of the proceedings before him and that finding has become final, since the respondents have not questioned the same before any superior forums.

17. In view of the above discussion, we cannot sustain the impugned order passed by the Division Bench of Gujarat High Court.

18. In the result, the appeal is allowed. The impugned order is set aside. The matter is remitted back to the High Court, with a request to restore the Letters Patent Appeal No. 832 of 2006 on its Board and decide the appeal on merits. In the facts and circumstances of the case, parties are directed to bear their own costs.

S.L.P. (C) No. 11368 of 2006

Leave granted.

In view of the judgment in the abovesaid Civil Appeal No. 7365 of 2009 arising out of S.L.P.(C) No. 11281 of 2006 pronounced today by us, the appeal is allowed and the parties are directed to bear their own costs.

(SBS) *Appeal allowed.*

* * *

CRIMINAL APPEAL

Before the Hon'ble Mr. Justice D. H. Waghela

STATE OF GUJARAT v. SAILENDRABHAI DAMODARBHAI SHAH & ORS.*

(A) Criminal Procedure Code, 1973 (2 of 1974) — Secs. 313 & 386(a) — Prevention of Food Adulteration Act, 1954 (37 of 1954) — Secs. 7 & 16 — Prevention of Food Adulteration Rules, 1955 — Rule 47 — Accused prosecuted for violation of Rule 47 for misbranding a product that was sucralosebased artificial sweetener — On facts found that the rule would be attracted only if the product was "Table Top Sweetener" — Proceedings indicated that the complainant, prosecutor and Court "appeared to have scrupulously avoided use of those words" — Trial Court judgment set aside and matter remanded for retrial *de novo*.

(એ) ક્રિમિનલ પ્રોસીજર કોડ, ૧૯૭૩ — કલમ ૩૧૩ અને ૩૮૬(એ) — ખાદ્યચીજ ભેળસેળ પ્રતિબંધક અધિનિયમ, ૧૯૫૪ — કલમ ૭ અને ૧૬ — ખાદ્યચીજ ભેળસેળ પ્રતિબંધક નિયમો, ૧૯૫૫ — નિયમ ૪૭ — આરોપી પર મહોરના દુરુપયોગ બદલ નિયમ ૪૭ના ભંગ માટે ફરિયાદ કરવામાં આવેલી જે ઉત્પન્ન સુક્રાલોઝ આધારિત બનાવટી ગળપણ ઉમેરી બનાવવામાં આવ્યું હતું — હકીકતમાં જણાયેલું કે, જો ઉત્પાદનમાં 'ટેબલ ટૉપ ગળપણ'' ઉમેરાયું હોય તો જ નિયમ લાગુ પડશે — કાર્યવાહીઓ એવું સૂચવતી હતી કે ફરિયાદી, સરકારી વકીલ

*Decided on 28-10-2009. Criminal Appeal No. 81 of 2008 against the judgment and order dated 20-10-2007 of the Metropolitan Magistrate, Court No. 6, Ahmedabad in Criminal Case No. 25 of 2005.

અને કોર્ટે 'આવા શબ્દોનો ઉપયોગ સાવધાનીપૂર્વક ટાળેલો'' — કેસ ચલાવનાર કોર્ટના ચુકાદાને રદ કરવામાં આવ્યો અને આ બાબત નવેસરથી ચલાવવા માટે રિમાન્ડ કરવામાં આવી.

The sole and central issue, besides the issues decided by the trial Court, which arises for decision in this appeal is as to whether the sweetener manufactured for sale by the respondent was Table Top Sweetener and whether it was properly put before them as the charge sought to be proved. (Para 9)

Coming to the aforesaid sole and central issue, unfortunately the charge is poorly framed and the offending food article is nowhere described as "Table Top Sweetener", though misbranding and violation of Sec. 7(i), (ii) and (v) are clearly alleged. The important witnesses, namely Food Inspector (Exh. 30) and Deputy Commissioner of Local Health Authority (Exh. 96), have gone on to confirm that the case of prosecution was not that the sample in question was sample of "Table Top Sweetener". To make the matter worse, the trial Court, while recording statements of the respondents, never put it in its elaborate questionnaire the question as to whether the respondents had anything to say about the product being "Table Top Sweetener" and being marketed as such. Therefore, the respondents have relied upon the set of circumstances in which they could contend that specific case of the product being Table Top Sweetener was never even sought to be made out by the prosecution. (Para 11)

