

**HIGH COURT OF CHHATTISGARH, BILASPUR**Order Reserved on :16.12.2020Order Delivered on:04.01.2021**Cr.M.P.No.1242 of 2020**

Abhishek Gupta Proprietor Mahendra Mawa Bhandar, S/o late Shri Mahendra Gupta, Aged about 24 years, R/o Golbazar, Behind Chhitani-Mitani Dharamshala, Khowa Mandi, Bilaspur, Chhattisgarh

---Petitioner**Versus**

1. State of Chhattisgarh through Deepak Kumar Dewangan, Food Safety Officer, Food and Durg Administration, Janjgir-Champa, Chhattisgarh
2. The Commissioner, Food Safety and Standard, Food and Drugs Administration, Chhattisgarh, New Raipur, District Raipur, Chhattisgarh
3. Sanjay Kumar Kewat, S/o Shri Jethuram Kewat, Aged about 28 years, R/o Main Road, Bus Stand, Pahariya, Baloda, District-Janjgir-Champa, Chhattisgarh

---Respondents

For Petitioner : Mr.Aman Upadhyay, Advocate
For Respondents No.1 and 2/State:
Mr.Ravi Bhagat, Dy.G.A.
For Respondent No.3:- None present though served

Hon'ble Shri Justice Sanjay K. Agrawal**C.A.V.Order**

1. The petitioner is an accused standing trial for commission of offence alleged to have been committed under Sections 26(2)(ii) and 31(1) punishable under Sections 51 and 63 of the Food Safety and Standards

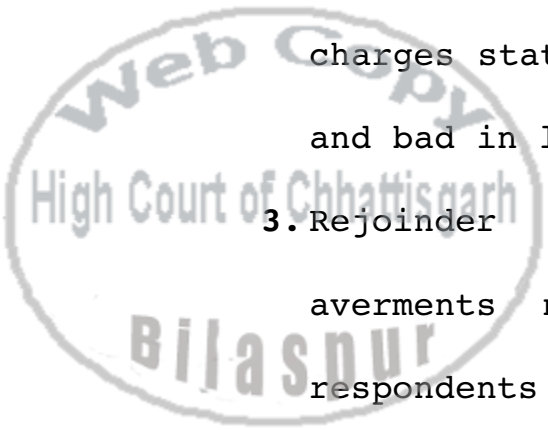


Act, 2006 (hereinafter called as 'FSS Act, 2006') and against him, charges are said to have been framed for the aforesaid offences by order dated 10.02.2020. The petitioner calls in question legality and validity of the order framing charges and also seeks to challenge entire proceeding on the ground that charge-sheet filed against the petitioner for aforesaid offences are without jurisdiction and without authority of law.

2. Return has been filed by respondents No.1 and 2/State supporting the filing of charge-sheet and framing of charges stating that challenge so made is unsustainable and bad in law.

3. Rejoinder has also been filed controverting the averments made in the counter-affidavit filed by respondents No.1 and 2.

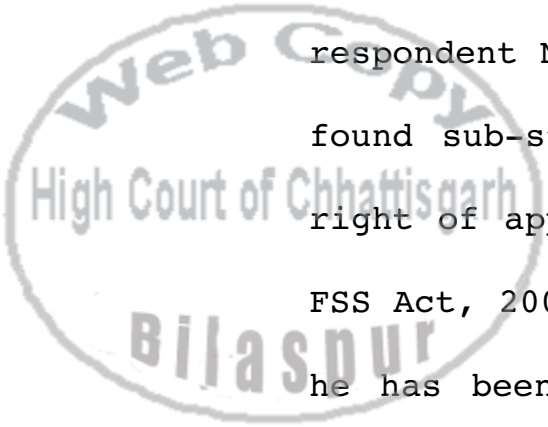
4. Mr. Aman Upadhyay, learned counsel for the petitioner, would submit that the petitioner has been charge-sheeted for the aforesaid offences by prosecution and charges have been framed by the Judicial Magistrate First Class, Akaltara by the impugned order and that the offences alleged to have been committed under Section 26(2)(ii) of the FSS ACT, 2006 holding that the food article was found to be mis-branded/sub-standard, which is punishable under Section 51 of the FSS Act, 2006 and offence under Section 51 of the FSS Act, 2006





