouse, some other reason is given for not clearing the goods. However, in the Court reliance is placed on section 22 and this is the argument which is sought to be advanced in support of the action of the Food Authority. In our view, there is something fundamentally wrong in the approach of the Food Authority and in the interpretation which is sought to be given by it to several provisions of the Act, including section 22 of the Act.

FINDING ON ISSUE NOS.(VI) & (VII) WICH CAN BE DECIDED TOGETHER:

(VI) Whether there is violation of principles of natural justice on the part of Respondent Nos. 1 to 4 on account of the impugned orders being passed without issuance of show cause notice and without giving the Petitioner an opportunity to explain the discrepancy pointed out by the Food Authority in respect of the product of the Petitioner?

(VII) What is the source of power under which the impugned orders were passed and whether

such orders could have been passed under sections 10(5), 16(1), 16(5), 18, 22, 26, 28 and 29 of the Act?

55. Mr. Iqbal Chagla, the learned Senior Counsel appearing on behalf of the Petitioner submitted that the impugned orders were passed in utter violation of principles of natural justice since no show cause notice was given to the Petitioner and, secondly, though the representatives of the Petitioner were called for the meeting which was held on 05/06/2015 at 1.00 P.M., they were not given copies of the analysis reports signed by the Food Analyst and of the reports of the Food Laboratories. He submitted that the impugned orders had resulted in severe adverse civil consequences as the Petitioner had to destroy food packets of thousands of tonnes which had caused huge financial loss of more than Rs 100 crores to the Petitioner. He submitted that as a result of the impugned orders, goodwill and reputation of the Petitioner – Company had been damaged irreparably. He further submitted that the Petitioner is carrying of business of Maggi in India for more than 30 years and such a complaint was never made against the Petitioner by anyone in the past. He relied upon the judgment in *M/s Dharampal Satyapal Ltd. vs. Deputy Commissioner of Central Excise, Guhati & Ors.*[1]

56. On the other hand, all the three learned Counsels

1 2015 SCC OnLine SC 489

appearing on behalf of Respondent Nos. 1 to 4 submitted that the Food Authority had passed the order without issuing a show cause notice since it had found that the product manufactured by the manufacturer i.e. Petitioner – Company was unsafe for human consumption. It was submitted that Maggi Noodles were consumed even by children of the age of one year and above and looking to the internal damage which would be caused to the human body on account of presence of lead, necessitated immediate ban on the product of the Petitioner. It was submitted that the Food Authority had power to impose ban even without giving show cause notice. Lastly, it was submitted that the representatives of the Petitioner were called to attend the meeting on 05/06/2015 at 1.00 P.M., and they were heard and they had given replies to the queries made by the Food Authority. It was submitted that the impugned order clearly reflects that hearing was given, objections of the representatives of the Petitioner were considered and overruled by giving reasons. It was submitted that therefore there was no question of violation of principles of natural justice.

57. Before we consider these rival submissions, it will be necessary again to have a look at the events which had taken place before the impugned order was passed.

In January, 2015, one sample of the

Petitioner's product was analysed in Food Laboratory in Gorakhpur, UP. It was found that though a declaration was given on the food packet of the Petitioner that there was “No added MSG”, on analysis it was found that MSG was found in the sample.

At the behest of the Petitioner, the sample was sent to the Referral Laboratory in Kolkata. This was done on 22/01/2015. The sample was with the Kolkata Referral Laboratory till 29/03/2015 and thereafter a report was submitted in which it was stated that the lead to the extent of 17 ppm. was found in the sample.

Thereafter, the Food Authority asked the Food Analyst of several States to analyse the food packets manufactured by the Petitioner and in 7 States, it was found that the lead content was more than the permissible limit and in two States viz Goa and Kerala it was found that the lead content in the sample was within the permissible limit. Wide publicity was given by the media to the reports which were

given by various Laboratories regarding product of the Petitioner.

In view of the reports which appeared in media, Petitioner – Company gave a press release, stating therein that the Petitioner would stop manufacture, sale, distribution etc of Maggi Products and on 05/06/2015, the representatives of the Petitioner were invited for a meeting which was held at 1.00 P.M. Petitioner was not specifically informed about the intention of the Food Authority to ban the product and on the same day thereafter the impugned order was passed. Perusal of the impugned order (Exhibit-A) indicates that Respondent No.2 has recorded submissions made by the representatives of the Petitioner and thereafter the Food Authority had given reasons why they were not accepted and the impugned order was passed.

58. Two questions under these circumstances are required to be considered viz.

(i) Whether the meeting which was

held on 05/06/2015 in which the representatives of the Petitioner were heard could be said to be the compliance of the principles of natural justice?

(ii) Whether the contention of the Petitioner was right that there was violation of the principles of natural justice before passing the impugned order OR it was not necessary to give hearing to the Petitioner before passing the impugned order?

59. It would be fruitful to examine the law on this point. The phrase *audi alteram partem* means no man can be condemned without being heard has been evolved in the last two to three decades. The Apex Court taking a clue from the law laid down by the English Courts in *Ridge vs. Baldwin and others*[1] and in *A.K. Kraipak and others vs. Union of India and others*[2] has held that over a period of time the dividing line between the orders passed by quasi judicial authorities and the administrative authorities had diminished and disappeared. The Apex Court in A.K. Kraipak (Supra) has observed in para 13 as under:-

1 [1963] 2 ALL E.R. 66
2 AIR 1970 SC 150

> "13. The dividing line between an administrative power and a quasi-judicial power is quite thin and is being gradually obliterated. For determining whether a power is an administrative power or a quasi-judicial power one has to look to the nature of the power conferred, the person or persons on whom it is conferred, the framework of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised. In a welfare State like ours it is inevitable that the organ of the State under our Constitution is regulated and controlled by the rule of law. In a welfare State like ours it is inevitable that the jurisdiction of the administrative bodies is increasing at a rapid rate. The concept of rule of law would lose its validity if the instrumentalities of the State are not charged with the duty of discharging their functions in a fair and just manner. The requirement of acting judicially in essence is nothing but a requirement to act justly and fairly and not arbitrarily or capriciously. The procedures which are considered inherent in the exercise of a judicial power are merely those which facilitate if not ensure a just and fair decision. In recent years the concept of quasi-judicial power has been undergoing a radical change. What was considered as an administrative power some years back is now being considered as a quasi-judicial power....."

The Apex Court has, therefore, held that even if the order is

passed by the administrative authority and particularly when it entails adverse civil consequences the person against whom such an order is passed should be given an opportunity to explain and should be heard. This principle has been enunciated in subsequent judgments by the Apex Court. It is well settled that even before passing the administrative order which may lead to adverse civil consequences, party who is going to be affected should be heard before passing such order.

60. In the recent judgment in *M/s Dharampal Satyapal Ltd. vs. Deputy Commissioner of Central Excise, Gauhati & Ors.*[1], the Apex Court after taking into consideration the evolution of the said principle in English Common Law and its Indian origin as explained in Mohinder Singh Gill vs. The Chief Election Commissioner, New Delhi [(1978) 1 SCC 405 : Air 1978 SC 851] and referring to definition of the term by the Jurists De Smith and Wade and taking into consideration the other judgments of the Apex Court has finally observed in the facts of the said case as under:-

> "Therefore, we are inclined to hold that there was a requirement of show-cause notice by the Deputy Commissioner before passing the order of recovery irrespective of the fact whether Section 11A of the Act is attracted in the instant case or not.

1 2015 SCC Online SC 489

But that is not the end of the matter. While the law on the principle of audi alteram partem has progressed in the manner mentioned above. At the same time, the Courts have also repeatedly remarked that the principles of natural justice are very flexible principles. They cannot be applied in any straight-jacket formula. It all depends upon the kind of functions performed and to the extent to which a person is likely to be affected. For this reason, certain exceptions to the aforesaid principles have been invoked under certain circumstances. For example, the Courts have held that it would be sufficient to allow a person to make a representation and oral hearing may not be necessary in all cases, though in some matters, depending upon the nature of the case, not only full-fledged oral hearing but even cross-examination of witnesses is treated as necessary concomitant of the principles of natural justice. Likewise, in service matters relating to major punishment by way of disciplinary action, the requirement is very strict and full-fledged opportunity is envisaged under the statutory rules as well. On the other hand, in those cases where there is an admission of charge, even when no such formal inquiry is held, the punishment based on such admission is upheld. It is for this reason, in certain circumstances, even post-decisional hearing is held to be permissible. Further, the Courts have held that under certain circumstances, principles of natural justice may even be excluded by reason of diverse factors like

> time, place, the apprehended danger and so on."

61. From the conspectus of these cases, it can be seen that there is no straight-jacket formula which can be used in each and every case to decide a question as to whether the affected party has to be given hearing or not and that would depend upon facts and circumstances of each case.

62. In this context, therefore, it will be necessary to see the scheme of the Act and the powers which are vested in various authorities constituted under the Act so that after understanding the scheme of the Act and the powers which are vested in these authorities, we can then examine whether the impugned orders which had been passed could have been passed without issuing the show cause notice to the Petitioner and without giving proper hearing to the Petitioner.

63. If we examine the scheme of the Act, as has been done hereinabove, it can be seen that the authorities can pass orders and impose penalties in ascending degree of coercion. The Act envisages that the authorities can pass orders which have adverse civil consequences and they can also prosecute those who violate the provisions of the Act and Rules and Regulations framed thereunder which may then result in imposition of fine and sentence on the accused. In

cases of emergency, order banning the product can also be passed and, obviously, in such cases, question of giving hearing does not arise. The principal object in passing these orders is to protect public interest at large and to see the public welfare and to ensure that the food which is sold is not unsafe for human consumption.

64. According to Respondent Nos. 1 and 2 the impugned order at Exhibit-A has been passed while exercising powers vested in them under sections 10(5), 16(1), 16(5), 18, 22, 26, 28 and 29 of the Act, whereas, according to Respondent Nos. 3 and 4, the impugned order at Exhibit-B has been passed under section 30 of the Act. It will be necessary therefore to examine the contention of the Respondents that the impugned orders are passed under the aforesaid provisions before it can be accepted.

65. In our view, from the perusal of the aforesaid provisions it is difficult to accept that the Food Authority can pass the impugned orders under these provisions. It is difficult to trace the origin of the power to ban the product on emergency basis to sections 10(5), 16(1), 16(5), 18, 22, 26, 28, 29 of the Act.

66. Section 10(5) enumerates that the Chief Executive Officer shall exercise the powers of the Commissioner of

Food Safety while dealing with matters relating to food safety of such articles. This section therefore empowers the Chief Executive Officer to exercise the powers which are exercised by the Commissioner of Food Safety and, to that extent, Respondent No.2 was authorized to pass the said order. However, the section does not specify as to whether the principles of natural justice have to be followed or not and, for that purpose, the powers vested in Commissioner of Food Safety will have to be examined. Section 10(5) of the Act reads as under:-

> **"10(5)** The Chief Executive Officer shall exercise the powers of the Commissioner of Food Safety while dealing with matters relating to food safety of such articles."

67. Section 16(1) only imposes duty on the Food Authority to regulate and monitor the manufacture, processing, distribution, sale and import of the food so as to ensure safe and wholesome food. Sub-section (1) of section 16 is an omnibus provision which casts a duty and obligation on the part of the Food Authority to regulate the food business to ensure food safety. To our mind, Section 16(1) does not empower the Food Authority to ban any product or article of food. That power would be found elsewhere. Section 16(1) of the Act reads as under:-

> **"16(1)** It shall be the duty of the Food Authority to regulate and monitor the manufacture, processing, distribution, sale and import of food so as to ensure safe and wholesome food."

68. Section 16(5) also speaks about the directions which can be given by the Food Authority to the Commissioner of Food Safety. Section 16(5) of the Act reads as under:-

> **"16(5)** The Food Authority may, from time to time give such directions, on matters relating to food safety and standards, to the Commissioner of Food Safety, who shall be bound by such directions while exercising his powers under this Act."

69. It is difficult to accept the contention of Respondent Nos. 1 and 2 that the impugned order at Exhibit-A has been passed under section 16(1) or under section 16(5) since section 16(1) only speaks about the duty cast on the Food Authority and section 16(5) authorizes Food Authority to give directions to the Commissioner of Food Safety who is bound by such directions. Therefore, in our view, the impugned order at Exhibit-A could not have been passed under these provisions.

