
(2010) 09 AHC CK 0018

In the Allahabad High Court

Case No : Writ Petition No. 8254, 8255 and 8256 of 2010

M/s Pepsico India Holdings (Pvt) Ltd. and Another

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 08-09-2010

Acts Referred:

Constitution of India, 1950 — Article 14, 21
Criminal Procedure Code, 1973 (CrPC) — Section 156(3), 167(2), 4, 4(2)
Food Safety and Standards Act, 2006 — Section 1(3), 100, 2, 29(1), 3
General Clauses Act, 1897 — Section 1(3), 5(3), 6
Penal Code, 1860 (IPC) — Section 2, 272, 273, 419, 420
Prevention of Food Adulteration Act, 1954 — Section 10, 11, 16, 5, 7
Prevention of Food Adulteration Rules, 1955 — Rule 32, 49, 50
Transplantation of Human Organs and Tissues Act, 1994 — Section 22

Citation : (2011) 2 Crimes 250

Hon'ble Judges : S.N.H. Zaidi, J;Rajiv Sharma, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Rajiv Sharma and S.N.H. Zaidi, JJ.—Heard Shri Umesh Chandra and Nageshwar Rao, Senior Advocates, assisted by Sri Vikas Singh, Advocate, for the petitioners and Sri Jyotendra Mishra, learned Advocate General, duly assisted by Government Advocate.

2. As in all the aforesaid writ petitions, question of law was involved and as such, both the parties consented for deciding the matter finally without exchange of pleadings, at the admission stage itself. Consequently, all the writ petitions are being deciding by a common order.

3. In all the afore-captioned writ petitions, petitioners have questioned the validity of the Government Order dated 11.5.2010 issued by the State Government directing the police to register cases or initiate action under Sections 272/273 IPC inter alia on the ground that it has resulted in gross violation of fundamental rights of the employee's and agents of the Company as

available under Article 14 and 21 of the Constitution of India and have consequently prayed for quashing of the FIR registered against the employees of the Company in different districts of the State of Uttar Pradesh.

In writ petition No. 8254 (MB) of 2010, petitioner No. 2 Sumit Sehgal is the distributor of the company, who has been arrested on 11.8.2010 in pursuance of FIR dated 11.8.2010 registered as Case prime No. 392 of 2010 under Sections 272/273 IPC at PS Cantt. District Varanasi.

In Writ Petition No. 8255 (MB) of 2010, petitioner No. 2 Wajid Ali is Quality Control Executive of the Company and Petitioner No. 3 Mohd. Shahid is Manager; of thus CFA Agency of the Company. They were arrested in pursuance of the FIR dated 11.8.2010 registered at PS Khuldabad, District Allahabad as Case Crime No. 244 of 2010 u/s 273 IPC

In writ petition No. 8256 (MB) of 2010, petitioners were arrested pursuant to the FIR dated 12.8.2010 registered at police station Rohania District Varanasi as case crime No. 144/10 under Sections 419, 420, 467, 468, 471 IPC and Section 7/16 of the PFA Act and Rules 32, 49, 50 of the Rules framed thereunder. In the said case, the prosecution moved an application for alteration of sections, which was allowed by the competent Court and the petitioners were remanded only u/s 273 IPC and Sections 51 and 57 of the Food Safety and Standards Act, 2006.

4. Draped in brevity, the facts of the case are that the petitioner Pepsico India Holdings Private Limited, is a company registered under the provisions of the Companies Act, 1956. The company is engaged in the business of manufacturing of soft drinks inter alia under the brand name of PEPSI, Lehar, 7UP, Slice and Miranda etc. The company is aggrieved by the issuance of the Government Order dated 11.5.2010 issued by the State Government as it gives unfettered powers to the authorities to initiate action against violators or suspected violators for food adulteration and misbranding by invoking Sections 272/273 IPC by registering FIRs. After the issuance of the aforesaid Government Order, various products of; the Company were seized from the godown and FIRs were registered against the officers/agents of the company under Sections 272/273 IPC and Section 7/16 of the Prevention of Food Adulteration Act, 1954 [hereinafter referred to as the "PFA Act"].

5. Sri Nagendra Rao, learned Counsel for the petitioners, while giving a summary of the history of legislation on Food laws, took us to the past and stated that Chapter XIV of the Indian Penal Code deals with "Offences affecting the public health". Sections 272 and 273 IPC deal with public health by making penal offences pertaining to adulteration of food etc. and sale of noxious food or drink. Thereafter the Parliament in the year 1954 enacted "The Prevention of Food Adulteration Act, 1954" which was a complete code in itself providing for various penalties for adulteration of food stuff and other related subjects. It also provided an exhaustive procedure for the inquiry and trial of such offences, regulating the manufacture, sale and distribution etc of "Food".

6. According to Counsel for the petitioners, on coming into force of the PFA Act, it repealed Sections 272 and 273 IPC by necessary implication as it occupied complete field with regard to "adulteration of foodstuff and also on the principle of a special law prevailing over a general law to the extent Sections 272/273 IPC got covered by the PFA Act. In. the said PFA Act and Sections 272 IPC, the State of Uttar Pradesh brought amendments in the year 1975 whereby Section 16 of the PFA Act was amended and the period of imprisonment of 6 years was substituted with "imprisonment for life". Similarly amendments were incorporated in Section 272 IPC, whereby imprisonment for six months was also substituted by "imprisonment for life". The offences under both the aforesaid Acts were also made cognizable and non-bailable. Thereafter, the Parliament made further amendments to the PFA Act through the Act No. 34 of 1976. By this amendment graded punishment based on the degree of violation was introduced. Recently, the Parliament in the year 2006 passed the Food Safety and Standards Act (in short, referred to as "FSSA"). Various provisions of FSSA were notified from time to time but finally on 29th July, 2010, Section 97 of FSSA, which repealed all other food related laws, was notified.

