

Judgment Sheet
IN THE LAHORE HIGH COURT AT LAHORE
JUDICIAL DEPARTMENT

WP No.25124 of 2015

Lung Fung Chinese Restaurant etc.

Versus

Punjab Food Authority etc.

J U D G M E N T

Date of Hearing	27.1.2017.
Petitioners By:	Mr. M. Irfan Khan Ghaznavi, Advocate.
Respondents By:	Mrs. Samia Khalid, AAG along with Muhammad Khurshid, Assistant Director (Legal), Punjab Food Authority, Lahore.

Ayesha A. Malik J: Through this Petition, the Petitioners have challenged the vires of Clause (c) and (ca) of Section 13(1), Sub Section 3, 4 of Section 40 and 52 of the Punjab Food Authority Act, 2011 (“**Act**”) being ultra vires of the Constitution of Islamic Republic of Pakistan, 1973 (“**Constitution**”).

The Case

2. The basic facts of the case are that Petitioner No.1 is a restaurant by the name of Lung Fung Chinese Restaurant located at 8-B, Kashmir Block, Lahore. On 8.8.2015 the Food Safety Officer (“**FSO**”), Respondent No.4 along with other officials entered into the premises of the Petitioner Restaurant and sealed it. The Restaurant was de-sealed on 17.8.2015 after the Petitioners removed the objections noted by Respondent No.4 at the time of sealing of the premises. The Petitioners are aggrieved by the act of sealing as carried out by the Respondents on the ground that it was done in contravention of the principles of natural justice and due process and that Section 13 of the Act is unconstitutional being against the principle of natural justice and due process. The Petitioners have also

challenged the constitutionality and legality of Sections 40 and 52 of the Act on the ground that Section 40 is against the doctrine of trichotomy of powers under the Constitution as it gives the executive the power to recommend the names of judges who will be working under the Act, which encroaches upon the independence of the judiciary. So far as Section 52 of the Act is concerned, the grievance of the Petitioners is that the stated Section is unconstitutional because it encourages efficiency on the basis of monetary benefits meaning thereby that it will encourage greed and wrong doing under the garb of receiving a reward from Punjab Food Authority (“PFA”). Section 52 of the Act is also challenged on the ground that it is discriminatory because it can be used in a discriminatory manner to oppress people in the business of food services.

The Arguments

3. Learned counsel for the Petitioners argued that the act of sealing was carried out without any notice to the Petitioners; without affording opportunity of hearing; and most importantly without any warning of the inspection or the consequence of sealing. Learned counsel argued that Section 13 of the Act violates Article 10-A of the Constitution whereby it is the fundamental right of every citizen to be heard, to be treated in accordance with law and due process. Learned counsel further submitted that at the time of sealing, the Petitioners should have been informed of the defects, if any, and in terms of Section 16 of the Act be served with an improvement notice. Thereafter they should have been given time to correct the wrong if any, before the oppressive act of sealing could materialize. In this case, he argued that the Respondents acted prematurely, in haste with malafide intent, infringing upon the fundamental right of due process thereby causing embarrassment and humiliation for the Petitioner Restaurant. Learned counsel argued that as soon as the act of sealing took place, information to this effect is placed on the social media and

an entire campaign commenced against the Restaurant and its owners. He further argued that this brings a bad name to the reputation of the Petitioners and the people involved in the industry, without giving them an opportunity to refute any of the allegations raised against them. Learned counsel further argued that regulations for sealing and de-sealing issued in 2016 are in excess of the power authorized under Section 13 of the Act and therefore is a case of excessive delegation of power to the Respondents. He clarified that at the time when the Petitioner Restaurant was sealed, there were no regulations in the field.