70. The next section on which the reliance is placed by Respondent Nos.1 and 2 is section 18 which is found in

Chapter-III of the Act which deals with general principles of food safety and sub-section (1) of section 18 enumerates the guiding principles which are to be followed while implementing the provisions of the Act. Sub-section (2) of section 18 lays down guiding principles which are to be kept in mind by the Food Authority while framing regulations and specifying standards under the Act. We fail to understand as to how these guiding principles can be said to give power to the Food Authority or Commissioner of Food Safety in passing the impugned order at Exhibit-A. This section also cannot be said to be a source of power since it only lays down the guidelines. Section 18 of the Act reads as under:-

> "**18. General principles to be followed in administration of Act**.- The Central Government, the State Governments, the Food Authority and other agencies, as the case may be, while implementing the provisions of this Act shall be guided by the following principles, namely:--
>
> (1) (a) endeavour to achieve an appropriate level of protection of human life and health and the protection of consumers' interests, including fair practices in all kinds of food trade with reference to food safety standards and practices;
>
> (b) carry out risk management which shall include taking into account the results of risk assessment, and other factors which in the opinion of the Food Authority are relevant to the matter under consideration and where the conditions are relevant, in order to achieve the general objectives of

regulations;

(c) where in any specific circumstances, on the basis of assessment of available information, the possibility of harmful effects on health is identified but scientific uncertainty persists, provisional risk management measures necessary to ensure appropriate level of health protection may be adopted, pending further scientific information for a more comprehensive risk assessment;

(d) the measures adopted on the basis of clause (c) shall be proportionate and no more restrictive of trade than is required to achieve appropriate level of health protection, regard being had to technical and economic feasibility and other factors regarded as reasonable and proper in the matter under consideration;

(e) the measures adopted shall be reviewed within a reasonable period of time, depending on the nature of the risk to life or health being identified and the type of scientific information needed to clarify the scientific uncertainty and to conduct a more comprehensive risk assessment;

(f) in cases where there are reasonable grounds to suspect that a food may present a risk for human health, then, depending on the nature, seriousness and extent of that risk, the Food Authority and the Commissioner of Food Safety shall take appropriate steps to inform the general public of the nature of the risk to health, identifying to the fullest extent possible the food or type of food, the risk that it may present, and the measures which are taken or about to be taken to prevent, reduce or eliminate that risk; and

(g) where any food which fails to comply with food safety requirements is part of a batch, lot or consignment of food of the same class or description, it shall be presumed until the contrary is proved, that all of the food in that batch, lot or consignment fails to comply with those requirements.

(2) The Food Authority shall, while framing regulations or specifying standards under this Act--

(a) take into account--

(i) prevalent practices and conditions in the country including agricultural practices and handling, storage and transport conditions; and

(ii) international standards and practices, where international standards or practices exist or are in the process of being formulated,

unless it is of opinion that taking into account of such prevalent practices and conditions or international standards or practices or any particular part thereof would not be an effective or appropriate means for securing the objectives of such regulations or where there is a scientific justification or where they would result in a different level of protection from the one determined as appropriate in the country;

(b) determine food standards on the basis of risk analysis except where it is of opinion that such analysis is not appropriate to the circumstances or the nature of the case;

(c) undertake risk assessment based on the available scientific evidence and in an independent, objective

and transparent manner;

(d) ensure that there is open and transparent public consultation, directly or through representative bodies including all levels of panchayats, during the preparation, evaluation and revision of regulations, except where it is of opinion that there is an urgency concerning food safety or public health to make or amend the regulations in which case such consultation may be dispensed with:

Provided that such regulations shall be in force for not more than six months;

(e) ensure protection of the interests of consumers and shall provide a basis for consumers to make informed choices in relation to the foods they consume;

(f) ensure prevention of--

(i) fraudulent, deceptive or unfair trade practices which may mislead or harm the consumer; and

(ii) unsafe or contaminated or sub-standard food.

(3) The provisions of this Act shall not apply to any farmer or fisherman or farming operations or crops or livestock or aquaculture, and supplies used or produced in farming or products of crops produced by a farmer at farm level or a fisherman in his operations."

71. Section 22 quoted above on which reliance is placed by Mr. Mehmood Pracha, the learned Counsel appearing on behalf of Respondent No.2, is a provision which is found in

Chapter-IV of the Act which deals with general provisions as to articles of food and it clarifies that the categories of food mentioned in the said section viz novel food, genetically modified articles of food, irradiated food, organic food, foods for special dietary uses, functional foods, neutraceuticals, health supplements, proprietary food etc cannot be manufactured by any person save and otherwise provided under the Act and Rules and Regulations framed thereunder. The impugned order at Exhibit-A also does not in terms state that the order is passed under section 22 of the Act. This argument is advanced for the first time by Mr. Mehmood Pracha, the learned Counsel appearing on behalf of the Respondent No.2. The learned Additional Solicitor General appearing on behalf of Respondent No.1 or Mr. Darius Khambatta appearing on behalf of Respondent Nos. 3 and 4 have not argued that the the order has been passed under section 22. Even otherwise, from the aforesaid provisions, it can be seen that this order (Exhibit-A) could not have been passed under section 22 as canvassed by Mr. Mehmood Pracha, the learned Counsel appearing on behalf of Respondent No.2.

72. The other provisions which are mentioned in the impugned order at Exhibit-A are sections 26 and 28 of the Act which are found in Chapter VI which deals with special responsibilities as to food safety. Section 26 and 28 of the

Act read as under:-

> "**26. Responsibilities of the food business operator.**- (1) Every food business operator shall ensure that the articles of food satisfy the requirements of this Act and the rules and regulations made thereunder at all stages of production, processing, import, distribution and sale within the businesses under his control.
>
> (2) No food business operator shall himself or by any person on his behalf manufacture, store, sell or distribute any article of food--
>
> (i) which is unsafe; or
>
> (ii) which is misbranded or sub-standard or contains extraneous matter; or
>
> (iii) for which a licence is required, except in accordance with the conditions of the licence; or
>
> (iv) which is for the time being prohibited by the Food Authority or the Central Government or the State Government in the interest of public health; or
>
> (v) in contravention of any other provision of this Act or of any rule or regulation made thereunder.
>
> (3) No food business operator shall employ any person who is suffering from infectious, contagious or loathsome disease.
>
> (4) No food business operator shall sell or offer for sale any article of food to any vendor unless he also gives a

guarantee in writing in the form specified by regulations about the nature and quality of such article to the vendor:

Provided that a bill, cash memo, or invoice in respect of the sale of any article of food given by a food business operator to the vendor shall be deemed to be a guarantee under this section, even if a guarantee in the specified form is not included in the bill, cash memo or invoice.

(5) Where any food which is unsafe is part of a batch, lot or consignment of food of the same class or description, it shall be presumed that all the food in that batch, lot or consignment is also unsafe, unless following a detailed assessment within a specified time, it is found that there is no evidence that the rest of the batch, lot or consignment is unsafe:

Provided that any conformity of a food with specific provisions applicable to that food shall be without prejudice to the competent authorities taking appropriate measures to impose restrictions on that food being placed on the market or to require its withdrawal from the market for the reasons to be recorded in writing where such authorities suspect that, despite the conformity, the food is unsafe."

"28. Food recall procedures.- (1) If a food business operator considers or has reasons to believe that a food which he has processed, manufactured or distributed is not in compliance with this Act, or the rules or regulations, made thereunder, he shall immediately initiate procedures to withdraw the food in question from the market and consumers indicating reasons for its withdrawal and inform the competent authorities thereof.

(2) A food business operator shall immediately inform the competent authorities and co-operate with them, if he considers or has reasons to believe that a food which he has placed on the market may be unsafe for the consumers.

(3) The food business operator shall inform the competent authorities of the action taken to prevent risks to the consumer and shall not prevent or discourage any person from co-operating, in accordance with this Act, with the competent authorities, where this may prevent, reduce or eliminate a risk arising from a food.

(4) Every food business operator shall follow such conditions and guidelines relating to food recall procedures as the Food Authority may specify by regulations."

Perusal of sections 26 and 28 shows that these sections impose a duty and obligation on the food business operator to ensure that articles of food satisfy the requirements of the Act and the rules and regulations made thereunder at all stages of food business viz manufacture, sale etc.

73. Sub-section (2) of section 26 specifies some of the duties of food business operator viz not to manufacture, store, sell or distribute unsafe food or food which is misbranded or substandard or for which a license is required, except in accordance with the conditions of the license or food which is for the time being prohibited by the Food

Authority etc. Sub-section (3) of section 26 mentions that the food business operator should not employ any person who is suffering from infectious, contagious or loathsome disease. Sub-section (5) of section 26 on which reliance is placed clarifies that when any food which is unsafe is part of a batch, lot or consignment of food then it has to be presumed that all food in that batch, lot or consignment is also unsafe. This provision also, in our view, only casts a responsibility on the food business operator to maintain the food safety standards. Sub-section (5) of section 26 on which reliance was placed only clarifies that any food, which is a part of the batch, lot or consignment, if found to be unsafe then it will have to be presumed that the entire batch, lot or consignment of the food is unsafe. The proviso also clarifies that even if the food is found to be in conformity with specific provisions applicable to that food, the Food Authority can still impose restrictions, if according to the Food Authority, despite conformity the food is unsafe. The said provision, at the most, clarifies that the Food Authority, if it finds that a particular food packet from a batch is found to be unsafe the entire batch can be recalled and that is essentially a part of the responsibility imposed on the food business operator.

74. Section 28 deals with food recall procedure. Again, perusal of the said provision indicates that the said

procedure is to be followed by the food business operator if he has reason to believe that the food is not in compliance with the Act or the rules or regulations made under the Act.

75. Chapter VII deals with enforcement of the Act and section 29 enumerates the authorities which are responsible for enforcement of the Act. Section 29 of the Act reads as under:-

> "**29. Authorities responsible for enforcement of Act**.- (1) The Food Authority and the State Food Safety Authorities shall be responsible for the enforcement of this Act.
>
> (2) The Food Authority and the State Food Safety Authorities shall monitor and verify that the relevant requirements of law are fulfilled by food business operators at all stages of food business.
>
> (3) The authorities shall maintain a system of control and other activities as appropriate to the circumstances, including public communication on food safety and risk, food safety surveillance and other monitoring activities covering all stages of food business.
>
> (4) The Food Safety Officers shall enforce and execute within their area the provisions of this Act with respect to which the duty is not imposed expressly or by necessary implication on some other authority.
>
> (5) The regulations under this Act shall specify which of the Food Safety Officers are to enforce and execute

them, either generally or in relation to cases of a particular description or a particular area, and any such regulations or orders may provide for the giving of assistance and information, by any authority concerned in the administration of the regulations or orders, or of any provisions of this Act, to any other authority so concerned, for the purposes of their respective duties under them.

(6) The Commissioner of Food Safety and Designated Officer shall exercise the same powers as are conferred on the Food Safety Officer and follow the same procedure specified in this Act."

76. In our view, therefore, the Food Authority cannot trace its power to pass the impugned order at Exhibit-A under section 26, 28 and 29 of the said Act.

77. Section 30 of the Act lays down functions of the Commissioner of Food Safety of the State and his power to delegate his powers and function to other officers. Section 30 of the Act reads as under:-

"**30. Commissioner of Food Safety of the State**.-(1) The State Government shall appoint the Commissioner of Food Safety for the State for efficient implementation of food safety and standards and other requirements laid down under this Act and the rules and regulations made thereunder.

(2) The Commissioner of Food Safety shall perform all or any of the following functions, namely:--

(a) prohibit in the interest of public health, the

manufacture, storage, distribution or sale of any article of food, either in the whole of the State or any area or part thereof for such period, not exceeding one year, as may be specified in the order notified in this behalf in the Official Gazette;

(b) carry out survey of the industrial units engaged in the manufacture or processing of food in the State to find out compliance by such units of the standards notified by the Food Authority for various articles of food;

(c) conduct or organise training programmes for the personnel of the office of the Commissioner of Food Safety and, on a wider scale, for different segments of food chain for generating awareness on food safety;

(d) ensure an efficient and uniform implementation of the standards and other requirements as specified and also ensure a high standard of objectivity, accountability, practicability, transparency and credibility;

(e) sanction prosecution for offences punishable with imprisonment under this Act;

(f) such other functions as the State Government may, in consultation with the Food Authority, prescribe.