7. It has been vehemently argued that invocation of Sections 272/273 IPC by registering the impugned FIR originate from the impugned Government Order, is in clear violation of Article 14 of the Constitution, as in any other part of the Country, if there is any adulteration, same will be dealt with under FSSA by following the procedure laid down therein. Astonishingly, the authorities in the State of U.P. are not invoking the provisions of FSSA and instead the persons are being arrested under Sections 272/273 IPC thereby the fundamental rights of the petitioners as guaranteed by Article 14 stand violated since in cases where provisions of FSSA are invoked the defaulter gets benefit of procedure and safeguards "as provided under the Act whereas in the present cases, pursuant to the Government Order, referred to above, the authorities have chosen to invoke Sections 272/273 IPC without even waiting for the report of Public Analyst. Since the alleged offence as disclosed in the FIR are covered under the provisions of FSSA and as such there cannot be any violation of Section 272/273 IPC.

8. Elaborating his arguments, Sri Nagendra Rao argued that there are certain ingredients for constituting an offence u/s 272 IPC. Similarly, Section 273 requires certain ingredients to be fulfilled before the offence of adulteration can be said to be made out. The ingredients are that somebody selling the food article or drinks which has been rendered noxious or unfit for food/drink with such knowledge or having reasons to believe that the same is noxious food item. To put differently, Sections 272/273 IPC are only attracted, if it is shown that the adulteration is deliberate, intentional or with the knowledge. In the absence of any such evidence or allegations, the ingredients of offence under Sections 272/273 IPC are not constituted. In any event intention to adulterate or the knowledge that the product is adulterated cannot be remotely attributed to the petitioners nor there is any such allegation in the complaint.

9. Learned Counsel for the petitioners next argued that the impugned Government Order directing the subordinates to initiate action under Sections 272/273 IPC is completely misconceived in law as Sections 272/273 IPC are not applicable to the cases of food adulteration as upto 29th July, 2010 all such cases were required to be dealt under the PFA Act and with effect from 29th July, 2010 the provisions of the said PFA Act and other food related laws relating to sampling, imposition of penalties for adulteration and other connected matters have been repealed by the introduction of Food Safety and Standards Act, 2006.

On the strength of paras 15 and 20 of the judgment rendered in Jeewan Kumar Raut and Another v. Central Bureau of Investigation, 2009 (7) UJ SC 3135, Sri Rao vehemently argued that action of the respondents in registering the FIR. instead of proceeding as per procedure, prescribed under the FSSA, is highly unjustified and illegal. The said judgment relates to the Transplantation of Human Organs Act, 1994, which has been referred to as TOHO" therein. Paragraphs 15 and 20 of the judgment, on which reliance has been placed, are reproduced hereunder:

15. TOHO being a special statute, Section 4 of the Code, which ordinarily would be applicable for investigation into a cognizable offence or the other provisions, may not be applicable. Section 4 provides for investigation, inquiry, trial, etc. according to the provisions of the Code. Sub-section (2) of Section 4, however, specifically provides that offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, tried or otherwise dealing with such offences. TOHO being a special Act and the matter relating to dealing with offences thereunder having been regulated by reason of the provisions thereof, there cannot be any manner of doubt whatsoever that the same shall prevail over the provisions of the Code.

20. It is a well-settled principle of law that if a special statute lays down procedures, the ones laid down under the general statutes shall not be followed. In a situation of this nature, the respondent could carry out investigations in exercise of its authorization u/s 13(3)(iv) of TOHO. While doing so, it could exercise such powers which are otherwise vested in it. But, as it could not file a police report but a complaint petition only; Sub-section (2) of Section 167 of the Code may not be applicable. The provisions of the Code, thus, for all intent and purport, would apply only to an extent till conflict arises between the provisions of the Code and TOHO and as soon as the area) of conflict reaches, TOHO shall prevail over the Code. Ordinarily, thus, although In terms of the Code, the respondent upon completion of investigation and upon obtaining remand of the accused from time to time, was required to file a police report, it was precluded from doing so by reason of the provisions contained in Section 22 of TOHO. To put it differently, upon completion of the investigation, an authorize id officer could only file a complaint and not a police report, as a specific bar has been

created by the Parliament. In that view of the matter, the police report being not a complaint and vice-versa, it was obligatory on the part of the respondent to choose the said method invoking the jurisdiction of the Magistrate concerned for taking cognizance of the "offence only in the manner laid down therein and not by any other mode. The procedure laid down in TOHO, thus, would permit the respondent to file a complaint and not a report which course of action could have been taken recourse to but for the special provisions contained in Section 22 off OHO.

Placing reliance on *Jatinder Kumar Jain v. State of Punjab* (2008) 2 FAC 437 learned Counsel for the petitioners has argued that registering of the FIRs under the Penal Code against the employees and agent of the company without following the procedure laid down in the special statute i.e. FSSA is not permissible.