4. With respect to the challenge to Section 40 of the Act, learned counsel submitted that similar matters challenging the right of the Executive under the Constitution to nominate and appoint Judges to Tribunals is pending before a learned Full Bench of this Court. Therefore, the Petitioners may, if desire raise this issue before the learned Full Bench through a fresh petition and do not press the issue in the instant Petition. As to the reward offered under Section 52 of the Act, learned counsel argued that the Section propagates greed and foul play because on the basis of the reward offered by the PFA, Food Inspectors are encouraged to seal the restaurants and businesses in order to collect reward money. Learned counsel further argued that the provision will encourage colourful exercise of powers by the Respondents which will render the acts under the Section not only as discriminatory but also as oppressive. In support of his arguments, learned counsel has relied upon the cases titled Khawaja Ahmad Hassaan v. Government of Punjab and others (2005 SCMR 186), Messrs Pearl Continental Hotel, through Executive Manager, Khyber, Peshawar v. Government of N.W.F.P through Secretary Excise and Taxation of N.W.F.P, Peshawar and 3 others (PLD 2005 Peshawar 25), Mst. Afsana v. District Police Officer (Operation), Khairpur and

5 others (2007 YLR 1618) and Government of KPK and others v. Khalid Mehmood (2012 SCMR 619).

The Respondents' Case

5. Report and parawise comments have been filed by the PFA being Respondents No.1 to 4 as well as on behalf of Secretary Food Department, Government of Punjab being Respondent No.7. In terms of the report and parawise comments filed, a visit was made to the Petitioners' premises on 8.8.2015 and during the visit it transpired that the Restaurant's workers were not wearing caps; the washing area was dirty; stagnant water was present on kitchen floor; raw and cooked food was placed together in the freezer; and expired bread was found at the premises. Flies were also seen on the uncooked food. Consequently, Respondent No.4 sealed the premises under the provisions of Section 13 of the Act and issued sealing form (Form 18) wherein all the issues and reasons for sealing the Restaurant were informed to the Petitioners. The Petitioners removed all the objections, corrected the defects and thereby on another visit after checking the premises, the Restaurant was de-sealed on 17.8.2015.

The Arguments

6. Learned Law Officer argued that the PFA was established to protect public health and provide safe and healthy food to the public at large. Section 13(1)(c) of the Act empowers the FSO to enter or seal any premises if he believes that any food which is prepared, preserved or stored, is operating and maintaining itself in contravention to the requirements of the Act. Learned Law Officer further argued that the Petitioners do not deny any of the objections raised against the cleanliness and maintenance of food at the Restaurant but are aggrieved by the manner in which the act of sealing took place. She argued that as an emergent measure, in order to prevent imminent danger or injury to the public, the PFA can seal the premises without any notice at the time. She argued that the power of seizure and the

power of imposition of fine falls within the ambit of strict liability for which hearing and mens rea are not required. She further argued that the right to fair trial has not been denied or deprived to the Petitioners. This right is available to the Petitioners, however, the law empowers the FSO to take immediate action which power is not in derogation of Article 10-A of the Constitution.

7. So far as the argument that an improvement notice must be given before taking any action, she argued that the objective of the Act and the powers under Section 13 of the Act are to ensure that certain standards of cleanliness and health are maintained by persons providing services in the food sector to protect public health and safety. Therefore, she argued that there is no requirement of informing the Petitioner of the visit or to give the Petitioners an opportunity to explain why food was not being maintained in a proper and hygienic manner. She argued that there is no bar in the law preventing the FSO from carrying out such visits and in fact it is in furtherance of the mandate of the law that these actions are taken. So far as the grievance of the Petitioners that the matter is placed on Face Book and other social media, she explained that this has stopped and now the matter is totally regulated under the Sealing and De-sealing of Food Business Premises Regulations, 2016 (“**Regulations**”). So far as the objections to the reward given under Section 52 of the Act, she argued that it was lawful and in accordance with international best practices. Hence requests for dismissal of the Petition.

8. Heard and record perused.

The Law

9. The relevant law on the subject being the sections impugned before this Court are Section 13, 40 and 52 of the Act. And for ease of reference Section 16 of the Act regarding improvement notice is also relevant. These sections are reproduced below:-

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

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

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

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

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

(d) open and examine any package which, he believes, to contain any food;

(e) examine any book or documents with respect to any food and make copies of or take extracts from the book or document;

(f) demand the production of the identity card, the business registration certificate, licence or any other relevant document from a food operator;

(g) mark, seal or otherwise secure, weigh, count or measure any food or appliance; and

(h) search and seize any vehicle carrying food.

(2) A Food Safety Officer shall prepare a statement describing the food, apparatus, utensil or vehicle seized and shall deliver a copy of the statement to the person from whom it is seized or, if such person is not present, send such copy to him by mail.