(3) The Commissioner of Food Safety may, by Order, delegate, subject to such conditions and restrictions as may be specified in the Order, such of his powers and functions under this Act (except the power to appoint Designated Officer, Food Safety Officer and

> Food Analyst) as he may deem necessary or expedient to any officer subordinate to him."

Perusal of section 30 indicates that section 30(a) gives power to the Commissioner of Food Safety to prohibit in the interest of public health, the manufacture, storage, distribution, or sale of any article of food.

78. The learned Senior Counsel Mr. Darius Khambatta appearing on behalf of Respondent Nos. 3 and 4 has submitted that the order at Exhibit-B has been passed under section 30. The learned Counsels appearing on behalf of Respondent Nos. 1 and 2 have not relied on section 30 as a source of power for passing the impugned order at Exhibit-A. Whereas, according to Mr. Iqbal Chagla, the learned Senior Counsel appearing on behalf of the Petitioner, both the orders viz Order at Exhibit-A and the Order at Exhibit-B had been passed under section 34 of the Act which reads as under:-

> **"34. Emergency prohibition notices and orders.-**(1) If the Designated Officer is satisfied that the health risk condition exists with respect to any food business, he may, after a notice served on the food business operator (in this Act referred to as an "emergency prohibition notice"), apply to the Commissioner of Food Safety for imposing the prohibition.
>
> (2) If the Commissioner of Food Safety is satisfied, on the application of such an officer, that the health risk

condition exists with respect to any food business, he shall, by an order, impose the prohibition.

(3) The Designated Officer shall not apply for an emergency prohibition order unless, at least one day before the date of the application, he has served notice on the food business operator of the business of his intention to apply for the order.

(4) As soon as practicable after the making of an emergency prohibition order, the Designated Officer shall require the Food Safety Officer to --

(a) serve a copy of the order on the food business operator of the business; or

(b) affix a copy of the order at a conspicuous place on such premises used for the purposes of that business;

and any person who knowingly contravenes such an order shall be guilty of an offence and shall be punishable with imprisonment for a term which may extend to two years and with fine which may extend to two lakh rupees.

(5) An emergency prohibition order shall cease to have effect on the issue by the Designated Officer of a certificate to the effect that he is satisfied that the food business operator has taken sufficient measures for justifying the lifting of such order.

(6) The Designated Officer shall issue a certificate under sub-section (5) within seven days of an application by the food business operator for such a certificate and on his being not satisfied, the said officer shall give notice to the food business operator

> within a period often days indicating the reasons for such decision."

The learned Senior Counsel for the Petitioner then submitted that even if it is held that the both these orders had been passed under section 30, though it does not mention that principles of natural justice have to be followed, it is implied that before passing such order doctrine of *audi alteram partem* has to be complied with and hearing has to be given to the affected party.

79. In our view, after having seen all these provisions, it is difficult to accept the contention of Respondent Nos. 1 and 2 that the order at Exhibit-A has been passed under section 10(5), 16(1), 16(5), 18, 22, 26, 28 and 29 of the Act. In our view, it appears that Respondent Nos. 3 and 4 have passed the impugned order at Exhibit-B under section 30 of the Act and Respondent Nos. 1 and 2 have passed the impugned order at Exhibit-A either under section 30 or under section 34 of the Act. It appears that Respondent Nos. 1 and 2 have taken the aforesaid stand to justify their action of not giving show cause notice and hearing before passing the impugned order at Exhibit-A. Sub-section (1) of section 34 mentions that before passing any order under section 34, the Designated Officer has to serve a notice on the food business operator and then pass the order. Section 34, therefore, speaks about issuance of show cause notice and following

the principles of natural justice. Section 30 even though it does not in terms mentions that principles of natural justice have to be followed, it is implied that such a course has to be normally followed. The Apex Court in *C.B. Gautam vs. Union of India and Others*[1] while deciding the issue as to whether in the absence of specific requirement of following the principles of natural justice in any section, whether it can be implied that such a hearing has to be given has observed in paras 28 and 30 as under:-

> "28. It must, however, be borne in mind that courts have generally read into the provisions of the relevant sections a requirement of giving a reasonable opportunity of being heard before an order is made which would have adverse civil consequences for the parties affected. This would be particularly so in a case where the validity of the section would be open to a serious challenge for want of such an opportunity."
>
> "30..... The observance of principles of natural justice is the pragmatic requirement of fair play in action. In our view, therefore, a requirement of an opportunity to show cause being given before an order for purchase by the Central Government is made by an appropriate authority under section 269-UD must be read into the provisions of Chapter XX-C. There is nothing in the

1 (1993) 1 SCC 78

> language of section 269-UD or any other provision in the said Chapter which would negate such an opportunity being given. Moreover, if such a requirement were not read into the provisions of the said Chapter, they would be seriously open to challenge on the ground of violations of the provisions of Article 14 on the ground of non-compliance with principles of natural justice. The provision that when an order for purchase is made under section 269-UD – reasons must be recorded in writing is no substitute for a provision requiring reasonable opportunity of being heard before such an order is made."

In the said case, under section 269-UD of the Income-tax Act no reference was made to principles of natural justice being followed and the Apex Court has held that it was implied that such a hearing should be given.

80. Similarly, in *Godawat Pan Masala Products I.P. Ltd vs. Union of India and Others*[1], it has been held that hearing will have to be given before the impugned order is passed. In paras 75 and 76 of the said judgment the Apex Court has observed as under:-

> "75. In State of *T.N. v. K. Sabanayagam* [(1998) 1 SCC 318 : 1998 SCC (L&S) 260] (Vide para 17) this Court after referring to

1 (2004) 7 SCC 68

the aforesaid observations of Chinnappa Reddy, J. in *Cynamide* [(1987) 2 SCC 720] observed that even when exercising a legislative function, the delegate may in a given case be required to consider the viewpoint which may be likely to be affected by the exercise of power. This Court pointed out that conditional legislation can be broadly classified into three categories: (1) when the legislature has completed its task of enacting a statute, the entire superstructure of the legislation is ready but its future applicability to a given area is left to the subjective satisfaction of the delegate (as in *Tulsipur Sugar Co. case* [Tulsipur Sugar Co. Ltd. vs. Notified Area Committee, (1980) 2 SCC 295]; (2) where the delegate has to decide whether and under what circumstances a legislation which has already come into force is to be partially withdrawn from operation in a given area or in given cases so as not to be applicable to a given class of persons who are otherwise admittedly governed by the Act: and (3) where the exercise of conditional legislation would depend upon satisfaction of the delegate on objective facts placed by one class of persons seeking benefit of such an exercise with a view to deprive the rival class of persons who otherwise might have already got statutory benefits under the Act and who are likely to lose the existing benefit because of exercise of such power by the delegate. This Court emphasised that in the third type of cases the satisfaction of the delegate must necessarily be based on objective considerations and, irrespective of whether

> the exercise of such power is a judicial or quasi-judicial function, still it has to be treated to be one which requires objective consideration of relevant factual data pressed into service by one side, which could be rebutted by the other side, who would be adversely affected if such exercise of power is undertaken by the delegate."
>
> "76. In our view, even if the impugned notification falls into the last of the above category of cases, whatever material the Food (Health) Authority had, before taking a decision on the articles in question, ought to have been presented to the appellants who are likely to be affected by the ban order. The principle of natural justice requires that they should have been given an opportunity of meeting such facts. This has not been done in the present case. For this reason also, the notification is bad in law."

In the said case, Notification was issued by the State of Maharashtra under the provisions of Prevention of Food Adulteration Act, 1954 (which has now been repealed by virtue of FSS Act, 2006) banning manufacture, sale, storage and distribution of pan masala and gutka permanently or for a period of five years. In the said case, it was argued on behalf of the State of Maharashtra that the Commissioner was a delegate of the Parliament and therefore he was not required to give hearing to the parties. The Apex Court in that context has made the aforesaid observations in paras

75 and 76 of the judgment and it has further held that even though he has acted as a delegate, satisfaction of the delegate must be based on objective consideration of relevant factual data. The Apex Court has further held in para 76 that principle of natural justice requires that Respondents should have been given an opportunity of meeting such facts. The ratio of this judgment will squarely apply to the facts of the present case. In the present case, the Food Authority and the Commissioner of Food Safety, State of Maharashtra have not issued any Notification banning all Noodles. The Food Authority has banned the product of the Petitioner relying on the results given by the Food Laboratories. It was, therefore, incumbent upon the Food Authority and the Commissioner of Food Safety to have given all the material to the Petitioner on the basis of which the impugned orders (Exhibit -A and Exhibit-B) were passed so that the Petitioner – Company could have got an opportunity of giving its reply to the material on the basis of the which the said impugned orders were passed.

81. In our view, in order to get over this lacuna, it is now sought to be contended by Respondent Nos. 1 and 2 that the impugned order at Exhibit-A was passed under those sections and not under section 30 or 34 of the Act.

82. Mr. Anil Singh, the learned Additional Solicitor General

appearing on behalf of Respondent No.1 and Mr. Darius Khambatta, the learned Senior Counsel appearing on behalf of Respondent Nos. 3 and 4 have relied on the judgment of this Court in *Dhariwal Industries Ltd and another vs. State of Maharashtra and others*[1]. Division Bench in the facts of the said case has held that Food Safety Commissioner, Maharashtra State while exercising his power under section 30(2)(a), is thus a delegate of Parliament and, therefore, not required to follow the principles of natural justice. In the said case, the Petitioner had challenged the validity of the provisions of two different regulations under the FSS Act, 2006 as well as the statutory order passed by the Commissioner of Food Safety under section 30(2)(a) of FSS Act, 2006. In the said case the State of Maharashtra had banned supply and distribution of pan masala containing tobacco known as gutka and pan masala not containing tobacco. The product as a whole class by itself therefore was completely banned by relying on section 30(2)(a) of the Act. Division Bench in these circumstances held that Food Safety Commissioner was acting as a delegate of the Parliament. In our view ratio of the said judment would not apply to the facts of the present case, firstly because in the present case only the Petitioner's product viz Maggi Noodles and its 9 variants have been banned. Secondly, in the present case, Respondent Nos. 2 and 3 are the authorities under the Act and they cannot be said to be delegate of the Parliament and

1 2013(1) Mh.L.J. 461

as observed in *Union of India vs. Cynamide Inida Ltd.*[1], even if the authority acts as a delegate of the legislature, it is required to give hearing to the affected party and give the affected party the material on the basis of which the impugned order is passed. Relying on the said decision in *Cynamide India Ltd.* (supra), the Apex Court in *Godawat Pan Masala Products I.P. Ltd.* (supra) has observed in para 73 as under:-

> ***"Natural Justice:***
>
> 73. Learned counsel for the State of Maharashtra cited Union of India vs. Cynamaide India Ltd. [(1987) 2 SCC 720] where this Court observed thus: (SCC pp.735-36)
>
> > "7. The third observation we wish to make is, price fixation is more in the nature of a legislative activity than any other. It is true that, with the proliferation of delegated legislation, there is a tendency for the line between legislation and administration to vanish into an illusion. Administrative, quasi-judicial decisions tend to merge in legislative activity and, conversely, legislative activity tends to fade into and present an appearance of an administrative or quasi-judicial activity. Any attempt to draw a distinct line between legislative and administrative functions, it has been said, is 'difficult in theory and impossible in practice'. Though difficult, it is necessary that the line must sometimes be drawn as different legal rights and consequences may ensue. The distinction between the two has usually been expressed as 'one between the

1 (1987) 2 SCC 720

> general and the particular'. 'A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; an administrative act is the making and issue of a specific direction or the application of a general rule to a particular case in accordance with the requirements of policy'. 'Legislation is the process of formulating a general rule of conduct without reference to particular cases and usually operating in future ; administration is the process of performing particular acts, of issuing particular orders or of making decisions which apply general rules to particular cases'. It has also been said: 'Rule-making is normally directed toward the formulation of requirements having a general application to all members of a broadly identifiable class' while, 'adjudication, on the other hand, applies to specific individuals or situations'. But, this is only a broad distinction, not necessarily always true. Administration and administrative adjudication may also be of general application and there may be legislation of particular application only. That is not ruled out. Again, adjudication determines past and present facts and declares rights and liabilities while legislation indicates the future course of action. Adjudication is determinative of the past and the present while legislation is indicative of the future. The object of the rule, the reach of its application, the rights and obligations arising out of it, its intended effect on past, present and future events, its form, the manner of its promulgation are some factors which may help in drawing the line between legislative and non-legislative acts." “

83. We must note here that a situation may arise in a given

case where the Food Authority or Commissioner of Food Safety would be compelled to pass immediate order of prohibition in the interest of public health to manufacture, sale of food etc and similar order can be passed under section 34 when it is found that there is contamination in food which is such an eminent threat to the public health that immediate order of prohibition has to be passed. In such compelling and threateningly emergent situations, or in a situation like the one in Dhariwal's case (supra) the principles of natural justice may not come into play. In the present case, however, there was no such eminent threat.