A comprehensive assessment of the evidence and the record and proceedings of the present case does not *prima facie* leave any room for doubting that the respondents were prosecuted for violation of Rule 47 resulting into misbranding and that rule was attracted only if the product in question was Table Top Sweetener. However, the complainant and main witness, the prosecutor and the Court appeared to have scrupulously avoided use of those words in the complaint, in the charge, in the depositions and in the questionnaire under Sec. 313 of Cr.P.C., except where the complainant was cross-examined and he denied that the samples were taken as samples of Table Top Sweetener. Such curious conspiracy of the circumstances clearly appeared to have resulted into miscarriage of justice and the Court, the complainant and the prosecutor are clearly found to be remiss in the discharge of their essential duties. (Para 13)

In the facts and for the reasons discussed hereinabove, the appeal is allowed, the impugned judgment is set aside and the matter is remanded for retrial *de novo* after framing a proper charge and for conducting the trial in accordance with law. The charge need to clearly allege that the respondents are alleged to have stored and sold the food article marketed as "Zero Calorie Sweetener" in violation of the provisions of Rule 47 of the Prevention of Food Adulteration Rules, 1955 and it amounted to misbranding prohibited under Sec. 7 and punishable under Sec. 16 of the Prevention of Food Adulteration Act, 1954. It is clarified that this Court has not pronounced finally on any issues of fact or facts in issue and the parties shall be at liberty to raise other issues of law emerging from the

evidence that may be recorded as also the issues of law which are not addressed in this judgment. (Para 14)

(B) Prevention of Food Adulteration Act, 1954 (37 of 1954) — Sec. 20 — Trial Court held that sanction was not legal as manufacturer had not nominated person responsible at the time of production of food article — Held, the reasoning was perverse.

(બી) ખાદ્યચીજ ભેળસેળ પ્રતિબંધક અધિનિયમ, ૧૯૫૪ — કલમ ૨૦ — કેસ ચલાવનાર કોર્ટે ઠરાવેલું કે મંજૂરી કાયદેસર હતી નહિ; કારણ કે ઉત્પાદકે ખાદ્ય ચીજ બનાવવાના સમયે જવાબદાર વ્યક્તિની નિમણૂક કરી હતી નહિ — ઠરાવવામાં આવ્યું કે, કારણ વિકૃત હતું.

The trial Court held that respondent No. 2 was not nominated by respondent No. 3 as nominee at the time of production of the food article and despite thereof, sanction was granted, and hence, it was not proved to be legal as it appeared to be without application of mind. (Para 4)

It is seen that consent for prosecution as envisaged in Sec. 20 of the Act is held to be not legal and held to be without application of mind only on the ground that nomination of respondent No. 2 was accepted after the date of production of the food article of which samples were taken. The reasoning of the trial Court is obviously perverse and illegal insofar as the alleged offence consisted of marketing as Table Top Sweetener the product containing sucralose in violation of the rules regarding content, concentration and labelling. (Para 10)

The Court noted a judgment of the High Court that consent order "need not record any reason". (*See* Para 10)

The consent envisaged in the provisions of Sec. 20 of the Act as condition precedent to prosecution is a written consent for instituting the prosecution under the Act and such defence as may be put up by the accused has to be considered by the Court in light of the evidence on record. In the facts of the present case, respondent No. 2 was obviously liable to be prosecuted as the article of food was stored and sold while he was nominated by the company as the person responsible. (Para 10)

(C) Prevention of Food Adulteration Act, 1954 (37 of 1954) — Secs. 2(ix), 7(i), (ii) & (v) — Prevention of Food Adulteration Rules, 1955 — Rules 42 & 47 — Sample of Sweetener alleged to be misbranded — Trial Court held in favour of the accused on the premise that no standards were prescribed for "zero calorie sweetner" — Finding of trial Court, held, was "mired in muddled logic" — Trial Court was required to come to its own conclusion mainly from reading of the label and placard of the product.