(3) A person claiming back anything seized under sub-section (1) may, within seven days of the seizure, apply to the Court and the Court may confirm such seizure, wholly or in part, or may order that it be restored to the claimant.

(4) If the Court confirms the seizure of the food, apparatus or utensil, it shall be forfeited to the Food Authority or the Court may direct that such food, apparatus, utensil may be destroyed at the cost of the owner or person in whose possession it was found.

(5) If an application is not made within seven days under sub-section (3), the food, apparatus or utensil seized, shall be forfeited to the Food Authority.

(6) Any person may make an application in writing to the Food Safety Officer asking him to purchase a sample of any food from a food operator and get it analyzed from the public analyst.

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

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

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

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

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

52. **Reward by the Food Authority.** The Food Authority may, in the manner prescribed by the rules, make payment of reward from the Food Authority Fund to any person who has made an exceptional effort towards accomplishing the objective of this Act.

Decision

10. The basic question before the Court is whether the Respondents were required to issue notice to the Petitioners and provide an opportunity of hearing before exercising powers under Section 13(1)(c) of the Act. The PFA was established under Section 3 of the Act to provide for the safety and standards of food under the Act. Its powers and functions include the appointment of *food safety officers* to regulate and monitor the *food business* in order to ensure the provision of *safe food* which is fit for human consumption. Section 2(f) of the Act defines “food” to mean anything used as food or drink for human consumption other than drugs, and includes—

- (i) any substance which is intended for use in the preparation of food;
- (ii) any flavouring agent or condiment;
- (iii) any colouring matter intended for use in food;
- (iv) chewing gum, confectionary and other products of like nature;
- (v) water in any form including ice, intended for human consumption or for use in the composition or preparation of food; and
- (vi) any other thing prescribed as food

Section 2(i) of the Act defines food business to mean any undertaking, whether or not for profit, carrying out any of the activities related to any stage of manufacturing, processing, packaging, storage, transportation, distribution of food, import, export and includes food services, catering services, sale of food or food ingredients. Section 2(k) defines food operator to mean a person who manufactures for sale, transports, stores, sells, distributes, imports or exports food. Section 2(w) defines safe food to mean an article of food which is not

unsafe. Hence the Act governs food operators in the food business to ensure that the food is safe for human consumption.

11. Section 12 of the Act empowers the PFA to appoint and notify the FSO in such areas as the Authority deems necessary. The function and powers of the FSO are laid out under Section 13 of the Act which enables the FSO to take immediate action to ensure that the food consumed or used by the public at large is safe and fit for human consumption. The Section authorizes the FSO to enter or seal any premises, collect samples of food or any substance which is intended for sale or has been sold as food, mark or seize any food, apparatus or utensils which is in contravention to the Act or any of the rules and regulations made thereunder. Specifically, the challenged Section 13(1)(c) of the Act empowers the FSO to enter and seal premises which are involved in preparation, preservation, distribution, packaging or sale of food. On 6.12.2016 the Regulations were notified in the official gazette. These Regulations provide for the procedure to be followed for sealing and desecaling any premises in the food business and further provide that a sealing order can be challenged before the Director General, PFA. It is relevant to note that these Regulations were not in field when the Petitioner's Restaurant was sealed.

12. Section 16 of the Act provides for an enforcement mechanism to be adopted by the FSO where he believes that a food operator has failed to comply with any of the provisions of the Act, rules or regulations. Therefore Section 16 of the Act requires the FSO to issue an *improvement notice* to the food operator before taking any action. If the food operator fails to comply with the improvement notice, the PFA can cancel or suspend the license of the food operator. Learned counsel for the Petitioners argument that in order to invoke the powers under Section 13(1)(c) of the Act, the FSO has to issue an improvement notice under Section 16 of the Act before sealing the