84. From the facts of this case it can be seen that:-

(i) The Petitioner was carrying on business for more than 30 years and no such contamination was found in the past.

(ii) There was no risk analysis made by the authorities to determine the extent of damage which would be caused on the consumption of food as was done in *Dhariwal Industries Ltd and another vs. State of Maharashtra and others*[1].

(iii) The reports received from other States

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were informed to the Food Authority on telephone and, in any case, so far as the Commissioner of Pune is concerned, he had conducted the test on 06/06/2015 that is one day after the impugned order at Exhibit-A was passed.

(iv) Petitioner – Company itself had already issued a press release stating therein that the Petitioner was recalling the product and was going to stop manufacture, sale distribution of the product etc.

(v) Out of 70 samples examined by Food Authority – Respondent Nos. 1 and 2, more than 50% i.e. about 42 samples were found to be within permissible limit and in 30 samples the lead was found to be in excess.

(vi) Delhi and Kolkata reports were available.

85. Under these circumstances therefore, in our view, the Food Authority should have given a proper opportunity to the Petitioner – Company to prove that its product was safe for human consumption and it was not necessary to impose a nationwide ban on the product, particularly when the

Petitioner had already, one day before the impugned order at Exhibit-A was passed, had given a press release, stating therein that Petitioner was recalling its product from the market. Therefore, in our view, in this particular case, there is a clear violation of principles of natural justice and on that ground alone the impugned orders at Exhibit-A and B respectively are liable to be set aside. **Issue No.(VI)** is therefore **answered in the affirmative.** The answer to Issue No(VII) is that the source of power under which the impugned orders were passed is traceable to either section 30 or section 34 of the Act and, in any case, the impugned orders could not have been passed under sections 10(5), 16(1), 16(5), 18, 22, 26, 28 and 29 of the Act. **Issue No. (VII)** therefore is **answered accordingly.**

FINDINGS ON ISSUE NOS. (VIII) to (XI) WHICH CAN BE DECIDED TOGETHER:

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

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

(X) Whether the Food Analyst was entitled to

test the samples in any Laboratory, even if it was not accredited and recognized by the Food Authority?

(XI) Whether it was established by the Food Authority that the lead beyond the permissible limit was found in the product of the Petitioner and the product of the Petitioner was misbranded on account of a declaration made by the Petitioner that the product contained "No added MSG"?

86. Mr. Chagla, the learned Senior Counsel appearing on behalf of the Petitioner submitted that analysis of all food samples was not done by the Food Analyst at accredited Laboratories approved by the NABL and, therefore, no reliance could be placed on the results of the reports given by these Laboratories. Secondly, he submitted that procedure for taking samples was not followed. He submitted that the sample which was sent to Referral Laboratory at Kolkata was kept for a period of three months and it was not in a sealed packet and it was kept open and, therefore, the possibility of contamination through air and other methods could not be ruled out. He submitted that the reports given by the Food Analyst on the basis of the samples which were taken could not be relied upon. He submitted that the analysis of the food has to be done in the Food Laboratory accredited by NABL and recognized by the Food Authority under section 43 of the Act which provision is a mandatory provision and non-compliance of

the mandatory provision would vitiate the entire process of analysis. He relied upon the judgment of the Apex Court in *Pepsico India Holdings Private Limited vs. Food Inspector and another*[1]. He then submitted that the learned Counsel appearing for Respondent No.2 had, during the course of arguments, tendered reports of Avon Food Lab (Pvt.) Ltd. which is an accredited Laboratory and he had submitted that on the basis of the said reports the Food Analyst had given his certificate. The learned Senior Counsel for the Petitioner submitted that copies of the said reports of Avon Food Lab (Pvt.) Ltd. were not even provided to the learned Additional Solicitor General. He submitted that Mr. Anil Singh, the learned ASG, during the course of his arguments, had not made any reference to these reports. Furthermore, those reports have surfaced for the first time in the sur-rejoinder filed by Respondent No.2 during the course of arguments in the matter and no copies of these reports were ever supplied to the Petitioner, was the submission of the learned Senior Counsel Mr. Chagla. He then submitted that there was no reference made in the Reports given by the Food Analyst of Delhi that he had relied on these reports. He further pointed out several discrepancies in the reports of Avon Food Lab (Pvt.) Ltd. He submitted that batch number, date of manufacture and other particulars of the product of the Petitioner were not mentioned in the said reports. The quantity of sample which was made available was in excess

1 (2011) 1 SCC 176

of the food which was put in the packet and, therefore, it reflected that the original sample was taken out of the sealed envelope by the Food Analyst and it was then handed over to Avon Food Lab (Pvt.) Ltd. which was not the procedure prescribed under the Act and Rules and Regulations framed thereunder. He pointed out the relevant provision of the Act in which it has been stated that if the food is found in a packet, the entire packet has to be sent for analysis and it is not to be opened. He submitted that the said reports of the Avon Food Lab (Pvt.) Ltd. were fabricated ad no reliance could be placed on these reports. He submitted that these reports have been produced during the course of hearing and upon directions being given by this Court, these reports were annexed to the affidavit-in-sur-rejoinder. He then submitted that the Petitioner – Company had made analysis of its product at its own accredited Laboratories and other Laboratories all over the world. He placed reliance on 2700 reports actually submitted to the Food Authority. He submitted that all these reports indicated that lead content found in the product of the Petitioner was within the permissible limit. He then submitted that the food product has to be tested in the manner in which it is used. He submitted that, in the present case, it was clearly stated on the packet that the Noodles and the Taste Maker have to be boiled in water for two minutes. He submitted that, therefore, these samples could

not have been tested separately and, on that ground alone, results of analysis of the samples of the product of the Petitioner could not be relied upon. He further invited our attention to section 3(p) which defines the "food laboratory" and section 43 of the Act.

87. On the other hand, Mr. Mehmood Pracha, the learned Counsel appearing on behalf of Respondent No.2, submitted that since the necessary infrastructure was not available, a Notification dated 5/7/2011 was issued. He submitted that, in the said Notification, it was clearly stated that as long as Laboratories were not recognized by the Food Authority and accredited by the NABL, the existing State and Central Laboratories which were in existence under the Old Act would continue on account of transitory powers under section 98 of the said Act. He submitted that though subsequently in 2012, several Laboratories were recognized by the Food Authority and were also accredited, the Notification which was issued in 2011 was still in force and, therefore, the Food Authority could test the samples in these Laboratories which were not accredited. He submitted that no reliance could be placed on the reports which were submitted on behalf of the Petitioner since there was every possibility of fabrication and tampering with the samples as well as the reports.

88. Mr. Khambatta, the learned Senior Counsel appearing on behalf of Respondent Nos. 3 and 4, on the other hand, submitted that the Food Analyst was empowered to make his own analysis in any Food Laboratory. He submitted that the Food Analyst had to be a qualified chemist and it was nowhere stated in the Act that certificate given by him was not valid irrespective of the Laboratory in which the sample was tested. In support of the said submission, he pointed out various provisions under the Act. He relied upon section 47 of the Act and more particularly section 47(5). He submitted that sub-section (5) of section 47 in terms stated that so far imported food is concerned, it has to be tested in notified laboratory whereas under sub-section (3) of section 47, there was no such restriction. It was submitted that, therefore, the Food Analyst was duty bound to send only imported food to the notified laboratory and not the food which was manufactured in India.

89. In rejoinder, Mr. Chagla, the learned Senior Counsel for the Petitioner submitted that this submission does not have any foundation. He submitted that if this submission is accepted provisions of sections 3(p) and 43 would be rendered nugatory. He submitted that section 43 clearly provided that Food Analyst had to analyse all samples of food in a Food Laboratory which was accredited by NABL and recognized and notified by the Food Authority under

section 43.

90. Mr. Khambatta, the learned Senior Counsel for Respondent Nos. 3 and 4 then submitted that this Court while exercising its writ jurisdiction under Article 226 should not sit in appeal over the analysis which is made by the experts. He relied on the judgment of the Apex Court in *Academy of Nutrition Improvement and Others vs. Union of India*[1] and three other judgments on the similar point

91. Mr. Anil Singh, the learned Additional Solicitor General appearing for Respondent No.1, made similar submission and relied on the judgment of the Apex Court in M/s E. Merck (India) Ltd and another vs. Union of India and another[2] and three other judgments on the similar point.

92. There is no manner of doubt that this Court is not expected to see the correctness or otherwise of the reports given by the experts and, therefore, there cannot be any dispute regarding ratio of the judgments on which reliance has been placed by the learned Senior Counsel for Respondent Nos. 3 and 4 and the learned Additional Solicitor General for Respondent No.1. This Court, however, can see whether the samples have been properly analysed in terms of the mandatory provisions of the Act or not and, secondly,

1 (2011) 8 SCC 274
2 AIR 2001 Delhi 326

whether any reliance can be placed either on reports obtained by the Respondents or even for that matter on the reports obtained by the Petitioner.

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

> "3(p) "food laboratory" means any food laboratory or institute established by the Central or a State Government or any other agency and accredited by National Accreditation Board for Testing and Calibration Laboratories or any equivalent accreditation agency and recognised by the Food Authority under section 43."
>
> "43. **Recognition and accreditation of laboratories, research institutions and referral food laboratory.-** (1) The Food Authority may notify food laboratories and research institutions accredited by National Accreditation Board for Testing and Calibration Laboratories or any other accreditation agency for the purposes of carrying out analysis of samples by the Food Analysts under this Act.
>
> (2) The Food Authority shall, establish or recognise by notification, one or more referral food laboratory or laboratories to carry out the functions entrusted to the referral food laboratory by this Act or any rules and regulations made thereunder.
>
> (3) The Food Authority may frame regulations specifying--

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

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

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

Upon conjoint reading of both these sections quoted hereinabove, it is clear that under section 3(p), “food laboratory” is a laboratory which is either State or Central laboratory or any other allied laboratory which is accredited and recognized by NABL and by the Food Authority under section 43 of the Act. The laboratory, therefore, has to pass twin test before it can be said to be a recognized laboratory viz **(i)** it has to be accredited by NABL and over and above that **(ii)** it has also to be recognized by the Food Authority under section 43 of the Act. Sub-section (1) of section 43 makes it abundantly clear that only in that laboratory which is recognized by the Food Authority by Notification, food can be sent for analysis by the Food Analyst. Upon conjoint reading of the said two provisions, it is clear that the submission made by Mr. Khambata, the learned Senior Counsel for Respondent Nos. 3 and 4 is without any substance. Section 43(1) mandates that the Food Analyst

has to analyse the food in a laboratory accredited by NABL and also recognized by the Food Authority and notified by it. It is apparent that therefore if there is non-compliance of the said provisions and if the food is tested in a laboratory which does not fall within the definition of section 3(p) and not recognized by the Food Authority, the analysis made in such laboratory cannot be relied upon. The Apex Court in *Pepsico India Holdings Private Limited vs. Food Inspector and Another*[1] has observed that the provisions are mandatory. The Apex Court in this case held that provisions under section 23(1-A)(ee) of the Prevention of Food Adulteration Act, 1954 for testing the food samples/adulteration are mandatory and not directory. Though the said observation is made in respect of provisions of the Prevention of Food Adulteration Act, 1954 (which has now been repealed by FSS Act, 2006), even under the new Act, the provisions of section 43(1) will have to be held mandatory and not directory. This is more so when Section 43(1) is read with the definition of the words "food laboratory" in Section 3(p) of the FSS Act, 2006. The Apex Court in Pepsico India Holding Private Limited (supra) has observed in para 44 as under:-

> "44. The High Court also misconstrued the provisions of Sections 23(1-A)(ee) and (hh) in holding that the same were basically enabling provisions and were

1 (2011) 1 SCC 176

> not mandatory and could, in any event, be solved by the Central Government by framing the Rules thereunder, by which specified tests to be held in designated laboratories could be spelt out. Consequently, the High Court also erred in holding that the non formulation of rules under the aforesaid provisions of the 1954 Act could not be said to be fatal for the prosecution."