(સી) ખાદ્યચીજ ભેળસેળ પ્રતિબંધક અધિનિયમ, ૧૯૫૪ — કલમ ૨(૯), ૭(૧), (૨) અને (૫) — ખાદ્યચીજ ભેળસેળ પ્રતિબંધક નિયમો, ૧૯૫૫ — નિયમો ૪૨ અને ૪૭ — ગળપણ ઉમેરેલા ઉત્પન્નનો નમૂનો મહોરનો દુરુપયોગ હોવાનો આક્ષેપ કરવામાં આવેલો — કેસ ચલાવનાર કોર્ટે એવા તર્ક પર આરોપીની તરફેણમાં ઠરાવેલું કે, 'શૂન્ય કેલરી ગળપણ ઉમેરવા' માટે કોઈ ધોરણ નક્કી કરવામાં આવ્યું હતું નહિ — કેસ ચલાવનાર કોર્ટના તારણ અંગે ઠરાવવામાં

આવેલું કે, 'તાર્કિક રીતે ગૂંચવાડાભરેલું હતું' — કેસ ચલાવનાર કોર્ટે ઉત્પન્નના જાહેરાતના પાટિયાં અને તેની છાપ વાંચીને મુખ્યત્વે પોતાના નિર્ણય પર આવવાની જરૂરિયાત હતી.

For finding of the trial Court. (*See* Para 4)

The impugned decision on the second issue is mired in muddled logic and based on supposed contradiction between the depositions of the complainant and the Local Health Authority (Exh. 96). It requires no elaboration that, in the facts of the present case, the Court was required to come to its own conclusion mainly from reading of the label and the placard of the product rather than relying upon opinions of the Public Analyst, Central Food Laboratory or the officers required to enforce the law. Thus, in short, decision of the trial Court on both the issues framed by it, scuttling the central issue, was wrong and the appeal is required to be allowed to that extent. (Para 10.1)

(D) Prevention of Food Adulteration Act, 1954 (37 of 1954) — Secs. 7 & 16 — Prevention of Food Adulteration Rules, 1955 — Rules 42 & 47 — Manufacture of sucralosebased artificial sweetner with concentration in excess of permissible limit — Adding as filler an impermissible ingredient — Product also contained a misleading label — Held, the provisions of Rule 47 were clearly violated.

(ડી) ખાદ્યચીજ ભેળસેળ પ્રતિબંધક અધિનિયમ, ૧૯૫૪ — કલમ ૭ અને ૧૬ — ખાદ્યચીજ ભેળસેળ પ્રતિબંધક નિયમો, ૧૯૫૫ — નિયમ ૪૨ અને ૪૭ — પરવાનગીપાત્ર મર્યાદા કરતાં વધારે 'સુકાલોઝ' નામનું ગળપણ ઉમેરેલું ઉત્પન્ન — પૂરક તરીકે ઉમેરવાનું અપરવાનગીપાત્ર ઘટક — ઉત્પન્ન ગેરરસ્તે દોરનાર છાપ ધરાવતું હતું — ઠરાવવામાં આવ્યું કે, નિયમ ૪૭ની જોગવાઈઓનું સ્પષ્ટ રીતે ઉલ્લંઘન કરવામાં આવ્યું હતું.

The provisions of Rule 47 were amended by GSR-388 (E), dated 25-6-2004 with effect from 25-6-2004 to permit selling of sucralose as Table Top Sweetener, containing permissible carriers or fillers subject to label declaration as provided in clauses (1) and (2) of sub-rule (ZZZ) of Rule 42; which means that the label requirements as contained in Rule 42(ZZZ)(2) were incorporated in Rule 47 itself while permitting sale of sucralose as Table Top Sweetener. Therefore, not only in terms of manufacturing sucralosebased artificial sweetener with concentration thereof in excess of the permissible limit and adding as filler an impermissible ingredient, *i.e.* crospovidone, but labelling it with "sucralose is safe for children" instead of "Not recommended for children", the provisions of Rule 47 were clearly violated. (Para 8)

The alleged violation amounted to misbranding within the meaning and definition of Sec. 2(ix)(k) of the Act. The rule making power of the Central Government cannot be so compartmentalized that the authority to make a particular rule could be traced exclusively to the power conferred by one of the clauses of sub-sec. (1A) of Sec. 23. In other words, the Central Government can be presumed to have made a particular rule deriving authority from more than one of the clauses of sub-sec. (1A) of Sec. 23 and made a composite rule in its wisdom, so as to facilitate drafting, understanding

or application thereof. It would also be improper and illegal to hold that, because the standards of quality were not defined and limits of permissible variability were not fixed in respect of artificial sweetener, prosecution would be unsustainable in the facts of the present case. (Para 9)