Referring to the case of *Jamiruddin Ansari Vs. Central Bureau of Investigation and Another*, Sri Rao submitted that in this case the Apex Court has held that the provisions of Maharashtra Control of Organised Crime Act (MCOCA) would have an overriding effect over the provisions of Code of Criminal Procedure. In paragraph 67 of the report, the Apex Court observed as under: -

We are also inclined to hold that in view of the provisos of Section 25 of MCOCA, the provisions of the said Act would have an overriding effect over the provisions of the Criminal Procedure Code and the learned Special Judge would not, therefore, be entitled to invoke the provisions of Section 156(3) CrPC for ordering a special inquiry on a private complaint and taking cognizance thereupon, without traversing the route indicated in Section 23 of MCOCA.

10. On behalf of the State, it has been argued that the impugned Circular dated 11.5.2010 is nothing, but a direction to follow the rule of law as it had come to the knowledge of the State Government that the FIRs are not being registered by the Food Inspectors and Drug Inspectors even in the case of cognizable offences. The said Circular is only a reminder to the authorities to do work according to law and nothing else. It is incorrect to say that FIRs have been registered pursuant to the circular dated 11.5.2010.

11. During the course of argument, a feign attempt was also made regarding maintainability of the writ petition at Lucknow as no cause of action has arisen within the territorial jurisdiction of Lucknow, However, this point was not seriously pressed when it was pointed out that the primary relief relates to the quashing of the Government Order/Circular dated 11.5.2010 and the quashing for FIRs is the consequential relief.

12. Learned State Counsel has also pointed out that the Act of 2006 is a Central Act. Various provisions of the said Act of 2006 have been notified in the official gazette on various dates.

Some provisions of the said Act came into force on 15.10.2007, some provisions

came into force on 25.7.2008, some on 28.8.2008, some on 11.8.2008, some on 9.3.2009, some on 26.6.2009, some on 31.7.2009 and last by some on 29.7.2010. Therefore, the Union of India is a necessary party to place various objects and reasons including the Doctrine of Implied Repeal. Moreover, Section 29(1) of the FSSA deals with express repeal, which provides that the enactments and orders specified in the Second Schedule have been repealed from 29.7.2010 i.e. the appointed date. The Second Schedule mentions about 8 Acts or orders in which not a single provisions of the Penal Code has been mentioned. Thus, it is clear that the relevant provisions of the Penal Code i.e. Sections 272 and 273 have not been repealed by any express provision. In support of this contention reliance has been placed upon State of M.P. Vs. Kedia Leather and Liquor Ltd. and Others,

13. It has been vehemently argued that the provisions of the Penal Code shall not be repealed unless there is express provision to that effect as was done by the Parliament while enacting Prevention of Corruption Act. Moreover, the provisions of the FSSA and the relevant provisions of the Penal Code are not contradictory to each other. Reliance in this regard has been placed on Basti Sugar Mills Co. Ltd. v. State of U.P. and Another (1979) 2 SCC 86 In the Code of Criminal Procedure (Cr.P.C), there are various stages like investigation, cognizance, prosecution, conviction, sentence which are altogether different to the procedure provided in the FSSA as such the provisions of FSSA do not have any overriding effect upon the relevant provisions of the Cr.P.C. Furthermore, the assertion of the petitioners that the instant case is fully covered with the decision of the Apex Court in Jeevan Kumar Raut's (supra) is wholly misconceived as in the instant case, the relevant provisions of the Code remained intact as doctrine of implied repeal is not applicable.

14. Lastly, it has been submitted that in clause 3(j) of the definition clause of FSSA, the word "food" has been defined. The recovered article does not come within the meaning of "Food" as such the provisions of FSSA are not applicable in the present case.

15. Countering the allegations of the State Counsel, petitioners Counsel submitted that assertions of the State Counsel that date of repeal is yet to be notified is wholly fallacious as the notification bringing into force Section 97 of the FSSA has to be read in light of Section 1(3) and Section 5(3) of the General Clauses Act. A bare reading of Section 97(1) with the second Schedule as well as Column Comments under the caption "Notes on Clauses supplied with the Act will make it abundantly clear that "this section seeks to repeal the enactment and orders specified in second Schedule immediately w.e.f. the date on which Act is enacted and comes into force.

16. Clarifying the position, it has been submitted that Section 97(2) is not dependent on Section 97(1) and it has come into force on 29th July, 2010. By the impact of Section 97(2) all State Amendments corresponding to FSSA stand repealed, meaning thereby if subject matter of any State Amendment is included

in FSSA, the same stands repealed w.e.f. 29th July, 2010 since State Amendment amending Section 272 and section 273 IPC and Section 16 PFA Act deals with the same subject of food adulteration which is now fully covered by FSSA, the same stands repealed irrespective of the fact that whether PFA Act is repealed or not. In fact, the State by its own admission has accepted repeal of PFA Act in the FIR impugned in Writ Petition No. 8255 (MB) of 2010. Originally, the State had invoked Section 16 PFA Act which has now been replaced by Section 51 and 57 of FSSA.

17. Learned Counsel for the petitioners submitted that definition of "food" is an inclusive definition and includes any substance which is intended for human consumption. The word "substance" as defined in Section 2(zw) of FSSA includes any natural or artificial substance or other matter, whether it is in solid state or in liquid form or in the form of gas or vapour. It is nobody's case that carbonated drinks or juice based beverages are not intended for human consumption or that they are not substances for the purposes of Section 2(zw). Moreover, u/s 5 of PFA (Act, standards were laid for various food articles in Appendix B. In Appendix B, carbonated water is defined in entry A.01.01 Similarly juice based beverages are defined in Entry A. 15 of Appendix B. By virtue of Section 98, the rules including Appendix B have been temporarily transported to FSSA till the regulations under the FSSA are notified.. It would, therefore, be absurd to contend that although the standards for this product are provided treating it to be food stuff, but it otherwise is not an article of food.