premises is totally misconceived as the power under Section 13 of the Act is totally independent of the power under Section 16, which is an enforcement power. This power is invoked when the food operator has failed to comply with the provisions of the Act, the rules and the regulations despite notice from the FSO. Section 13 of the Act on the other hand authorizes the FSO to carry out the functions of regulating and monitoring the food business. Therefore the fundamental difference between both the Sections is that one is an enforcement mechanism while the other is a regulatory tool allowing the FSO to ensure that the food provider provides safe food. Hence the FSO can exercise powers under Section 13 as well as under Section 16 of the Act in different situations as neither section is dependent upon the other. The significance of Section 13 of the Act is that it enables the FSO to take necessary and immediate action where he finds that the food operator is providing unsafe food in an unhygienic manner in contravention to the standards, procedures, processes and guidelines provided by the PFA. The FSO can immediately enter, seal, seize or examine the premises or any apparatus or utensils from the premises where it is considered to be harmful and unsafe for human consumption. Clearly the intent of the legislature was to give the FSO the ability to take action not only to stop the harm but also to prevent further harm in cases where imminent danger to public health is involved.

13. The spirit of Section 13 of the Act is based on the *precautionary principle* which enables public authorities to legitimately impose precautionary measures in response to situations that may lead to imminent harm or damage. The Rio Declaration and Agenda 21 in 1992 adopted the precautionary principle as an instrument of self-executing powers that allows immediate action where there is some hazard or harm, in the form of a current or proposed activity that could lead to environmental degradation.

Jurisprudence developed by our Superior Courts has incorporated the precautionary principle and affirmed its commitment to sustainable development and the protection of the environment. The court in Ms. Shehla Zia and others v. WAPDA (PLD 1994 SC 693) first recognized this principle in the following terms:

The rule of precautionary policy is to first consider the welfare and safety of the human beings and the environment and then to pick up a policy and execute the plan which is more suited to obviate the possible dangers or make such alternate precautionary measures which may ensure safety. To stick to a particular plan on the basis of old studies or inconclusive research cannot be said to be a policy of prudence and precaution.

Subsequently, this principle has been cited and considered by the august Supreme Court of Pakistan in the cases cited at “Imrana Tiwana v. Province of Punjab, etc (2015 CLD 983) and “Adeel ur Rehman v Federation of Pakistan, etc” (2005 PTD 172). Over the years, jurisprudence from around the world has expanded the use of the precautionary principle to the function and authority of food regulators and matters of public health. The World Trade Organization Agreement on the Application of Sanitary and Phytosanitary Measures (adopted in 1995) and Regulation (EC) No. 178/ 2002 both employ the precautionary principle as a necessary tool for the application of food safety and protection of the public health. Article 7 of the Regulation (EC) No 178/2002 elaborates on the use of the Precautionary Principle for food safety as follows:

1. In specific circumstances where, following an assessment of available information, the possibility of harmful effects on health is identified but scientific uncertainty persists, provisional risk management measures necessary to ensure the high level of health protection chosen in the Community may be adopted, pending further scientific information for a more comprehensive risk assessment.
2. Measures adopted on the basis of paragraph 1 shall be proportionate and no more restrictive of trade than is required to achieve the high level of health protection chosen in the Community, regard being had to technical and economic feasibility and other factors regarded as legitimate in the matter under consideration. The measures shall be reviewed within a reasonable period of time, depending on the nature of the risk to

life or health identified and the type of scientific information needed to clarify the scientific uncertainty

The expansion of the precautionary principle in food safety laws has reaffirmed the public interest and the objectives of the precautionary principle to empower regulators to act in anticipation of any harm that can be detrimental to the health of the people. In this regard the august Supreme Court of Pakistan has considered the right to life in the case cited at **2005 PTD 172** (*supra*) holding that:

It is the duty of the State to see that the life of a person is protected to enable him to enjoy it within the prescribed limits of law. Pollution, environmental degradation and impure food items also fall in the category of deprivation of life.

Essentially the august Supreme Court of Pakistan has cast a duty on the state to protect the public from unsafe food under the fundamental right to life. This being so the power under Section 13(1)(c) of the Act ensures that the public is protected from unsafe foods by enabling the regulator to keep a check on the food operator and the food business in order to achieve the mandate of the Act and protect the public interest.

14. The issue of protecting the public at large versus the rights of the individual must be addressed as well. The august Supreme Court of Pakistan in the case *Regarding Pensionary Benefits of the Judges of the Superior Courts* (**PLD 2013 Supreme Court 829**) held that:

The interest of the public at large is to be given priority and preference over the interest of individuals, therefore, interest of public at large cannot be sacrificed to extend profane benefits to some individuals.