is punishable only with penalty to the extent of ₹ 5 lakhs and therefore, the authority to impose penalty in terms of Section 51 of the FSS Act, 2006 has been vested with the Adjudicating Officer duly notified by the State Government under Section 68 of the FSS Act, 2006, as such, prosecution launched against the petitioner by the JMFC, Akaltara for offence under Section 26(2)(ii) of the FSS Act, 2006 is without jurisdiction and without authority of law. He would further submit that article seized from possession of respondent No.3 alleged to be sold by the petitioner is found sub-standard by letter dated 09.08.2017, but no right of appeal as provided under Section 46(4) of the FSS Act, 2006 has been given to the petitioner by which he has been deprived of his indefeasible right as it was given to respondent No.3 vide letter dated 24.8.2017, therefore, the petitioner has been deprived of his valuable right and as such, the prosecution and subsequent proceeding initiated against the petitioner by the Judicial Magistrate First Class, Akalatara in Criminal Case No.487/2018 deserves to be quashed.

5. On the other hand, Mr. Ravi Bhagat, learned Deputy Government Advocate for respondents No.1 and 2/State, would support the prosecution as well as order framing charge against the petitioner. He would further submit





that no interference is warranted under Section 482 of the CrPC.

6. I have heard learned counsel for the parties, considered their rival submissions made hereinabove and also went through the records with utmost circumspection.

7. The learned Magistrate by order dated 10.02.2020 held the prima-facie offence under Section 26(2)(ii) of the FSS Act, 2006, which is punishable under Section 51 of the said Act. The said order states as under:-

10.02.2020	राज्य द्वारा ए.डी.पी.ओ.। आरोपी सहित श्री हेमलाल पाटले अधिवक्ता। प्रकरण आरोप तर्क हेतु नियत है। प्रकरण में आरोप पर तर्क श्रवण किया गया। प्रकरण में अभियोजन द्वारा प्रस्तुत सभी दस्तावेजों के आधार पर आरोपी के विरुद्ध प्रथम दृष्टया धारा भारतीय दंड संहिता 1860 की धारा 26.2(II) का उल्लंघन के अंतर्गत धारा 51 का आरोप किया जाना प्रतीत होता है।
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Thereafter, the following charges were framed:-

न्यायालय-आनंद बोरकर, न्यायिक मजिस्ट्रेट प्रथम श्रेणी, अकलतरा (छ.ग.)

॥ आरोप पत्र ॥

(आज दिनांक 10/02/2020 को विरचित)

मैं आनंद बोरकर, न्यायिक मजिस्ट्रेट प्रथम श्रेणी, अकलतरा (छ.ग.), इस तहरीर के जरिये, तुम 1 अभिषेक गुप्ता पर नीचे लिखे मुआफिज जुर्म लगाता हूँ-

कि तुमने तारीख 26/07/2017 उसके करीब समय 2.30 बजे मुकाम मेसेस केवट होटल बलौदा को विक्रय किये जाने हेतु 20 किलो खोवा प्रदान किया था, उक्त खोवे मे से 02 किलो खोवा को अधिनियम के प्रावधानों के तहत जांच हेतु लिया गया। दिनांक 09.08.2017 खाद्य विश्लेषक की रिपोर्ट के अनुसार जांच हेतु भेजा गया खोवा जो उपयोग हेतु मानक गुणवत्ता का नहीं था, जिसकी जांच किये जाने पर अवमानक घोषित गया।

और ऐसा करने से आपके द्वारा खाद्य सुरक्षा एवं मानक अधिनियम 2006 वह जुर्म



किया जो कि दफा धारा 26.2(II) एवं 31(1) का उल्लंघन के अंगर्तत धारा 51 एवं धारा 63 के अंदर सजा के काबिल है और जो मेरे अख्तियार में है, उक्त अपराध की विशिष्ट्यो पढ़कर सुनाये जाने पर क्या तुम जुर्म स्वीकार करते हो, या विचारण चाहते हो।

सही/-

(आनंद बोरकर)

न्यायिक मजिस्ट्रेट प्रथम श्रेणी,

अकलतरा (छ.ग.)

8. Thus, the petitioner/accused has been charged for offences under Sections (i) 26(2)(ii) of the FSS Act, 2006 punishable under Section 51 of the Act and (ii) 31(1) of the FSS Act, 2006 punishable under Section 61 of the Act.