94. Further, if the provisions of sections 43 and 47 are considered, it can be seen that notified laboratories which are referred to in section 47(5) for analysing imported food are laboratories which are separately notified for testing imported food articles as can be seen from the Food Safety and Standards (Laboratory and Samples Analysis) Regulations, 2011. The contention of Mr. Khambatta, the learned Senior Counsel appearing on behalf of Respondent Nos. 3 and 4 that only imported food could be tested in the notified laboratories therefore cannot be accepted. Sections 47(1) and 47(5) of the Act read as under:-

> **47. Sampling and analysis**.- (1) When a Food Safety Officer takes a sample of food for analysis, he shall -
> (a) give notice in writing of his intention to have it so analysed to the person from whom he has taken the sample and to the person, if any, whose name, address and other particulars have been disclosed;
> (b) except in special cases as may be provided by rules made under this Act, divide the sample into four parts and mark and seal or fasten up each part in

such a manner as its nature permits and take the signature or thumb impression of the person from whom the sample has been taken in such place and in such manner as may be prescribed by the Central Government:

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

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

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

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

Provided that if the test reports received under sub-clauses (i) and (iii) are found to be at variance, then the Designated Officer shall send one part of the sample kept in his custody, to referral laboratory for analysis, whose decision thereon shall be final.

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

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

recognized by the Food Authority under section 43(1) of the Act.

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

"No. 83-Dir (Enf.)/FSSAI/2011
Food Safety & Standards Authority of India
(A Statutory Regulatory Body of Govt. of India)
Ministry of Health & Family Welfare
3rd Floor, FDA Bhawan, Kotla Road
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 5th August, 2011.

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

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

Yours sincerely,

(S. S. Ghonkrokta)
Director"

The said Notification clearly mentions that the said Notification had been issued till the Laboratories under the FSS Act, 2006 were accredited by NABL and recognized and notified by the Food Authority. It is an admitted position that in 2012 the several Laboratories have been so recognized by the Food Authority and notified by issuing Notifications. The contention of the learned Counsel for Respondent No.2 is,

therefore, not acceptable. The contention of Mr. Khambatta the learned Senior Counsel for Respondent Nos. 3 and 4 that this issue which was raised in rejoinder by the Petitioner was an afterthought, also cannot be accepted and, therefore, it is not possible to place reliance on the reports of the Food Analysts given by various States in respect of analysis of the samples of the product of the Petitioner and therefore decision taken by the Food Authority relying on these reports therefore will have to be set aside. On the same ground, it will not be possible to accept the reports of the samples which have been tendered on behalf of the Petitioner since there is no manner of knowing whether procedure has been properly followed or not. **Issue No. (VIII) to (XI)** are therefore answered in the negative.

FINDING ON ISSUE NO.(XII)

(XII) Whether Respondent Nos. 2 to 4 were not justified in imposing the ban on all the 9 Variants of the Petitioner, though tests were conducted only in respect of 3 Variants and whether such ban orders are arbitrary, unreasonable and violative of Article 14 and 19 of the Constitution of India?

97. The last and most important question which falls for consideration before us is : whether the action of Respondent Nos. 1 to 4 is arbitrary, capricious, unreasonable

and violative of Articles 14 and 19 of the Constitution of India. The concept of arbitrary action has been the subject matter of decision given by the Apex court in several cases. It is not necessary therefore to refer to catena of decisions on this point. However, in a recent judgment[1] of the Apex Court wherein reference was made to the Apex Court by the President of India under Article 143(1) of the Constitution of India, the Apex Court was called upon to decide 8 questions which are found in para 1 of the judgment. It is not necessary to reproduce the said questions which fell for consideration before the Apex Court. The Apex Court while deciding these questions which were primarily relating to the issuance of licenses, fixation of license fee and royalty in respect of 2G Spectrum, the Apex Court had considered the concept of arbitrariness. The said observations succinctly and precisely lay down the entire law on arbitrary action by the Executive and Legislature and it would be worthwhile to reproduce the paragraphs in which this concept is discussed. Incidentally, it must be pointed out that the Apex Court itself has extracted in full the paragraphs of the judgment of the Apex Court in *State of West Bengal vs. Anwar Ali Sarkar*[2] and the observations of Justice Bose in his own words. It may not be necessary to reproduce these observations once again in this judgment since the Apex Court in this case has extracted what has been observed by Justice Bose in Anwarali Sarkar

1 Natural Resources Allocation, in Re, Special Reference No.1 of 2012 reported in (2012) 10 SCC 1

2 AIR (39) 1952 SC 75

(supra) and has paraphrased them in their own words. The Apex Court in the said judgment in Natural Resources Allocation, In Re, Special Reference No.1 of 2012[1] has observed in paras 159 and 170 to 172 as under:-

> "159. First of all reference was made to the decision of this Court in *S.G. Jaisinghani v. Union of India and Ors.* : AIR 1967 SC 1427, wherein this Court observed as under: (AIR p. 1434 para 14)
>
> > 14. *In this context it is important to emphasize that the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable and the citizen should know where he is.* If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the Rule of law. (See Dicey - *Law of the Constitution* - 10th Edn., Introduction cx). "Law has reached its finest moments," stated Douglas, J. in *United States v. Wunderlich [96 L Ed 113: 342 US 98(1951)]*, "when it has freed man from the unlimited discretion of some ruler.... Where discretion, is absolute, man has always suffered." It is in this sense that the rule of law may be said to be the sworn enemy of caprice. Discretion, as Lord Mansfield stated it in classic terms in *Wilkes* [R.

1 (2012) 10 SCC 1

v. Wilkes, (1770) 4 Burr 2527 : 98 ER 327 : (1558-1774) All ER Rep 570] (ER p.334): Burr at p.2539 "means sound discretion guided by law. It must be governed by Rule, not by humour: it must not be arbitrary, vague, and fanciful."

(emphasis supplied)"

In the aforesaid case, it came to be emphasised that executive action should have clearly defined limits and should be predictable. In other words, the man on the street should know why the decision has been taken in favour of a particular party. What came to be impressed upon was, that lack of transparency in the decision-making process would render it arbitrary."

"170. The legal proposition laid down in the instant judgment in *Shrilekha Vidyarthi case [(1991) 1 SCC 212 : 1991 SCC (L&S) 742]* may be summarized as follows:

170.1. *Firstly*, State actions in the contractual field are meant for public good and in public interest and are expected to be fair and just.

170.2 *Secondly*, it would be alien to the constitutional scheme to accept the argument of exclusion of Article 14 of the Constitution of India in contractual matters."

170.3. *Thirdly*, the fact that a dispute falls in the domain of contractual obligation, would make no difference, to a challenge raised under Article 14 of the Constitution of India on the ground that the impugned act is arbitrary, unfair and unreasonable.

170.4 *Fourthly*, every State action must be informed of reason and it follows that an act uninformed by reason is arbitrary.

170.5 *Fifthly*, where no plausible reason or principle is

indicated (or is discernible), and where the impugned action ex facie appears to be arbitrary, the onus shifts on the State to justify its action as fair and reasonable."

170.6. *Sixthly*, every holder of public office is accountable to the people in whom the sovereignty vests. All powers vested in a public office, even in the field of contract, are meant to be exercised for public good and for promoting public interest."

170.7. And *seventhly*, Article 14 of the Constitution of India applies also to matters of governmental policy even in contractual matters, and if the policy or any action of the government fails to satisfy the test of reasonableness, the same would be unconstitutional."

"171. Thereafter our attention was invited to the decision rendered in *LDA v. M.K. Gupta* [(1994) 1 SCC 243]. Seriously, the instant judgment has no direct bearing to the issue in hand. The judgment determines whether compensation can be awarded to an aggrieved consumer under the Consumer Protection Act, 1986. It also settles who should shoulder the responsibility of paying the compensation awarded. But all the same it has some interesting observations which may be noticed in the context of the matter under deliberation. Portions of the observations emphasized upon are being noticed below:(SCCpp.260-64, paras 8, 10-11)

> "8... *Under our Constitution sovereignty vests in the people. Every limb of the constitutional machinery is obliged to be people oriented. No functionary in exercise of statutory power can claim immunity, except to the extent protected by the statute itself. Public authorities acting in violation of constitutional or statutory*

provisions oppressively are accountable for their behaviour before authorities created under the statute like the commission or the courts entrusted with responsibility of maintaining the rule of law. Each hierarchy in the Act is empowered to entertain a complaint by the consumer for value of the goods or services and compensation. The word 'compensation' is again of very wide connotation. It has not been defined in the Act. According to dictionary it means, 'compensating or being compensated; thing given as recompense;'. In legal sense it may constitute actual loss or expected loss and may extend to physical, mental or even emotional suffering, insult or injury or loss. Therefore, when the Commission has been vested with the jurisdiction to award value of goods or services and compensation it has to be construed widely enabling the Commission to determine compensation for any loss or damage suffered by a consumer which in law is otherwise included in wide meaning of compensation. The provision in our opinion enables a consumer to claim and empowers the Commission to redress any injustice done to him. Any other construction would defeat the very purpose of the Act. The Commission or the Forum in the Act is thus entitled to award not only value of the goods or services but also to compensate a consumer for injustice suffered by him.

* * *

“10. Who should pay the amount determined by the Commission for harassment and agony, the statutory authority or should it be realised from those who were responsible for it? Compensation as explained includes both the just equivalent for loss of goods or services and

also for sufferance of injustice. For instance in Civil Appeal No.... of 1993 arising out of SLP (Civil) No. 659 of 1991 the Commission directed the Bangalore Development Authority to pay Rs 2446 to the consumer for the expenses incurred by him in getting the lease-cum-sale agreement registered as it was additional expenditure for alternative site allotted to him. No misfeasance was found. The moment the authority came to know of the mistake committed by it, it took immediate action by allotting alternative site to the Respondent. It was compensation for exact loss suffered by the Respondent. It arose in due discharge of duties. For such acts or omissions the loss suffered has to be made good by the authority itself. But when the sufferance is due to mala fide or oppressive or capricious acts etc. of a public servant, then the nature of liability changes. The Commission under the Act could determine such amount if in its opinion the consumer suffered injury due to what is called misfeasance of the officers by the English Courts. Even in England where award of exemplary or aggravated damages for insult etc. to a person has now been held to be punitive, exception has been carved out if the injury is due to, 'oppressive, arbitrary or unconstitutional action by servants of the Government' (*Salmond and Heuston on the Law of Torts*). Misfeasance in public office is explained by Wade in his book on *Administrative Law* thus:

> 'Even where there is no ministerial duty as above, and even where no recognised tort such as trespass, nuisance, or negligence is committed, public authorities or officers may be liable in damages for malicious, deliberate or

> injurious wrong-doing. There is thus a tort which has been called misfeasance in public office, and which includes malicious abuse of power, deliberate maladministration, and perhaps also other unlawful acts causing injury.' (p. 777)

The jurisdiction and power of the courts to indemnify a citizen for injury suffered due to abuse of power by public authorities is founded as observed by Lord Hailsham in *Cassell and Co. Limited v. Broome [1972 AC 1027:1972) 2 WLR 645:(1972) 1 ALL ER 801 (HL)]*, on the principle that, 'an award of exemplary damages can serve a useful purpose in vindicating the strength of law'. An ordinary citizen or a common man is hardly equipped to match the might of the State or its instrumentalities. That is provided by the rule of law. It acts as a check on arbitrary and capricious exercise of power. In *Rookes v. Barnard [1964 AC 1129:(1964) 2 WLR 269 : (1964) 1 ALL ER 367 (HL)* it was observed by Lord Devlin, 'the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service'. A public functionary if he acts maliciously or oppressively and the exercise of power results in harassment and agony then it is not an exercise of power but its abuse. No law provides protection against it. He who is responsible for it must suffer it. Compensation or damage as explained earlier may arise even when the officer discharges his duty honestly and bona fide. *But when it arises due to arbitrary or capricious behaviour then it loses its individual character and assumes social significance. Harassment of a common man by public authorities is socially abhorring and legally impermissible. It may harm him personally but the*

injury to society is far more grievous. Crime and corruption thrive and prosper in the society due to lack of public resistance. Nothing is more damaging than the feeling of helplessness. An ordinary citizen instead of complaining and fighting succumbs to the pressure of undesirable functioning in offices instead of standing against it. Therefore the award of compensation for harassment by public authorities not only compensates the individual, satisfies him personally but helps in curing social evil. It may result in improving the work culture and help in changing the outlook. Wade in his book *Administrative Law* has observed that it is to the credit of public authorities that there are simply few reported English decisions on this form of malpractice, namely, misfeasance in public offices which includes malicious use of power, deliberate maladministration and perhaps also other unlawful acts causing injury. *One of the reasons for this appears to be development of law which, apart, from other factors succeeded in keeping a salutary check on the functioning in the government or semi-government offices by holding the officers personally responsible for their capricious or even ultra vires action resulting in injury or loss to a citizen by awarding damages against them.* Various decisions rendered from time to time have been referred to by Wade on *Misfeasance by Public Authorities.* We shall refer to some of them to demonstrate how necessary it is for our society. In *Ashby v. White [(1703) 2 LD Raym 938 : 92 ER 126]*, the House of Lords invoked the principle of *ubi jus ibi remedium* in favour of an elector who was wrongfully prevented from voting and decreed the claim of damages. The ratio of this decision has been applied and extended by English Courts in various situations.