18. Learned Counsel for the petitioners has also urged that sale of unsafe food is a violation u/s 59 of FSSA where the punishment varies from six months to seven years. Unsafe food is defined u/s 2(zz) of FSSA, which also includes food which is harmful to health or repugnant to human use. Reliance has also placed on the judgment passed by a Division Bench of the Hon"ble High Court of Chami Vs. Excise Inspector, wherein the Court has dealt with the definition and the interpretation of the word "noxious" and has come to the conclusion at Para 4 that for a substance to become noxious it should be harmful to health.

19. The Ministry of Health and Family Welfare, New Delhi issued a notification dated 29th July, 2010 with regard to coming into force of various provisions of the FSSA, 2006. The notification reads as under:

S.O.1855(E)- In exercise of the powers conferred by sub-section (3) of Section 1 of the Food Safety and Standards Act, 2006 (34 of 2006), the Central Government hereby appoints the 29th day of July, 2010 as the date on which the provisions of Section 19 to 21 (both inclusive), Sections 23 to 29 (both inclusive), Sections 31 to 35 (both inclusive), Sections 48 to 80 (both inclusive), Sections 89, Section 94 to 98 (both inclusive) and Section 100 of the said Act, shall come into force.

20. As much emphasis has been laid on the various provisions of the FSSA, we deem it proper to reproduce certain relevant provisions of the Act. FSSA was

enacted by the Parliament with a view to consolidate the laws relating to food and to establish the Food Safety and Standards Authority of India for laying down science based standards for articles of food and to regulate their manufacture, storage, distribution, sale and import to ensure availability of safe and wholesome food for human consumption and for matters connected therewith.

The statement of object and reasons of the Act reads as under:

(1) Multiplicity of foods laws, standard setting and enforcement agencies pervades different sectors of food, which creates confusion in the minds of consumers, traders, manufacturers and investors. Detailed provisions under various laws regarding admissibility and levels of foods additives, contaminants, food colours, preservatives, etc., and other related requirements have varied standards under these laws. The standards are often rigid and non-responsive to scientific advancements and modernization. In view of multiplicity of laws, their enforcement and standard setting as well as various implementing agencies are detrimental to the growth of the nascent food processing industry and is not conducive to effective fixation of food standards and their enforcement.

(2) In as early as in the year 1998, the Prime Minister's Council on Trade and Industry appointed a Subject Group on Food and Agro Industries, which had recommended for one comprehensive legislation on Food with a Food Regulatory Authority concerning both domestic and export markets. Joint Parliamentary Committee on Pesticide Residues in its report in 2004 emphasized the need to converge all present food laws and to have a single regulatory body. The Committee expressed its concern on public health and food safety in India. The Standing Committee of Parliament on Agriculture in its 12th Report submitted in April 2005 directed that the much needed legislation on Integrated Food Law should be expedited.

(3) As an on going process, the then Member Secretary, law Commission of India, was asked to make a comprehensive review of Food Laws of various developing and developed countries and other relevant international agreements and instruments on the subject. After making an in-depth survey of the International scenario, the then Member-Secretary recommended that the new Food Law be seen in the overall prospective of promoting nascent food processing industry given its income, employment and export potential. It has been suggested that all acts and orders relating to food be subsumed within the proposed Integrated Food Law as the international trend is towards modernization and convergence of regulations of Food Standards with the elimination of multi-level and multi-departmental control. Presently, the emphasis is on (a) responsibility with manufactures, (b) recall, (c) Genetically Modified and Functional Foods, (d) emergency control, (e) risk analysis and communication and (f) Food Safety and Good Manufacturing Practices and Process Control, viz., Hazard Analysis and Critical Control Point.

(4) In this background, the Group of Ministers constituted by the Government of India, held extensive deliberations and approved the proposed Integrated Food Law with certain modifications. The Integrated Food Law has been named as "The Food Safety and Standards Bill, 2005". The main objective of the Bill is to bring out a single statute relating to food and to provide for a systematic and scientific development of Food Processing Industries. It is proposed to establish the Food Safety and Standards Authority of India, which will fix food standards and regulate/monitor the manufacturing, import, processing, distribution and sale of food, so as to ensure and wholesome food for the people.

The Food Authority will be assisted by Scientific Committees and Panels in fixing standards and by a Central Advisory Committee in prioritization of the work. The enforcement of the legislation will be through the State Commissioner for Food Safety, his officers and Panchayati Raj/ Municipal bodies.

Section 3 of the Act is the definition clause and defines "adulterant" "contaminant" "food" "food additive" "food business" "hazard", "manufacture", "sale", "substance", "sub-standard" and "unsafe food" amongst other words, which read as under:

"(a) "adulterant" means any material which is or could be employed for making the food unsafe or sub-standard, misbranded or containing extraneous matter;

(g) "contaminant" means any substance, whether or not added to food, but which is present in such food as a result of the production (including operations carried out in crop husbandry, animal husbandry or veterinary medicine), manufacture, processing, preparation, treatment, packing, packaging, transport or holding of such food or as a result of environmental contamination and does not include insect fragments, rodent hairs and other extraneous matter;

j) "food" means any substance, whether processed, partially processed or unprocessed; which is intended for human consumption and includes primary food, to the extent defined in clause (ZK) genetically modified or engineered food or food containing such ingredients, infant food, packaged drinking water, alcoholic drink, chewing gum, and any substance, including water used into the food during its manufacture, preparation or treatment but does not include any animal feed, live animals unless they are prepared or processed for placing on the market for human consumption, plants prior to harvesting, drugs and medicinal products, cosmetics, narcotic or psychotropic substances:

Provided that the Central Government may declare, by notification in the Official Gazette, any other article as food for the purposes of this Act having regards to its use, nature, substance or quality;

(k) "food additive" means any substance not normally consumed as a food by itself or used as a typical ingredient of the food, whether or not It has nutritive value, the intentional addition of which to food for a technological (including organoleptic) purpose in the manufacture, processing, preparation, treatment

packing, packaging, transport or holding of such food results, or may be reasonably expected to result (directly or indirectly), in it or its byproducts becoming a component of or otherwise affecting the characteristics of such food but does not include "contaminants" or substances added to food for maintaining or improving nutritional qualities;

(n) "food business" means any undertaking, whether for profit or not and whether public or private, carrying out any of the activities related to any stage of manufacture, processing, packaging, storage, transportation, distribution of food, import and includes food services, caterings services, sale of food or food ingredients;

(u) "hazard" means biological, chemical or physical agent in, or condition of, food with the potential to cause an adverse health effect;

(zd) "manufacturer" means a person engaged in the business of manufacturing any article of food for sale and includes any person who obtains such article from another person and packs and labels it for sale or only labels it for such purposes;

(zr) "sale" with its grammatical variations and cognate expressions, means the sale of any article of food, whether for cash or on credit or by way of exchange and whether by wholesale or retail, for human consumption or use, or for analysis, and includes an agreement for sale, an offer for sale, the exposing for sale or having in possession for sale of any such article, and includes also an attempt to sell any such article;

(zw) "substance" includes any natural or artificial substance or other matter, whether it is in a solid state or in liquid form or in the form of gas or vapour;

(zx) "sub-standard" an article of food shall be deemed to be sub-standard if it does not meet the specified standards but not so as to render the article of food unsafe;

(zz) "unsafe food" means an article of food whose nature, substance or quality is so affected as to render it injurious to health:

(i) by the article itself, or its package thereof, which is composed, whether wholly or in part, of poisonous or deleterious substances; or

(ii) by the article consisting, wholly or in part, of any filthy, putrid, rotten, decomposed or diseased animal substance or vegetable substance; or

(iii) by virtue of its unhygienic processing or the presence in that article of any harmful substance; or

(iv) by the substitution of any inferior or cheaper substance whether wholly or in part; or (v) by addition of a substance directly or as an ingredient which is not permitted; or

(vi) by the abstraction, wholly or in part, of any of its constituents; or

(vii) by the article being so coloured, flavoured or coated, powdered or polished, as to damage or conceal the article or to make it appear better or of greater value than it really is; or (viii) by the presence of any colouring matter or preservatives other than that specified in respect thereof; or

(ix) by the article having been infected or infested with worms, weevils or insects; or

(x) by virtue of its being prepared, packed or kept under in sanitary conditions; or

(xi) by virtue of its being misbranded or sub-standard or food containing extraneous matter; or

(xii) by virtue of containing pesticides and other contaminants in excess of quantities specified by regulations.

Section 41 deals with power of search, seizure, investigation, prosecution and procedure whereas Section 42 deals with the procedure for launching prosecution. Both the sections reads as under:

41. Power of search, seizure, investigation, prosecution and procedure thereof-
(1) Notwithstanding anything contained in sub-section (2) of Section 31, the Food Safety Officer may search any place, seize any article of food or adulterant, if there is a reasonable doubt about them being involved in commission of any offence relating to food and shall thereafter inform the Designated Officer of the actions taken by him in writing:

Provided that no search shall be deemed to be irregular by reason only of the fact that witnesses for the search are not inhabitants of the locality in which the place searched is situated.

(2) Save as in this Act otherwise expressly provided, provisions of the Code of Criminal Procedure, 1973 relating to search, seizure, summon, investigation and prosecution, shall apply, as far as may be, to all action taken by the Food Safety Officer under this Act.

42. Procedure for launching prosecution-(1) The Food Safety Officer shall be responsible for inspection of food business, drawing samples and sending them to Food Analyst for analysis.

(2) The Food Analyst after receiving the sample from the Food Safety Officer shall analyse the sample and send the analysis report mentioning method of sampling and analysis within fourteen days to Designated Officer with a copy to Commissioner of Food Safety.

(3) The Designated Officer after scrutiny of the report of Food Analyst shall decide as to whether the contravention is punishable with imprisonment or fine only and in the case of contravention punishable with imprisonment, he shall send his recommendations within fourteen days to the Commissioner of Food Safety for sanctioning prosecution.

(4) The Commissioner of Food Safety shall, if he so deems fit decide, within the period prescribed by the Central Government, as per the gravity of offence, whether the matter be referred to:

(a) a court of ordinary jurisdiction in case of offences punishable with imprisonment for a term up to three years; or

(b) a Special Court in case of offences punishable with imprisonment for a term exceeding three years where such Special Court is established and in case no Special Court is established, such cases shall be tried by a court of ordinary jurisdiction.

(5) The Commissioner of Food Safety shall communicate his decision to the Designated Officer and the concerned Food Safety Officer who shall launch prosecution before courts of ordinary jurisdiction or Special Court, as the case may be; and such communication shall also be sent to the purchaser if the sample was taken u/s 40.

Chapter IX of the Act deals with the offences and Penalties with regard to adulteration of food stuff, the relevant provisions of the statute read as under:-

48. General provisions relating to (1) A person may render any article of food injurious to health by means of one or more of the following operations, namely:

(a) adding "any article or substance to the food;

(b) using any article or substance as an ingredienf in the preparation of the food;

(c) abstracting any constituents from the food; or

(d) subjecting the food to any other process or treatment; with the; knowledge that it may be sold or offered for sale or distributed for human consumption.