9. Section 26(2)(ii) of the FSS Act, 2006 states as

under:-

"26. Responsibilities of the food business operator.-

(1) xxx xxx xxx

(2) No food business operator shall himself or by any person on his behalf manufacture, store, sell or distribute any article of food-

(i) xxx xxx xxx

(ii) which is misbranded or sub-standard or contains extraneous matter."

10. Section 51 of the FSS Act, 2006 provides penalty

for sub-standard food as under:-

"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."

11. Section 31(1) of the FSS Act, 2006 provides as

under:-



"31. Licensing and registration of food business.-(1) No person shall commence or carry on any food business except under a licence."

12. Offence under Section 31 (1) of the FSS Act, 2006 is punishable under Section 63 of the FSS Act, 2006, which states as under:-

"63. Punishment for carrying out a business without licence.-If any person or food business operator (except the persons exempted from licensing under sub-section (2) of section 31 of the Act), himself or by any person on his behalf who is required to obtain licence, manufactures, sells, stores or distributes or imports any article of food without licence, shall be punishable with imprisonment for a term which may extend to six months and also with a fine which may extend to five lakh rupees."

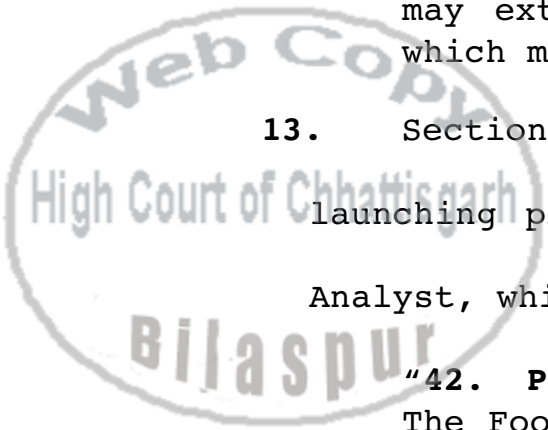
13. Section 42 of the FSS Act of 2006 provides for launching prosecution after receipt of report of Food Analyst, which states as under:-

"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





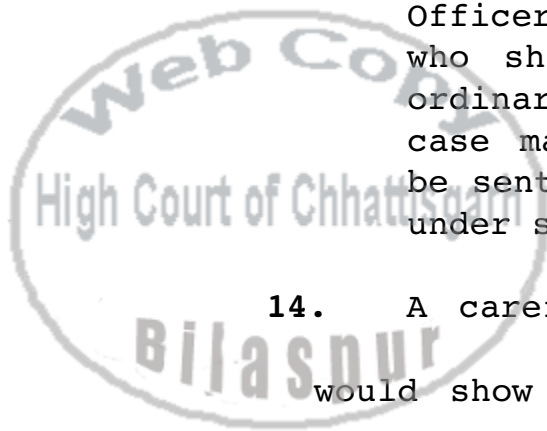
so deems fit, decide, within the period prescribed by the Central Government, as per the gravity of offence, whether the matter be referred to,-

(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 under section 40."

14. A careful perusal of the above-stated provisions would show that the Designated officer under Section 42(3) of the FSS Act, 2006 will send the matter to the Commissioner of Food Safety for granting prosecution if contravention is punishable with imprisonment and in turn under Section 42 (4) of the FSS Act, 2006, the Commissioner of the Food Safety, as per gravity of offence, refer the matter to the Court of ordinary jurisdiction in case of offences punishable with imprisonment for a term up to three years or to 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 special jurisdiction and thereafter the Food Safety Officer shall launch the prosecution, as such, if contravention is punishable with imprisonment, then only procedure under Section 42 of the FSS Act, 2006 is required to be followed for prosecution, otherwise the matter has to be adjudicated by the Adjudicating Officer under Section 68 of the FSS Act, 2006.