11. Today the issue thus is not only of award of

compensation but who should bear the brunt. *The concept of authority and power exercised by public functionaries has many dimensions. It has undergone tremendous change with passage of time and change in socio-economic outlook. The authority empowered to function under a statute while exercising power discharges public duty. It has to act to subserve general welfare and common good. In discharging this duty honestly and bona fide, loss may accrue to any person. And he may claim compensation which may in circumstances be payable. But where the duty is performed capriciously or the exercise of power results in harassment and agony then the responsibility to pay the loss determined should be whose? In a modern society no authority can arrogate to itself the power to act in a manner which is arbitrary. It is unfortunate that matters which require immediate attention linger on and the man in the street is made to run from one end to other with no result. The culture of window clearance appears to be totally dead. Even in ordinary matters a common man who has neither the political backing nor the financial strength to match the inaction in public oriented departments gets frustrated and it erodes the credibility in the system. Public administration, no doubt involves a vast amount of administrative discretion which shields the action of administrative authority. But where it is found that exercise of discretion was mala fide and the complainant is entitled to compensation for mental and physical harassment then the officer can no more claim to be under protective cover.* When a citizen seeks to recover compensation from a public authority in respect of injuries suffered by him for capricious exercise of power and the National Commission finds it duly proved then it has a statutory obligation to award the same. It was never more necessary than today

when even social obligations are regulated by grant of statutory powers. *The test of permissive form of grant is over. It is now imperative and implicit in the exercise of power that it should be for the sake of society. When the court directs payment of damages or compensation against the State the ultimate sufferer is the common man. It is the tax payers' money which is paid for inaction of those who are entrusted under the Act to discharge their duties in accordance with law.* It is, therefore, necessary that the Commission when it is satisfied that a complainant is entitled to compensation for harassment or mental agony or oppression, which finding of course should be recorded carefully on material and convincing circumstances and not lightly, then it should further direct the department concerned to pay the amount to the complainant from the public fund immediately but to recover the same from those who are found responsible for such unpardonable behaviour by dividing it proportionately where there are more than one functionaries."

(emphasis supplied)"

"172. The judgment in LDA case [*LDA vs. M.K. Gupta, (1994) 1 SCC 243*] brings out the foundational principle of executive governance. The said foundational principle is based on the realization that sovereignty vests in the people. The judgment therefore records that every limb of the constitutional machinery is obliged to be people oriented. The fundamental principle brought out by the judgment is, that a public authority exercising public power discharges a public duty, and therefore, has to subserve general welfare and common good. All power should be exercised for the sake of society. The issue which was the subject matter of consideration, and has been noticed along with the citation, was decided by concluding

> that compensation shall be payable by the State (or its instrumentality) where inappropriate deprivation on account of improper exercise of discretion has resulted in a loss, compensation is payable by the State (or its instrumentality). But where the public functionary exercises his discretion capriciously, or for considerations which are malafide, the public functionary himself must shoulder the burden of compensation held as payable. The reason for shifting the onus to the public functionary deserves notice. This Court felt, that when a court directs payment of damages or compensation against the State, the ultimate sufferer is the common man, because it is tax payers money out of which damages and costs are paid."

Similarly, in para 184 of the said Judgment of the Apex Court, the point of accountability of every holding of public office to the people has been reiterated. The Apex Court, thereafter, in paragraphs 96 to 107 has traced the evolution of the right to equality under Article 14. Para 184 and paras 96 to 107 of the said judgment read as under.

> "184. Another aspect which emerges from the judgments (extracted in paragraph 6 above) is that, the State, its instrumentalities and their functionaries, while exercising their executive power in matters of trade or business etc. including making of contracts, should be mindful of public interest, public purpose and public good. This is so, because every holder of public office by virtue of which he acts on behalf of the State, or its instrumentalities, is ultimately accountable to the people in whom

sovereignty vests. As such, all powers vested in the State are meant to be exercised for public good and in public interest. Therefore, the question of unfettered discretion in an executive authority, just does not arise. The fetters on discretion are - a clear, transparent and objective criteria or procedure which promotes public interest, public purpose and public good. A public authority is ordained, therefore to act, reasonably and in good faith and upon lawful and relevant grounds of public interest."

"***Mandate of Article 14***

96. Article 14 runs as follows:

"**14. Equality before law.** - The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

The underlying object of Article 14 is to secure to all persons, citizens or non-citizens, the equality of status and opportunity referred to in the preamble to our Constitution. The language of Article 14 is couched in negative terms and is in form, an admonition addressed to the State. It does not directly purport to confer any right on any person as some of the other Articles, e.g., Article 19, do. The right to equality before law is secured from all legislative and executive tyranny by way of discrimination since the language of Article 14 uses the word "State" which as per Article 12, includes the executive organ. [See: *Basheshar Nath v. CIT [*AIR 1959 SC 149, p.158 para 13: 1959 Supp (1) SCR 528]) Besides, Article 14 is expressed in absolute terms and its effect is not curtailed by

restrictions like those imposed on Article 19(1) by Articles 19(2)-(6). However, notwithstanding the absence of such restrictions, certain tests have been devised through judicial decisions to test if Article 14 has been violated or not.

97. For the first couple of decades after the establishment of this Court, the 'classification' test was adopted which allowed for a classification between entities as long as it was based on an intelligible differentia and displayed a rational nexus with the ultimate objective of the policy. *Budhan Choudhry and Ors. v. State of Bihar* [AIR 1955 SC 191 : 1955 Cri LJ 374 referred to in *Ram Krishna Dalmiya v. Shri Justice S.R. Tendolkar and Ors.* [AIR 1958 SC 538 : (1959) SCR 279] explained it in the following terms (*Budhan Chaudhari case* [AIR 1955 SC 191 : 1955 Cri LJ 374] AIR p. 193, para 5):

> "5.... It is now well established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and, (ii) that that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases, namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established by the decisions of this

> Court that Article 14 condemns discrimination not only by a substantive law but also by a law of procedure."

"98. However, after the judgment of this Court in *E.P. Royappa v. State pf T.N.*[(1974) 4 SCC 3 :1974 SCC (L&S) 165] the "arbitrariness" doctrine was introduced which dropped a pedantic approach towards equality and held the mere existence of arbitrariness as violative of Article 14, however equal in its treatment. Bhagwati, J. (as his Lordship was then) articulated the dynamic nature of equality and borrowing from Shakespeare's *Macbeth*, said that the concept must not be "cribbed, cabined and confined" within doctrinaire limits.(SCC p.38, para 85)

> "85. ...Now, what is the content and reach of this great equalising principle? It is a founding faith, to use the words of Bose. J., "a way of life", and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be 'cribbed, cabined and confined' within traditional and doctrinaire limits."

His Lordship went on to explain the length and breadth of Article 14 in the following lucid words (*Royappa case [(1974) 4 SCC 3 :1974 SCC (L & S) 165] SCC p.38, para 85)*

> "85... From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality

and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it effects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount to mala fide exercise of power and that is hit by Articles 14 and 16. Mala fide exercise of power and arbitrariness are different lethal radiations emanating from the same vice: in fact the latter comprehends the former. Both are inhibited by Articles 14 and 16.

99. Building upon his opinion delivered in *Royappa case [E.P. Royappa v. State of T.N., (1974) 4 SCC 3 : 1974 SCC (L&S) 165]*, Bhagwati, J., held in *Maneka Gandhi v. Union of India [*(1978) 1 SCC 248]: (Maneka Gandhi case [1978 1 SCC 248], SCC p.284, para 7)

> "7. ... The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding

> omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive."

"100. *In Ajay Hasia and Ors. v. Khalid Mujib Sehravardi* [(1981) 1 SCC 722:1981 SCC (L&S) 258], this Court said that the "arbitrariness" test was lying "latent and submerged" in the "simple but pregnant" form of Article 14 and explained the switch from the "classification" doctrine to the "arbitrariness" doctrine in the following words: (SCC p.741, para 16)

> *"16*...The doctrine of classification which is evolved by the courts is not paraphrase of Article 14 nor is it the objective and end of that article. It is merely a judicial formula for determining whether the legislative or executive action in question is arbitrary and therefore constituting denial of equality. If the classification is not reasonable and does not satisfy the two conditions referred to above, the impugned legislative or executive action would plainly be arbitrary and the guarantee of equality under Article 14 would be breached. Wherever therefore there is arbitrariness in State action whether it be of the legislature or of the executive or of an 'authority' under Article 12, Article 14 immediately springs into action and strikes down such State action. In fact, the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution."

"101. *Ramana Dayaram Shetty v. International*

Airport Authority of India [(1979) 3 SCC 489 : AIR 1979 SC 1628] explained the limitations of Article 14 on the functioning of the Government as follows: (SCC p. 506, para 12)

> *"12*. ...It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largesse, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norms which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largesse including award of jobs, contracts, quotas, licences, etc. must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory."

> "102. Equality and arbitrariness were thus, declared "sworn enemies" and it was held that an arbitrary act would fall foul of the right to equality. Non-arbitrariness was equated with the rule of law about which Jeffrey Jowell in his seminal article "The Rule of Law Today" said: -

> "Rule of law principle primarily applies to the power of implementation. It mainly represents

a state of *procedural fairness*. When the rule of law is ignored by an official it may on occasion be enforced by courts."

"103. As is evident from the above, the expressions "arbitrariness" and "unreasonableness" have been used interchangeably and in fact, one has been defined in terms of the other. More recently, in *Sharma Transport v. Government of A.P.[*(2002) 2 SCC 188], this Court has observed thus: (SCC pp. 203-04, para 25)

"*25*. ...In order to be described as arbitrary, it must be shown that it was not reasonable and manifestly arbitrary. The expression 'arbitrarily' means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone."

104. Further, even though the "classification" doctrine was never overruled, it has found less favour with this Court as compared to the "arbitrariness" doctrine. In *Om Kumar v. Union of India* [(2001) 2 SCC 386: 2001 SCC (L&S) 1039], this Court held thus: (SCC p.409, para 59)

"*59*. But, in *E.P. Royappa v. State of T. N.(1974) 4 SCC 3 : 1974 SCC (L&S) 165]* Bhagwati, J. laid down another test for purposes of Article 14. It was stated that if the administrative action was 'arbitrary', it could be struck down under Article 14. This principle is now uniformly followed in

all courts more rigorously than the one based on classification. Arbitrary action by the administrator is described as one that is irrational and not based on sound reason. It is also described as one that is unreasonable."