In light of this, the sealing of a food operator providing harmful, impure or unhygienic food becomes necessary to protect the public from potential harm. While protecting the interest of the public is necessary, a question arises as to whether the use of the precautionary principle or other self-executing powers would violate the individual's right to due process. The right to fair trial and due process are enshrined within Article 10-A of the Constitution. Superior Courts

have accepted that certain deviations are necessary even with respect to the rights guaranteed under Article 10-A of the Constitution. In this regard, the august Supreme Court of Pakistan in the case cited at Justice Khurshid Anwar Bhinder v. Federation of Pakistan (PLD 2010 SC 483) affirmed that where a right to prior notice and an opportunity of hearing before an order is passed will obstruct the taking of a prior action such a right of notice and hearing can be excluded. The august Supreme Court of Pakistan also held that the rule of *audi alteram partem* can be excluded if importing a right to hearing has the effect of paralyzing an administrative process or the need for a prompt or urgent action as the situation demands. Thus, deviation from the right to be heard is necessary in cases where there is an imminent threat or possibility of imminent threat to the public at large. It was held in the case cited at Warid Telecom (PVT.) Limited v Pakistan Telecommunication Authority (2015 SCMR 338) that it is necessary to take precautionary measures, as such measures ensure that no harm will occur during the time spent in due process so the need for such measures does not violate the right to fair trial and due process. So far as the individuals rights are concerned, being the food operator in this case, the Regulations governing the process of sealing and dealing ensure that the FSO does not act arbitrarily. Hence in terms of the Regulations any grievance of the food operator against the FSO can be raised before the Director General PFA giving an opportunity to appeal against any wrongful act of the FSO.

15. It is pertinent to note that FSO or other officers must have self-executing powers that allow them to act immediately. This is necessary to protect the overriding objective of public health and food safety. The temporary nature of the FSO's action and the ability to review any action taken by the FSO, satisfies the due process requirement. Hence no violation of Article 10-A of the Constitution

exists, nor is there a need to hinder the good administration by limiting the powers of the FSO.

16. It was also argued that the FSO visits food operators at night, after closing the premises which is intended to harass the food operator. The counsel argued that there is no reason to visit premises after closing hours. While exercising its power and functions under the Act, the FSO can inspect restaurants at any time deemed necessary especially since they are checking on the cleanliness standards, food safety and hygiene matters. In fact it would defeat the purpose of the Act if the FSO could only perform his duties during a stipulated time of the day. The Act is concerned with the safety and standards of food and to fulfill this objective it does not matter what time the FSO performs his function as the standard of the food should be consistent across the board at all times. Further if there is an apprehension that the food operators will conceal facts during working hours, the FSOs late night inspections may be necessary to ensure that the food operators are in compliance with safety and hygienic requirements. Hence inspections do not offend any right of the Petitioners. At the same time needless to say the FSO must remain mindful of their functions and not overstep by publishing posts or pictures of food operators that have been inspected on the social media. The Law Officer stated that this practice has been abandoned and is no longer used by the FSO. However since people have a right to information, the PFA may develop a monthly reporting process which informs the public of the actions of the food operators and the consequences of such actions. The objective being to establish good practices and not to create unnecessary publicity in such cases.

17. With respect to the vires of Section 52 of the Act, the learned Law Officer explained that the procedure for giving rewards is under consideration and rules in relation there to are being proposed, hence this provision has not been executed to date. A plain reading of the

Section makes it clear that it does not cater for reward to only public officers meaning the FSO but includes the food operator as well. The word 'any person' in this section has been used to mean persons other than the FSO and can include the food operator, hence it will not give rise to incentives to unnecessarily seal premises as argued by the counsel. To the contrary it will encourage food operators to apply under the reward scheme for recognition and acknowledgement of the clean and healthy standards maintained by them. Moreover the Petitioners have not placed on record any document to show that any such action has been taken adverse to their interest. Therefore, there is no merit in this objection.

18. In view of the aforesaid, no case for interference is made out. The instant Petition is **dismissed**.

(AYESHA A.MALIK)
JUDGE

Approved for Reporting

JUDGE