15. Chapter X of the FSS Act, 2006 provides for adjudication and Food Safety Appellate Tribunal.

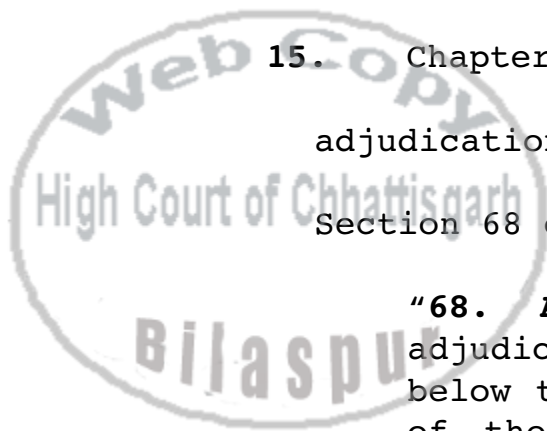
Section 68 of the FSS Act, 2006 provides as under:-

"68. Adjudication.-(1) For the purposes of adjudication under this Chapter, an officer not below the rank of Additional District Magistrate of the district where the alleged offence is committed, shall be notified by the State Government as the Adjudicating Officer for adjudication in the manner as may be prescribed by the Central Government.

(2) The Adjudicating Officer shall, after giving the person a reasonable opportunity for making representation in the matter, and if, on such inquiry, he is satisfied that the person has committed the contravention of provisions of this Act or the rules or the regulations made thereunder, impose such penalty as he thinks fit in accordance with the provisions relating to that offence.

(3) The Adjudicating Officer shall have the powers of a civil court and-

(a) all proceedings before him shall be deemed to be judicial proceedings within the meaning of sections 193 and 228 of the Indian





Penal Code (45 of 1860).

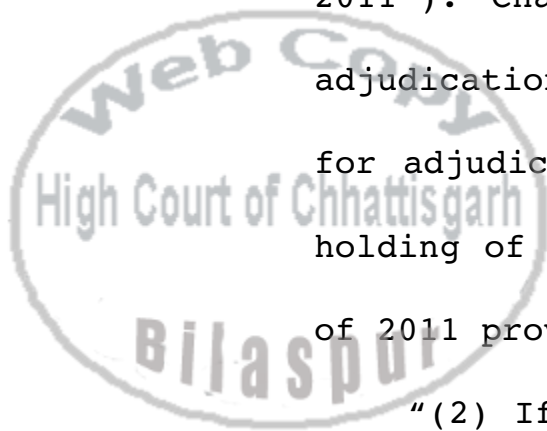
(b) shall be deemed to be a court for the purposes of sections 345 and 346 of the Code of Criminal Procedure, 1973 (2 of 1974).

(4) While adjudicating the quantum of penalty under this Chapter, the Adjudicating Officer shall have due regard to the guidelines specified in section 49."

16. In exercise of powers conferred by Section 91 of the FSS Act, 2006, the Central Government has framed the rules known as "The Food Safety and Standards Rules, 2011" (hereinafter called as the 'Rules of 2011'). Chapter 3 of the Rules of 2011 provides for adjudication and appeal to Tribunal. Rule 3.1 provides for adjudication proceedings. Rules 3.1.1 provides for holding of inquiry. Rule 3.1.1 (2) to (5) of the Rules of 2011 provides as under:-

"(2) If the Designated Officer decides that such contravention is not punishable with imprisonment but only with fine under the provisions of the Act, he shall cause and authorize the Food Safety Officer to file with the Adjudicating Officer an application for adjudication of the offence alleged to have been committed by the person from whom the food sample has been taken or the person whose name and address and other particulars have been disclosed under Rule 2.5 of these rule and/or the seller or manufacturer of the food item in respect of which the report has been received.

(3) On receipt of the communication from the Designated Officer authorizing the filing of the adjudication application, the Food Safety Officer shall file the application for adjudication with the Adjudicating Officer for adjudication of the offence/contravention alleged to have been committed.





(4) On receipt of the application for adjudication from the Food Safety Officer, the Adjudicating Office shall commence the inquiry proceedings.

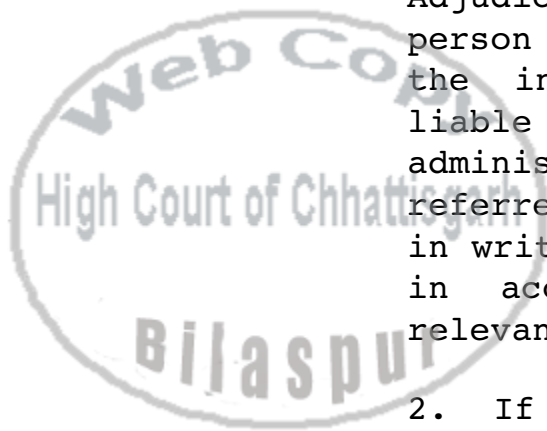
(5) The Adjudicating Officer shall have power to hold an inquiry for purpose of adjudicating offences punishable under sections 50, 51, 52, 53, 54, 55, 56, 57, 58, 64, 65, 66 and 67 of the Act."