"105. However, this Court has also alerted against the arbitrary use of the "arbitrariness" doctrine. Typically, laws are struck down for violating Part III of the Constitution of India, legislative incompetence or excessive delegation. However, since Royappa case [(1974) 4 SCC 3: 1974 SCC (L&S) 165], the doctrine has been loosely applied. This Court in *State of A.P. v. McDowell and Co.*[(1996) 3 SCC 709] stressed on the need for an objective and scientific analysis of arbitrariness, especially while striking down legislations. Jeevan Reddy, J. observed: (SCC pp. 737-38, para 43)

"*43*. ...The power of Parliament or for that matter, the State Legislatures is restricted in two ways. A law made by Parliament or the legislature can be struck down by courts on two grounds and two grounds alone, viz., (1) lack of legislative competence and (2) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision. There is no third ground. We do not wish to enter into a discussion of the concepts of procedural unreasonableness and substantive unreasonableness - concepts inspired by the decisions of United States Supreme Court. Even in U.S.A., these concepts and in particular the concept of substantive due process have proved to be of unending controversy, the latest thinking tending towards a severe

curtailment of this ground (substantive due process). The main criticism against the ground of substantive due process being that it seeks to set up the courts as arbiters of the wisdom of the legislature in enacting the particular piece of legislation. It is enough for us to say that by whatever name it is characterised, the ground of invalidation must fall within the four corners of the two grounds mentioned above. In other words, say, if an enactment is challenged as violative of Article 14, it can be struck down only if it is found that it is violative of the equality clause/equal protection clause enshrined therein. Similarly, if an enactment is challenged as violative of any of the fundamental rights guaranteed by clauses (a) to (g) of Article 19(1), it can be struck down only if it is found not saved by any of the clauses (s) to (6) of Article 19 and so on. No enactment can be struck down by just saying that it is arbitrary [*An expression used widely and rather indiscriminately - an expression of inherently imprecise import. The extensive use of this expression in India reminds one of what Frankfurter, J. said in* Tiller v. Atlantic Coast Line Railroad Co*. 87 L Ed 610 : 318 US 54 (1943) (L Ed p. 618). "The phrase begins life as a literary expression; its felicity leads to its lazy repetition and repetition soon establishes it as a legal formula, undiscriminatingly used to express different and sometimes contradictory ideas", said the learned Judge.]* or unreasonable. Some or other constitutional infirmity has to be found before invalidating an Act. An enactment cannot be struck down on the ground that court thinks it unjustified. Parliament and the legislatures, composed as they are of the representatives of the people, are supposed to know and be aware of the needs of the people and what is good and bad for them. The court cannot sit in judgment over their wisdom. In this connection,

it should be remembered that even in the case of administrative action, the scope of judicial review is limited to three grounds, viz., (i) unreasonableness, which can more appropriately be called irrationality, (ii) illegality and (iii) procedural impropriety (see *Council of Civil Service Unions v. Minister for Civil Service* [1985 AC 374 : (1984) 3 WLR 1174 : (1984) 3 All ER 935 (HL)] which decision has been accepted by this Court as well)."

"106. Therefore, ever since the Royappa *[E.P. Royappa v. State of T.N. (1974) 4 SCCC 3 : 1974 SCC (L&S) 165]* era, the conception of "arbitrariness" has not undergone any significant change. Some decisions have commented on the doctrinal looseness of the arbitrariness test and tried keeping its folds within permissible boundaries. For instance, cases where legislation or rules have been struck down as being arbitrary in the sense of being unreasonable [See: *Air India v. Nergesh Meerza* [(1981) 4 SCC 335 : 1981 SCC (L&S) 599] (SCC at pp. 372-373)] only on the basis of "arbitrariness", as explained above, have been doubted in McDowell's case [(1996) 3 SCC 709] But otherwise, the subject matter, content and tests for checking violation of Article 14 have remained, more or less, unaltered.

"107. From a scrutiny of the trend of decisions it is clearly perceivable that the action of the State, whether it relates to distribution of largesse, grant of contracts or allotment of land, is to be tested on the touchstone of Article 14 of the Constitution. A law may not be struck down for being arbitrary without the pointing out of a constitutional infirmity as McDowell's case [State

> of A.P. vs. McDowell & Co., (1996) 3 SCC 709] has said. Therefore, a State action has to be tested for constitutional infirmities qua Article 14 of the Constitution. The action has to be fair, reasonable, non-discriminatory, transparent, non-capricious, unbiased, without favouritism or nepotism, in pursuit of promotion of healthy competition and equitable treatment. It should conform to the norms which are rational, informed with reasons and guided by public interest, etc. All these principles are inherent in the fundamental conception of Article 14. This is the mandate of Article 14 of the Constitution of India."

98. Keeping all the observations of the Apex Court in the said case and other judgments in view, we will have to examine whether action of Respondent Nos. 1 to 4 is arbitrary capricious and violative of Article 14 and 19 of the Constitution of India.

99. Again, it will be necessary to briefly examine the facts of this case in order to see whether the impugned order is arbitrary in the facts of this case. We have already held that the mandatory provision for analysing sample as laid down under section 47 and the Regulations framed thereunder has not been followed by Respondent Nos. 1 to 4. We have considered those questions at length and we do not propose therefore to again repeat the said reasons. Secondly, it is an admitted position that on 04/06/2015, the Petitioner had given press release, stating therein that though its product

was safe, in view of what had happened the Petitioner – Company was stopping the production, distribution and sale etc of all 9 variants of Maggi before the Petitioner – Company clears the misunderstanding. On 05/06/2015, the impugned order at Exhibit-A was passed by Respondent No.2 – Food Authority imposing a complete ban on production, sale, distribution etc of Petitioner's product Maggi Noodles throughout India. In the said impugned order, three reasons were given viz (i) that lead in excess of the prescribed standard was found in the product of the Petitioner – Company, (ii) the product was misbranded because though it was stated on the packet there was “No added MSG”, MSG was found in the product of the Petitioner and (iii) one of the 9 variants viz. MAGGI Vegetable Atta Noodles was manufactured and sold without seeking product approval. Similar order was passed by Respondent No.4 on 06/06/2015 which is at Exhibit-B and Respondent No.4 had stated in the order that in view of the directions given by Respondent No.2 the impugned order was passed and over and above that in view of the analysis of food samples which were tested in laboratories at Pune, Respondent No.4 was satisfied that lead was found in excess of the statutory limit and on personal satisfaction also, the impugned order was issued.

100. In our view the impugned order (Exhibit-A) is liable to be set aside because-

(i) It has been passed in an arbitrary manner. There is lack of transparency. It is unreasonable.

(ii) It has been passed in utter violation of principles of natural justice since no material on the basis of which the said order was passed was given to the Petitioner as is discussed hereinabove by us while deciding Issue No. (VI).

(iii) The samples of the product of the Petitioner have not been analysed as per the mandatory provision viz. Section 47(1) and Regulations framed thereunder, which has been elaborately discused by us while dealing with Issue Nos. (VIII) to (XI)

(iv) The procedure which was followed by Respondent Nos. 1 to 4 was not fair and transparent. As observed by the Apex Court in Natural Resources Allocation (supra), the State action in order to escape the wrath of Article 14 has to be fair, reasonable, non-discriminatory, transparent, non-capricious, unbiased, without favouritism or nepotism, in pursuit of promotion of healty competition and equitable treatment and State action must conform to norms which are

rational, informed with reasons and guided by public interest.

101. Though Respondents have been shouting from roof top that their action was in public interest as they found that the food which was contaminated by lead beyond permissible limit was unsafe for human consumption, they promptly swung into action and banned the product. The said tall claim has not been substantiated by them before us. Merely stating that the food was unsafe or that the action was in public interest is not sufficient as is observed by the Apex Court in *Godawat Pan Masala Products I.P. Ltd vs. Union of India and Others*[1]. The Apex Court in the said case has observed in para 61, 68 and 77.5 as under:-

> "61. We are unable to accept that the words "in the interest of public health" used in Clause (iv) of Section 7 of the Act can operate as an incantation or *mantra* to get over all the constitutional difficulties posited. In any event, the collocation of the words in the statutory scheme suggests not a matter of policy, but a matter of implementation of policy. For this reason also, we are of the view that the impugned notification must fail."

> *"Paradoxical consequence:*
>
> 68. There is yet another reason why we are inclined to take the view that Section 7(iv) deals with a situation of emergency with respect to

1 (2004) 7 SCC 68

the local area. A decision for banning an article of food or an article containing any ingredient of food injurious to health can only arise as a result of broadly considered policy. If such a power be conceded in favour of a local authority like the Food (Health) Authority, paradoxical results would arise. The same article could be considered injurious to public health in one local area, but not so in another. In our view, the construction of the provision of the statute must not be such as to result in such absurd or paradoxical consequences. Hence, for this reason also, we are of the view that the power of the State (Health) Authority is a limited power to be exercised locally for temporary duration."

"Conclusion:

77. As a result of the discussions, we are of the view that:

1. ...
2. ...
3. ...
4. ...

5. The state Food (Health) Authority has no power to prohibit the manufacture for sale, storage, sale or distribution of any article, whether used as an article or adjunct thereto or not used as food. Such a power can only arise as a result of wider policy decision and emanate from Parliamentary legislation or, at least, by exercise of the powers by the Central Government by framing rules under Section 23 of the Act;

6.....
7.....
8....."

102. Respondents had not undertaken any investigation for carrying out the risk analysis to decide that the product of the Petitioner was unsafe for human consumption as was done in *Dhariwal Industries Ltd and another vs. State of Maharashtra and others*[1]. The Division Bench of this Court in the said case observed in paras 5 and 6 as under:-

> "5. Affidavits in reply have been filed by Mr. Kamlesh V. Sankhe, Joint Commissioner (Food) at Food and Drugs Administration, Government of Maharashtra justifying the impugned order and submitting that the said order is in conformity with the provisions of the Food Safety Act and 2011 Regulations made thereunder. Reference is made to the reports submitted by Tata Institute of Fundamental Research and other organizations indicating the harmful effects of consumption of gutka and pan masala, the widespread prevalence of consumption of gutka and pan masala in the State of Maharashtra and that out of about 1200 samples of gutka and pan masala collected by the authorities in the State of Maharashtra in the years 2003-2011, 98% of gutka and pan masala were found to be contravening the provisions of the Prevention of Food Adulteration Rules and the 2011 Regulations as they were found to be containing prohibited ingredients like Magnesium carbonate, tobacco or nicotine."
>
> "6. Action Council Against Tobacco, India, having as its members, Professors of Medicine and Professors of Oncology of Tata Memorial Hospital and other hospitals has been permitted to intervene. The affidavits dated 10 August 2012 and 23 August 2012 have also been filed on behalf of the intervenor placing on record substantial material including the following:-

1 2013(1) Mh.L.J. 461

i) Global Adult Tobacco Survey Factsheet (2009-2010)
ii) Short report of World Health Organization framework convention on Tobacco Control
iii) Economics of Tobacco in India by Voluntary Health.
iv) Article on Cancer Mortality in India
v) World Health Organisation's Monographs on evaluation of carcinogenic risks to humans
vi) Review of Areca nut and tobacco use in Pacific- A technical report
vii) Evidence assessment by National Institute of Health and Family Welfare and several other reports.

Reports of National Institute of Health and Family Welfare making assessment about the contents of gutka, pan masala and other similar articles manufactured in India. These reports were submitted by the National Institute of Health and Family Welfare pursuant to the Supreme Court order dated 7 December 2010 in SLP No. 16308 of 2007 (Ankur gutka v. Indian Asthma Care Society & ors.)"

103. Apart from that, the most important aspect is that the Respondents were aware that the Petitioner had recalled the its product on 04/06/2015 and the press release to that effect was given by the Petitioner and under these circumstances it was not necessary to impose ban all over India and proper opportunity ought to have been given to the Petitioner to clear the misunderstanding or find out the correct position regarding safety of its product. Action of the State of not supplying the material on the basis of which the action was taken and not giving a personal hearing to the Petitioner and issuing an order of ban when Petitioner itself had withdrawn the product clearly falls within the four

corners of arbitrariness and is therefore violative of Article 14 and 19 of the Constitution of India. In fact, the entire sequence culminating in imposition of ban on 05/06/2015 by Respondent No.2 shows that there is something more that what meets the eye which has resulted in passing the impunged orders by Respondent Nos. 2 and 4.

104. The Apex Court has held that procedure of sampling is mandatory in the case of Pepsico (supra) Though the said judgment was passed under the Prevention of Food Adulteration Act, 1954, the provisions under the repealed Prevention of Food Adulteration Act, 1954 and FSS Act, 2006 are almost identical and, therefore, observations of the Apex Court in the said case are squarely applicable even to the provisions under the FSS Act, 2006.