(2) In determining whether any food is unsafe or injurious to health, regard shall be had to:

(a) (i) the normal conditions of use of the food by the consumer and its handling at each stage of production, processing and distribution,

(ii) the information provided to the consumer, including information on the label, or other information generally available to the consumer concerning the avoidance of specific adverse health effects from a particular food or category of foods not only to the probable, immediate or short-term or long-term effects of that food on the health of a person consuming it, but also on Subsequent generations;

(iii) to the probable cumulative toxic effects;

(iv) to the particular health sensitivities of a specific category of consumers where the food is intended for that category of consumers; and

(v) also to the probable cumulative effect of food of substantially the same

composition on the health of a person consuming it in ordinary quantities;

(b) the fact where the quality or purity of the article, being primary food, has fallen below the specified standard or its constituents are present in quantities not within the specified limits of variability, in either case, solely due to natural causes and beyond the control of human agency, then such article shall not be deemed to be unsafe or sub-standard or food containing extraneous matter.

Explanation-For the purposes of this section, "injury", includes any impairment, whether permanent or temporary, and "injurious to health" shall be construed accordingly.

49. General provisions relating to penalty-While adjudging the quantum of penalty under this Chapter, the Adjudicating Officer or the Tribunal, as the case may be, shall have due regard to the following:

(a) the amount of gain or unfair advantage, wherever quantifiable, made as a result of the contravention,

(b) the amount of loss caused or likely to cause to any person as a result of the contravention,

(c) the repetitive nature of the contravention,

(d) whether the contravention is without his knowledge, and

(e) any other relevant factor.

50. Penalty for selling food not of the nature or substance or quality demanded-Any person who sells to the purchaser's prejudice any food which is not in compliance with the provisions of this Act or the regulations made thereunder, or of the nature or substance or quality demanded by the purchaser, shall be liable to a penalty not exceeding two lakh rupees.

Provided that the persons covered under sub-section (2) of Section 31, shall for such non-compliance be liable to a penalty not exceeding twenty five thousand rupees.

51. Penalty for sub-standard food-Any person who whether by himself or by any other person on his behalf manufactures for sale or stores or sells or distributes or imports any article of food for human consumption which is sub standard, shall be liable to a penalty which may extend to five lakh rupees;

52. Penalty for misbranded food- (1)

Any person who whether by himself or by any other person on his behalf manufactures for sale or stores or sells or distributes or imports any article of food for human consumption which is misbranded, shall be liable to a penalty which may extend to three lakh rupees.

(2) The Adjudicating Officer may issue a direction to the person found guilty of

an offence under this section, for taking corrective action to rectify the mistake or such article of food shall be destroyed.

53. Penalty for misleading advertisement- (1) Any person who publishes, or is a party to the publication of an advertisement, which:

(a) falsely describes any food; or

(b) is likely, to mislead as to the nature or substance or quality of any food or gives false guarantee, shall be liable to a penalty which may extend to ten lakh rupees.

(2) In any proceeding the fact that a label or advertisement relating to any article of food in respect of which the contravention is alleged to have been committed contained an accurate statement of the composition of the food shall not preclude the court from finding that the contravention was committed.

54. Penalty for food containing extraneous matter-Any person whether by himself or by any other person on his behalf manufactures for sale or stores or sells or distributes or imports any article of food for human consumption containing extraneous matter, shall be liable to a penalty which may extend to one lakh rupees.

55. Penalty for failure to comply with the directions of Food Safety Officer-If a food business operator or importer without reasonable ground, fails to comply with the requirements of this Act or the rules or regulations or orders issued thereunder, as directed by the Food Safety Officer, he shall be liable to a penalty which may extend to two lakh rupees.

56. Penalty for unhygienic or unsanitary processing or manufacturing of food-Any person who, whether by himself or by any other person on his behalf, manufactures or processes any article of food for human consumption under unhygienic or unsanitary conditions, shall be liable to a penalty which may extend to one lakh rupees.

57. Penalty for processing adulterant- (1) Subject to the provisions of this chapter, if any person who whether by himself or by any other person on his behalf, imports or manufactures for sale, or stores, sells or distribute any adulterant shall be liable:

(i) where such adulterant is not injurious to health, to a penalty not exceeding two lakh rupees;

(ii) where such adulterant is injurious to health, to a penalty not exceeding ten lakh rupees.

In a proceeding under sub-section (1), it shall not be a defence that the accused was holding such adulterant on behalf of any other person.

58. Penalty for contravention for which no specific penalty is provided-Whoever contravenes an provisions of this Act or the rules or regulations made

thereunder, for the contravention of which no penalty has been separately provided in this Chapter, shall be liable to a penalty which may extend to two lakh rupees.

59. Punishment for unsafe food-Any person who, whether by himself or by any other person on his behalf, manufactures for sale or stores or sells or distributes or imports any article of food for human consumption which is unsafe, shall be punishable,

(i) where such failure or contravention does not result in injury, with imprisonment for a term which may extend to six months and also with fine which may extend to one lakh rupees;

(ii) where such failure or contravention results in a non-grievous injury, with imprisonment for a term which may extend to one year and also with fine which may extend to three lakh rupees;

(iii) where such failure or contravention results in a grievous injury, with imprisonment for a term which may extend to seven years and also with fine which may extend to five lakh rupees;

Section 89 gives overriding effect of the Act over the other food related laws and reads as under:

89. Overriding effect of this Act over all other food related laws-The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

Section 97 of the Act seeks to repeal the enactment and orders specified in the Second Schedule immediately with effect from the date on which the Act is enacted and comes into force. It further provides* that if there is any other law for the time being in force in any State, corresponding to the Act, the same shall, upon the commencement of the Act, stand repealed and in such case, the provisions of Section 6 of the General Clauses Act, 1897 shall apply.