17. Rule 3.1.2 (1) and (2) of the Rules of 2011 provides for order of the Adjudicating Officer which states as under:-

"1. If, upon consideration of the evidence produced before the Adjudicating Officer, the Adjudicating Officer is satisfied that the person or persons or any of them against whom the inquiry has been conducted, has become liable for penalty and/or any suitable administrative action under any of the sections referred to in Rule 3.1.1. (5) he may, by order in writing, impose such penalty as he thinks fit in accordance with the provisions of the relevant section or sections of the Act.

2. If however, the Adjudicating Officer is satisfied that the person or persons or any of them against whom the inquiry has been conducted for the contravention of provisions of the Act, has or have not been proved beyond doubt the Adjudicating Officer shall dismiss the case."

18. From the above-stated scheme of the FSS Act, 2006 and the Rules of 2011, it is quite vivid that if contravention of provisions of the FSS Act, 2006 is punishable with imprisonment, then only prosecution will be launched with leave of the Commissioner of Food Safety following the procedure laid down in Section 42 of the FSS Act, 2006, but where contravention of





provisions of the FSS ACT, 2006 is punishable with penalty only, then the matter will be referred to the Adjudicating Officer under Section 68 of the FSS Act, 2006 read with Rule 3.1.2 of Rules of 2011 for adjudication and upon adjudication as per Rules of 2011, the Adjudicating Officer will have the jurisdiction to impose penalty as prescribed under the provisions the FSS Act, 2006 for alleged contravention of Section 26(2)(ii) of the FSS Act, 2006. In the instant case, penalty will be imposable under Section 51 of the FSS Act, 2006, which is required to be adjudicated by the Adjudicating officer under Section 68 of the FSS Act, 2006 for selling sub-standard food and no prosecution will lie in the Court of ordinary jurisdiction or in the Court of special jurisdiction as mandated in Sections 73 and 74 of the FSS Act, 2006.

19. There is one more reason for holding that for contravention of the provision for which only penalty is prescribed in the FSS Act, 2006, only the Adjudicating Officer has jurisdiction to adjudicate and impose penalty. In the present case, the petitioner has been charged for offence under Section 51 of the FSS Act, 2006, which only prescribes levy of penalty only up to rupees five lakhs.

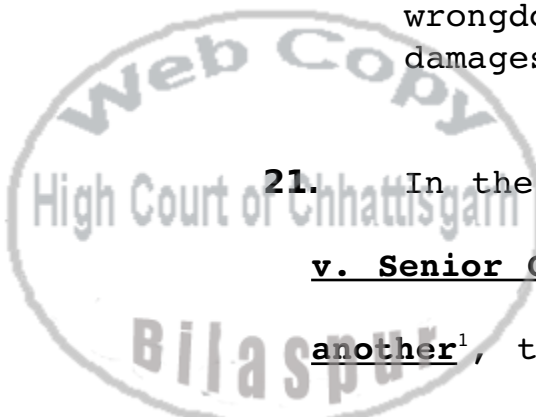
20. The "word" penalty has not been defined in the FSS



Act, 2006. In Black's Law Dictionary, 16th edition,
penalty has been defined as under:-

"Penalty:- An elastic term with many different shades of meaning; it involves idea of punishment corporal or pecuniary or civil or criminal although its meaning is generally confined to pecuniary punishment. Allied v. Graves 261 NC 91, 134, SE 2d, 186, 192
xxx xxx xxx
xxx xxx xxx

A penalty is a sum of money which the law exacts payment of by way of punishment for doing some act which is prohibited or for not doing some act, which is required to be done. Hiddin Hollow Ranch v. Collins 146 Mont. 32, 406 P.2nd, 365 and 366. A statutory liability imposed on wrongdoer in amount which is not limited to the damages suffered by party wronged."



21. In the matter of Karnataka Rare Earth and another v. Senior Geologist, Department of Mines & Geology and another¹, the Supreme Court noticing the definition of "penalty" in Black's Law dictionary, defined the penalty as under:-

"13. A penal statute or penal law is a law that defines an offence and prescribes its corresponding fine, penalty or punishment. (Black's Law Dictionary, 7th Edn., p.1421.) Penalty is a liability composed (sic imposed) as a punishment on the party committing the breach. The very use of the term "penal" is suggestive of punishment and may also include any extraordinary liability to which the law subjects a wrongdoer in favour of the person wronged, not limited to the damages suffered. (See Aiyer, P. Ramanatha: The Law Lexicon, 2nd Edn., 1431.)"