105. One other aspect which needs to be mentioned here is that during the course of arguments, Mr. Mehmood Pracha, the learned Counsel for Respondent No.2 produced various articles/links which were downloaded from “Google” on inter-net and it was urged that reputation of the Petitioner – Company was not good in other countries as well. The said material was produced across the bar and though it was pointed out to him that these allegations were not made by the Respondents either in their reply or sur-rejoinder, it was submitted that these articles are available on the inter-net.

In his written arguments, he has given various links in which similar allegations have been made against the Petitioner. We do not wish to say anything about correctness or otherwise of the said allegations since no opportunity was given to the Petitioner to refute the same but the fact remains that from the said submissions which are made by the learned Counsel for Respondent No.2, it appears that Respondent No.2 is also influenced by extraneous considerations such as the material which has been placed before us which is not reflected in the reasons which are given in the impugned order. The order at Exhibit-A therefore will have to be quashed on this ground also.

106. For the same reasons the order passed by Respondent No.4 which is at Exhibit-B also will have to be held to be arbitrary and capricious and violative of Article 14 and 19 of the Constitution of India.

107. What is most shocking is that though the samples of only three variants of the Maggi Noodles were taken all 9 variants of Maggi Noodles have been banned. Remaining six therefore have been banned only because lead was alleged to be found in excess of the permissible limit in other three and even without testing the said six Maggi variants, the order of ban has been imposed. This is one other incident of highhandedness and arbitrariness and there was no plausible

explanation given in the impugned orders or even before us for such an action.

108. It has also to be seen that so far as second ground for imposing ban is concerned, it is stated in the impugned order (Exhibit-A) that the product was misbranded since it was mentioned on the packet of the product of the Petitioner that there was “No added MSG” and the “MSG” was found. There is no material on record to substantiate the same. It is not the case of the Respondents that the Petitioner had added “MSG” though the Petitioner had declared that there was no added MSG. Secondly, it is an admitted position that the Glucomate is even otherwise found in its natural form in certain types of foods. Thirdly, the Petitioner had agreed that it would remove the declaration from the packet that there was “No added MSG”. Fourthly, the maximum penalty for misbranding of product even in criminal prosecution as laid down under section 52 of the Act is to the extent of Rs 3 lakhs. Misbranding of the product, therefore, could not be a ground for banning the product indefinitely.

109. Lastly, the third ground which has been mentioned is that one of the Maggi Variants viz. MAGGI Vegetable Atta Noodles were not approved by the Food Authority and the product approval was not obtained. The Petitioner in its Petition has stated that it had applied for product approval after the order

of stay granted by the High Court in Vital Nutraceuticals & Ors vs. Union of India & Ors was stayed by the Apex Court. Respondents have merely stated in view of non-compliance of objections, the file was closed. The Respondents, firstly, could have asked the Petitioners not to produce, or sell the said variant. There was no reason to ban all other Nine Maggi Variants and, secondly, it was the duty of the Respondents to inform the Petitioner as to how the requirements were not complied with so that they could have complied with the requirements.

110. Additionally, it is an admitted position that the product approval in respect of 8 products was granted by the Respondents. Viewed from any angle therefore we have no hesitation in coming to the conclusion that the action of Respondents in passing the impugned orders at Exhibit-A and Exhibit-B is violative of Articles 14 and 19 of the Constitution of India and the said orders at Exhibit-A and Exhibit-B will have to be set aside. **Issue No.(XII)** is therefore answered **in the affirmative.**

111 For the reasons stated hereinabove, the issues framed hereinabove are answered as under:-

ISSUES	FINDINGS
(I) Whether the Writ Petition filed by the Petitioner – Company under Article 226 of the Constitution of India is maintainable, particularly when the impugned orders, according to the Respondents, are show cause notices and that the Petitioner has an alternative remedy of filing an appeal under section 46(4) of the Act?	In the affirmative.
(II) Whether there was suppression of fact on the part of the Petitioner and whether the Petitioner had made an attempt to destroy the evidence disentitling the Petitioner from claiming any relief from this Court?	In the negative.
(III) Whether Respondent No.2 could impose a ban on the ground that the lead found in the product of the Petitioner was beyond what the Petitioner had represented in its application for product approval, though it was below the maximum permissible limit laid down under the Regulations?	In the negative.

ISSUES	FINDINGS
(IV) Whether the Food Authority had an unfettered discretion to decide what are the standards which have to be maintained by the manufacturers of proprietary food and whether in respect of the proprietary food, the Food Authority was not bound by the permissible limits of additives and contaminants mentioned in the Regulations and the Schedules appended thereto?	In the negative.
(V) Whether in view of the provisions of Section 22, there was a complete ban on the manufacture of sale and products mentioned in the said section?	Does not arise
(VI) Whether there is violation of principles of natural justice on the part of Respondent Nos. 1 to 4 on account of the impugned orders being passed without issuance of show cause notice and without giving the Petitioner an opportunity to explain the discrepancy pointed out by the Food Authority in respect of the product of the Petitioner?	In the affirmative

ISSUES	FINDINGS
(VII) What is the source of power under which the impugned orders were passed and whether such orders could have been passed under sections 10(5), 16(1), 16(5), 18, 22, 26, 28 and 29 of the Act?	Either section 30 or section 34 of FSS Act, 2006 but in any case such orders could not have been passed under sections 10(5), 16(1), 16(5), 18, 22, 26, 28 and 29 of the Act?
(VIII) Whether the analysis of the product manufactured by the Petitioner could have been made in the Laboratories in which the said product was tested by the Food Authority and whether these Laboratories are accredited Laboratories by the NABL and whether the reports submitted by these Laboratories can be relied upon.	In the negative.
(IX) Whether reliance can be placed on the reports obtained by the Petitioner from its Laboratory and other accredited Laboratories?	In the negative

ISSUES	FINDINGS
(XI) Whether it was established by the Food Authority that the lead beyond the permissible limit was found in the product of the Petitioner and the product of the Petitioner was misbranded on account of a declaration made by the Petitioner that the product contained “no added MSG”?	In the negative
(XII) Whether Respondent Nos. 2 to 4 were not justified in imposing the ban on all the 9 Variants of the Petitioner, though tests were conducted only in respect of 3 Variants and whether such ban orders are arbitrary, unreasonable and violative of Article 14 and 19 of the Constitution of India?	In the affirmative.

112. Accordingly the following order is passed:

FINAL ORDER:

113. During the course of arguments, we asked Mr. Iqbal Chagla, the learned Senior Counsel appearing on behalf of the Petitioner whether irrespective of the final outcome of

the Petition, whether Petitioner would continue to abide by the statement made by the Petitioner on 04/06/2015 for such time till the samples which were preserved by them could be tested in Food Laboratories mutually accepted by the Petitioner and the Respondents and he had answered in the affirmative. On the other hand, Mr. Darius Khambatta, the learned Senior Counsel appearing on behalf of Respondent Nos. 3 and 4 submitted that the food samples which were in their possession should be tested in an accredited Food Laboratory and not the samples which were in possession of the Petitioner. The learned Senior Counsel Mr. Chagla appearing for the Petitioner, however, submitted that the authenticity of the samples which were with the Food Authority was in doubt and similar statement was made by the learned Counsels appearing for the Respondents regarding authenticity of the samples which were in possession of the Petitioner. While making the said suggestion, we had pointed out that this Court was concerned about public health and manufacture and sale of safe and wholesome food to the people of India. Mr. Chagla, learned Senior Counsel for the Petitioner accepted the suggestion made by this Court. However, the Respondents did not accept the suggestion made by this Court and, therefore, we are constrained to give directions for testing of food samples which have been preserved by the Petitioner pursuant to the directions given by Respondent No.2 which

can be seen from the minutes of the meeting held between the representatives of the Petitioner and Respondent No.2.

114. Though, we have allowed the Petition and set aside the impugned orders, for the reasons mentioned hereinabove, we are still concerned about public health and public interest and therefore we are of the view that before allowing the Petitioner to manufacture and sell its product, Petitioner should send the 5 samples of each batch which are in their possession to three Food Laboratories accredited and recognized by NABL as per the provisions of section 3(p) and section 43 of the Act and which are as under:-

(1) Vimta Lab, Plot No.5, Alexandria Knowledge Park, Genome Valley, Shameerpet, Hyderabad-500078, Andhra Pradesh.

(2) Punjab Biotechnology Incubator, Agri & Food Testing Laboratory, SCO:7-8, Top Floor, Phase-5, SAS Nagar, Mohali-60 059.

(3) CEG Test House and Research Centre Private Limited, B-11(G), Malviya Industrial Area, Jaipur-17.

These samples shall be tested and analysed by these three Laboratories. The sampling process should be undertaken as per the provisions of section 47(1) and other relevant

provisions of the Act and Regulations framed thereunder. If the results show that lead in these samples is within the permissible limit then the Petitioner would be permitted to start its manufacturing process. However, even newly manufactured products of all the other Variants be tested in these three laboratories and if level of lead in these newly manufactured products is also within the permissible limit then the Petitioner – Company may be permitted to sell its products.

115 The contention of the Respondents that the 4th sample which is in their possession should also be tested cannot be accepted. We have already discussed the reason why we feel that procedure of sampling was not under taken as per the provisions of section 47(1) of the Act and the Regulations framed thereunder and therefore we feel that it would be an exercise in futility if the 4th sample is now permitted to be analysed.

SUMMARY:

116 Nestle (India) challenged the nationwide ban imposed by the Food Authority on its popular product Maggi Instant Noodles.

117. The Food Authority and Commissioner of Pune claimed that in public interest and to ensure food safety, the impugned orders were passed after the Food Laboratory Reports indicated the presence of lead in excess of the permissible limits and MSG being found in the product against the declaration of the Petitioner that there was “No added MSG” in the product.

118. After examining the rival contentions in great detail, we have come to the conclusion that -

(a) Principles of natural justice have not been followed before passing the impugned orders and on that ground alone the impugned orders are liable to be set aside, particularly when the Petitioner - Company, one day prior to the impugned orders, had given a Press Release that it had recalled the product till the authorities were satisfied about safety of its product.

(b) Secondly, we have held that the Food Laboratories where the samples were tested were not accredited and recognized Laboratories as provided under the Act and Regulations for testing presence of lead

and therefore no reliance could be placed on the said results.

(c) We have further held that the mandatory procedure which has to be followed as per Section 47(1) of the Act and Regulations framed thereunder, was not followed.

(d) The impugned orders are held to be arbitrary and violative of Articles 14, 19(1)(g) of the Constitution of India.

119. Although we are setting aside the impugned orders, in public interest and in order to give an opportunity to the Petitioner to satisfy the Food Authority, we have directed that five samples from each batch cases out of 750 may be tested in three laboratories mentioned hereinabove and if the lead is found within permissible limits then the Petitioner would be permitted to manufacture all the Variants of the Noodles for which product approval has been granted by the Food Authority. These in turn would be tested again in the said three Laboratories and if the lead is found within permissible limits then the Petitioner would be permitted to sell its product. The three laboratories shall follow the procedure laid down under section 47 of the Act

and Rules and Regulations framed thereunder.

120. Since the Petitioner – Company has already made a statement that it will delete the declaration made by it viz "No added MSG" on its product, no prejudice would be caused to the public at large and the allegation that product is misbranded also will not survive.

CONCLUSION:

121. Petition is accordingly disposed of in the aforesaid terms. Rule is made absolute in terms of prayer clause (a) and (b) along with what we have mentioned hereinabove.

122. We clarify that though in the judgment we have mentioned that the samples of 9 Variants of Maggi Noodles should be tested, we make it clear that the Variants which are available with the Petitioner may be tested. Those Variants which are not available with the Petitioner, they may be manufactured after positive report is given in respect of the Variants which are available. So far as "Maggi Oats Masala Noddles with Tastemaker" is concerned, the Petitioner will have to undergo the procedure of obtaining product approval and the Respondents may consider the application of the Petitioner again, after such an application is made within a period of 8 weeks from the date of making

of such application.

123. At this stage, Mr. Anil Singh, the learned Additional Solicitor General for Respondent No.1 and the learned Counsels for Respondent Nos. 2, 3 and 4 have submitted that the Judgment and Order passed by this Court may be stayed for a period of eight weeks.

124. In our view, since the Petitioner – Company has made a statement that it would not manufacture or sell the product, the question of granting stay to this Judgment and Order does not arise.

(B.P. COLABAWALLA, J.) **(V.M. KANADE, J.)**

bdp