97. Repeal and savings- (1) With effect from such date as the Central Government may appoint in this behalf, the enactment and orders specified in the Second Schedule shall stand repealed Provided that such repeal shall not affect:

(i) the previous operations of the enactment and order under repeal or anything duly done or suffered thereunder, or

(ii) any right, privilege, obligation or liability acquired, accrued or incurred under any of the enactment orders under repeal; or

(iii) any penalty, forfeiture or punishment incurred in respect of any offences committed against the enactment and orders under repeal; or

(iv) any investigation or remedy in respect of any such penalty, forfeiture or

punishment, and any such investigation, legal proceedings or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed, as if this Act had not been passed:

(2) If there is any other law for the time being in force in any State, corresponding to this Act, the same shall upon the commencement of this Act, stand repealed and in such case, the provisions of Section 6 of the General Clauses Act, 1897 shall apply as if such provisions of the State law had been repealed.

(3) Notwithstanding the repeal of the aforesaid enactment and orders the licences issued under any such enactment or order, which are in force on the date of commencement of this Act, shall continue to be in force till the date of their expiry for all purposes, as if they had been issued under the provisions of this Act or the rules or regulations made thereunder.

(4) Notwithstanding anything contained in any other law for the time being in force, no court shall take cognizance of an offence under the repealed Act or orders after the expiry of a period of three years from the date of the commencement of this Act.

Thus, after the aforesaid notification the FSSA now stands as the only law relating to deal with the adulteration of food. Various provisions of the Act were notified on different dates over a period of time.

21. The State Government has issued the G.O. Dated 11.5.2010 directing all Divisional Commissioners, District Magistrates, Deputy Inspector Generals of Police, Senior Superintendent of Police and Superintendents of Police to lodge FIR u/s 272/273 IPC case of adulteration of any article of food or drink. The grievance of the petitioners that pursuant to the said Government order, the authorities are invoking Sections 272/273 IPC without following or applying the provisions of FSSA. Sections 272 and Section 273 read as under:

272. Adulteration of food or drink intended for sale-Whoever adulterates any article of food or drink, so as to make such article noxious as food or drink, intending to sell such article as food or drink, or knowing it to be likely that the same will be sold as food or drink, shall be punished with imprisonment of either description for a term which may extended to six months, or with fine, which may extend to one thousand rupees, or with both.

273. Sale of noxious food or drink-Whoever sells, or offers or exposes for sale, as food or drink, any article which has been rendered or has become noxious or is in a state unfit for food or drink, knowing or having reason to believe that the same is noxious, or is in a state unfit for food or drink, knowing or having reason to believe that the same is noxious as food or drink, shall be punished with imprisonment of either description for a term which may extend to six months or with fine which may extend to one thousand rupees, or with both.

22. Section 272 IPC, reproduced hereinabove, is attracted when a person

adulterates an article of food with the intention to sell such an article or knowing that it is likely that the article will be sold as food or drink. In the instant case, there is no allegation in the FIR that the petitioner-company or its employees or agents had kept its products with the intention to sell the same or knowing that the products are likely to be sold as food or drink or that the said products were exposed or offered for sale. The definite stand the company was the articles seized were kept in the godown where even a board "not for sale" was also hanging at the time when the search was conducted.

23. At this juncture it would be relevant to mention that the Indian Penal Code is a general Penal Code for India. Section 2 IPC deals with the punishment of offences committed within India and provides -that every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within India. Section 5 IPC says that nothing in the Code shall affect any provisions of any Special or local law and it reads as under:-

5. Certain laws not to be affected by this Act- Nothing in this Act shall affect the provisions of any Act for punishing mutiny and desertion of officers, soldiers, sailors or airmen in the service of the Government of India or the provisions of any special or local law.

Thus, from perusal of provisions of Section 5 IPC, one thing is crystal clear that nothing in the Penal Code shall affect any provisions of any Special Act and when for any act or omission in a particular subject, a special set of rules have been framed, in that situation, the provisions of the IPC have to be ignored or overlooked. In the cases at hand FIRs have been registered under Sections 272 and 273 IPC pursuant to the impugned Government Order although adulteration of Food Stuff is covered by a Special Act i.e. The Food Safety and Standards Act, 2006.

24. It is pertinent to add that the PFA Act was enacted for the prevention of adulteration of food, being a special Act, it eclipsed Sections 272 and 273 of IPC. In other words, the said Act made Sections 272 and 273 of IPC redundant as punishment provided under the PFA Act was much more (sic) than what was provided under Sections 272 and 273 IPC,"

In *North East Pure Drinks Pvt Ltd v. State of Assam*, Criminal Petition No. 300 of 2007, on which reliance has been placed by the petitioners Counsel, the Gauhati High Court after examining the gravity of the charge u/s 272 IPC held as under:

Thus apart, even if one presumes that the seized products had been rendered noxious or were unfit for human consumption, the fact remains that mere possession or storage of such articles of food or drink would not be an offence u/s 273 IPC unless one, who is in possession of such an article of food or drink, sells the same or offers or exposes the same for sale or knows or has reason to believe that such article of food or drink would be sold or offered or would be exposed for sale.