22. The Supreme Court in the matter of Director of Enforcement v. M.C.T.M. Corporation Pvt. Ltd. and

¹ (2004) 2 SCC 783



others², while considering Section 23(1)(a) of the Foreign Exchange Regulation Act, 1947 held that adjudicatory proceedings are quasi criminal in nature and that proceeding is not criminal proceeding and held as under:-

"7."Mens-rea" is a state of mind. Under the criminal law, means-rea is considered as the "guilty intention" and unless it is found that the 'accused' had the guilty intention to commit the 'crime' he cannot be held 'guilty' of committing the crime. An 'offence' under Criminal Procedure Code and the General Clauses Act, 1897 is defined as any act or omission "made punishable by any law for the time being in force". The proceedings under Section 23(1)(a) of FERA, 1947 are 'adjudicatory' in nature and character and are not "criminal proceedings". The officers of the Enforcement Directorate and other administrative authorities are expressly empowered by the Act to 'adjudicate' only. Indeed they have to act 'judicially' and follow the rules of natural justice to the extent applicable but, they are not 'Judges' of the "Criminal Courts" trying an 'accused' for commission of an offence, as understood in the general context. They perform quasi-judicial functions and do not act as 'courts' but only as 'administrators' and 'adjudicators'. In the proceedings before them, they do not try 'an accused' for commission of "any crime" (not merely an offence) but determine the liability of the contravenor for the breach of his 'obligations' imposed under the Act. They impose 'penalty' for the breach of the "civil obligations" laid down under the Act and not impose any 'sentence' for the commission of an offence. The expression 'penalty' is a word of wide significance. Sometimes, it means recovery of an amount as a penal measure even in civil proceedings. An exaction which is not compensatory in character is also termed as a 'penalty'. When penalty is imposed by an adjudicating officer, it is done so in



"adjudicator proceedings" and not by way of fine as a result of 'prosecution' of an 'accused' for commission of an 'offence' in a criminal court. Therefore, merely because 'penalty' clause exists in Section 23(1)(a), the nature of the proceedings under that Section is not changed from 'adjudicatory' to 'criminal' prosecution. An order made by an adjudicating authority under the Act is not that of conviction but of determination of the breach of the civil obligation by the offender."

23. Their Lordships in M.C.T.M. Corporation Pvt. Ltd.

(supra) relying upon the Constitution Bench judgment rendered in the matter of Maqbool Hussain v. State of

Bombay³ held as under:-

"11. The Constitution Bench then laid down that though the administrative authorities functioning under the Sea Customs Act had the jurisdiction to confiscate gold illegally brought into the country, and levy penalty on the defaulter, nonetheless the authorities were not trying a criminal case but deciding only the effect of a breach of the obligations by the defaulter under the Act. On a parity of reasoning, what holds true for the adjudicator machinery under the Sea Customs Act holds equally true for the administrative or adjudicator machinery, designed to adjudge the breach of a civil statutory obligation and provide penalty for the said breach, under the FERA, 1947, whether the breach was occasioned by any guilty intention or not is irrelevant."

24. Thus, following the principle of law laid down in the above-stated judgments (supra), it is quite vivid that,

(i) for contravention of Section 26(2)(ii) of the FSS Act, 2006, the adjudication proceeding would lie before the Adjudication Officer notified under



Section 68 of the FSS Act, 2006 and he is required to adjudicate the said breach in accordance with Rule 3.1 of the Rules of 2011.

(ii) The adjudicatory officer is required to hold an enquiry in accordance with Rule 3.1.1 of the Rules of 2011.

(iii) The order passed by the Adjudicatory Officer will be appealable under Section 70 of the FSS Act, 2006 before the Food Safety Appellate Tribunal.

(iv) The Court of ordinary jurisdiction under Section 73 of the FSS Act, 2006 or Special Court constituted under Section 74 of the FSS Act, 2006 would have no jurisdiction to try contravention of Section 51 of the FSS Act, 2006 for which only "penalty" is prescribed.