In *Jatinder Kumar Jain v. State of Punjab*, 2008 (2) FAC 437, on which reliance has been placed by the Counsel for the petitioners, the Punjab and Haryana High Court held in paragraph 3 as under:

Ground for qua thing, put forward on behalf of the petitioner, is that for the offence of food adulteration, procedure is prescribed under Sections 10 and 11 of the PFA Act, for taking a sample and for getting the same tested. Separate procedure for trial has also been prescribed. In these circumstances, registering of FIR without following the procedure laid down in the special statute is not permissible in law.

The Punjab and Haryana High Court in the case of *Jatinder Kumar Jain* held that registering of FIR without following the procedure laid down in the special statute is not permissible in law. In *Jeewan Kumar Raut* [supra] the question before the Apex Court was regarding applicability of sub-section (2) of Section 167 of the Code of Criminal Procedure, 1973 in a case where cognizance has been taken u/s 22 of the Transplantation of Human Organs Act, 1994 (TOHO) on a complaint filed by the CBI. The Apex Court after examining the matter in detail hold that TOHO being a Special Act and the matter relating to dealing with offences thereunder having been regulated by reason of the provisions thereof, there cannot be any manner of doubt whatsoever that the same shall prevail over the provisions of the Code. It also held in unequivocal terms that if a Special Statute lays down procedures, the ones laid down under the general statutes shall not be followed.

In the case of *Jamiruddin Ansari* [supra], the Apex Court reiterated its earlier view and held that provisions of MCOCA would have an overriding effect over the provisions of the Criminal Procedure Code. For the reasons aforesaid, we are of the view that the Union of India is not a necessary party and that when there is no ambiguity in the notification dated 29th July, 2010.

25. As regard the assertion of the State Counsel that the recovered article i.e. cold drink is not a "Food" and as such the provisions of FSSA would not be applicable, we would like first to recapitulate the definition of word "Food" and "Substance" as defined u/s 3 of the Act, which reads as under:

j) "food" means any substance, whether processed, partially processed or unprocessed, which is intended for human consumption and includes primary food, to the extent defined in clause (ZK) genetically modified or engineered food or food containing such ingredients, infant food, packaged drinking water, alcoholic drink, chewing gum, and any substance, including water used into the food during its manufacture, preparation or treatment but does not include any animal feed, live animals unless they are prepared or processed for placing on the market for human consumption, plants prior to harvesting, drugs and medicinal products, cosmetics, narcotic or psychotropic substances:

Provided that the Central Government may declare, by notification in the Official Gazette, any other article as food for the purposes of this Act having regards to

its use, nature, substance or quality;

"(zw)substance" includes any natural or artificial substance or other matter, whether it is in a solid state or in liquid form or in the form of gas or vapour;

26. It is not the case of the State Counsel that the carbonated drinks or juice based beverages are not intended for human consumption or that they are not substances for the purposes of Section 3(zw). In PFA Act, standards were prescribed for various food articles in the Appendix B. In Appendix-B, carbonated water is defined in Entry A.01.01. By virtue of Section 98, the rules including Appendix B has been temporarily transported to FSSA till the regulations under the FSSA are notified. Therefore, we are unable to agree with the arguments advanced on behalf of the State that the provisions of the FSSA are not applicable in the instant case.

27. In view of the aforesaid crystal clear legal proposition and particular provisions under the FSSA we are in agreement with the arguments advanced by the petitioner's Counsel that for adulteration of food or misbranding, after coming into force of the provisions of FSSA vide notification dated 29th July, 2010, the authorities can take action only under the FSSA as it postulates an over riding effects over all other food related law including the PFA Act. In view of the specific provisions under the FSSA, the offences relating to adulteration of food that are governed under the FSSA after July 29, 2010 are to be treated as per the procedures to be followed for drawing and analysis of samples as have been provided for. The provisions of penalties and prosecution have also been provided therein. Therefore, before launching any prosecution against an alleged offence of food adulteration, it is necessary for the concerned authorities to follow the mandatory requirements as provided under Sections 41 and 42 of the FSSA and, therefore, the police have no authority or jurisdiction to investigate the matter under FSSA. Section 42 empowers the Food Safety Officer for inspection of food business, drawing samples and sending them to Food Analyst for analysis. The Designated Officer, after scrutiny of the report of Food Analyst shall decide as to whether the contravention is punishable with imprisonment or fine only and in the case of contravention punishable with imprisonment, he shall send his recommendations to the Commissioner of Food Safety for sanctioning prosecution. Therefore, invoking Sections 272 and 273 of the Indian Penal Code in the matter relating to adulteration of food pursuant to the impugned Government order is wholly unjustified and non est. Furthermore, it appears that the impugned Government Order has been issued without application of proper mind and examining the matter minutely and thus the State Government travelled beyond the jurisdiction.

28. In view of the aforesaid discussions, the writ petitions are allowed. The impugned G.O. dated 11.5.2010 issued by the State Government contained in Annexure-1 to the writ petition is hereby quashed. Consequently, the FIR dated 11.8.2010 registered as case crime No. 392 of 2010 under Sections 272/273 IPC, PS Cantt. District Varanasi, FIR dated 11.8.2010 in Case Crime No. 144 of

2010 registered at PS Rohaniya. District Varanasi and the FIR registered as case crime No. 244 of 2010, PS Khuldaoad, District Allahabad are also hereby quashed. The concerned Magistrates shall immediately pass necessary orders for forthwith release of all the petitioners, who are in jail.