(v) As such, no prosecution would lie for said contravention and said contravention would be adjudicated under Section 68 of the FSS Act, 2006 as adjudicatory proceeding is not a criminal proceeding as only penalty is imposable for contravention of its provision.

25. Reverting to the facts of the present case, in light of above-stated legal position, it is quite vivid that for contravention of Section 26(2)(ii) of the FSS Act, 2006 for selling sub-standard food, penalty would be imposable under Section 51 of the FSS Act, 2006, that too by way of adjudication and by adjudicatory authority under Section 68 of the FSS Act, 2006 read with Rule 3.1 of the Rules of 2011 by holding an enquiry in the manner prescribed therein and thereafter





penalty can be imposed, but for contravention of Section 26(2)(ii) of the FSS Act, 2006, no prosecution can be launched, which is also apparent from the provisions contained in Section 42 read with Section 68 of the FSS Act, 2006 as exclusive jurisdiction has been conferred to the Adjudicating officer notified under Section 68 of the FSS Act, 2006 to adjudicate the contravention and to impose penalty under Sections 50 to 58 and 64, 65, 66 and 67 of the FSS Act, 2006, as such, prosecution launched by the Food Safety Officer for contravention of Section 26(2)(ii) of the FSS Act, 2006 before the Court of Judicial Magistrate First Class, Akaltara is ex-facie without jurisdiction and without authority of law. It deserves to be quashed to that extent.

26. The petitioner has also been charged for breach of Section 31(1) of the FSS Act, 2006 for carrying food business without having a licence, which is punishable under Section 63 of the FSS Act, 2006 and imprisonment and fine have been prescribed for which the criminal Court has admittedly the jurisdiction under Section 73 of the FSS Act, 2006 and as such, the trial Magistrate has rightly framed the charges against the petitioner for commission of offence under Section 31(1) of the FSS Act, 2006. He is at liberty to raise all his



defence during the course of trial.

27. As a fallout and consequence of the above-stated discussion, initiation of prosecution and subsequent proceeding including order framing charge against the petitioner for offence under Section 26(2)(ii) of the FSS Act, 2006 punishable under Section 51 of the FSS Act, 2006 in Criminal Case No.487/2018 (State of Chhattisgarh v. Sanjay Kumar Kenwat and another) in the Court of Judicial Magistrate First Class, Akaltara to the extent of the petitioner is hereby quashed.

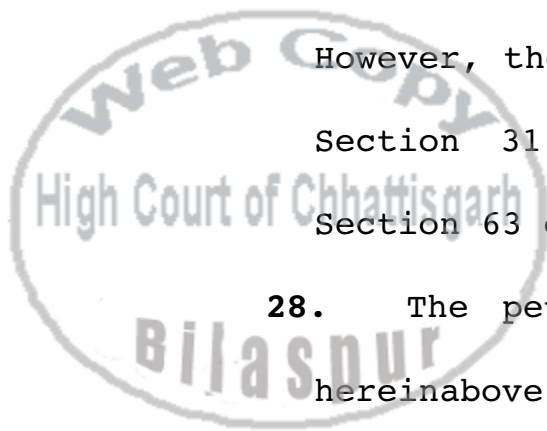
However, the petitioner's prosecution for offence under Section 31 of the FSS Act, 2006 punishable under Section 63 of the FSS Act, 2006 would continue.

28. The petition is allowed to the extent indicated hereinabove.

Sd/-

(Sanjay K.Agrawal)
Judge

B/-





HIGH COURT OF CHHATTISGARH AT BILASPUR

Cr.M.P.No.1242 of 2020

Petitioner

Abhishek Gupta

Versus

Respondents

State of Chhattisgarh and
others

(Head-note)

(English)

No charge-sheet can be filed for commission of offence under Section 26(2)(ii) of the Food Safety and Standards Act, 2006 as only penalty can be imposed for that by the Adjudicatory Authority under Section 68 of the said Act.

(हिन्दी)

खाद्य सुरक्षा और मानक अधिनियम, 2006 की धारा 26(2)(ख) के अंतर्गत किए गये अपराध हेतु कोई आरोप-पत्र प्रस्तुत नहीं किया जा सकता है, इन अपराधों के लिए न्यायनिर्णयन प्राधिकारी द्वारा अधिनियम की धारा 68 के अंतर्गत केवल शास्ति अधिरोपित की जा सकती है।