Cases Referred to :

(1) *Hindustan Lever Ltd. v. Food Inspector*, 2006 (1) SCC (Cri.) 288
(2) *State Government of N.C.T. of Delhi v. Amar Singh*, 2005 (10) SCC 279
(3) *Inspector of Customs, Akhnoor, Jammu & Kashmir v. Yashpal,* 2009 (2) SCC (Cri.) 593
(4) *Shaikh Maqsood v. State of Maharashtra,* JT 2009 (7) SC 554
(5) *Zahira Habibbullah Sheikh v. State of Gujarat,* 2006 (2) GLR 1493 (SC) : AIR 2006 SC 1367
(6) *Zahira Habibullah H. Sheikh v. State of Gujarat,* 2004 (2) GLR 1078 (SC) : 2004 (4) SCC 158
(7) Criminal Appeal No. 1809 of 2008 decided on 28-7-2009 by Guj.H.C.

Ms. Trusha Patel, Addl. P.P., for the Appellant.
Rule Served by D. S. for Opponent Nos. 1 and 2.
K. S. Nanavati, Sr. Advocate with *Prabhav Mehta* for Nanavati Associates, for Opponent No. 3.

D. H. WAGHELA, J. This appeal by the State is preferred from the judgment dated 20-10-2007 of Metropolitan Magistrate, Court No. 6, Ahmedabad in Criminal Case No. 25 of 2005, whereby the accused persons-respondents herein, are acquitted of the charge of offences punishable under Sec. 7 read with Sec. 16 of the Prevention of Food Adulteration Act, 1954 (for short, "the Act"). Respondent No. 1 is Vendor/ Manager, Technical Liaison of respondent No. 3-Company and respondent No. 2 is the Nominee and Associate Vice-President of respondent No. 3-Company, all of whom were charged with violation of Rule 42 (ZZZ) (12) and Rule 47 of the Rules made under the Act and committing offences punishable under Sec. 7 read with Sec. 16 of the Act. In substance, the charge consisted of manufacturing for sale misbranded food article in contravention of the rules by producing and marketing artificial sweetener containing sucralose in excess of permissible limits and not labelling it in the required manner. The prosecution and the charge were admittedly based upon opinion in the report of public analyst dated 16-6-2005 (Exh. 62) and certificate of analysis dated 18-10-2005 of Central Food Laboratory, Mysore (Exh. 14) wherein it was opined respectively as under :

"REPORT OF PUBLIC ANALYST

I found the samples to be ARTIFICIAL SWEETENER falling under Item Proprietary food of Prevention of Food Adulteration Rules, 1955.....

Sr. No.	Quality Characteristic	Name of Method of test used	Result	As per provisions of the Act and Rules.
6	Sucralose content per tablet	USP method	6.5 mg/ 70.5 mg.	Max. 6.0 mg./100 mg. as per Rule 47(iii)

OPINION

The sample of Zero Calorie Sweetener is misbranded as it does not comply with Rule 42(ZZZ)(12) and also does not comply with the provision of Rule 47 (iii) of the Prevention of Food Adulteration Rules, 1955."

....

"CERTIFICATE OF ANALYSIS BY CENTRAL FOOD LABORATORY, MYSORE

.....LABEL DECLARATION : ZERO CALORIE SWEETENER ingredients : Lactose, Crospovidone, Colloidal Silicon Dioxide, Magnesium Stearate; each uncoated tablet contains sucralose 6.5 mg., Excipients q.s. : Mfd. Alembic Ltd., Mfg. Date March, 2005.

1. SUCRALOSE CONTENT mg/100 mg. : 9.2

And I am of the opinion that the sample of ARTIFICIAL SWEETENER does not conform to the standards laid down for TABLE TOP SWEETENERS CONTAINING sucralose under the P.F.A. Act, 1954 and Rules thereof in that the sucralose content exceeds the maximum standard limit of 6.0 mg./100 mg. as per Rule 47(1)."

2. During the course of trial, the complainant notified Food Inspector for the State of Gujarat, examined himself at Exh. 30 to, *inter alia,* state that on 29-4-2005 he approached respondent No. 1 where manufacturing and storing of Zero Calorie Sweetener was carried on. Respondent No. 1 admitted before him that he was in charge of manufacturing, packing and despatch of food article which was being sent for sale to the godown of the company. That he bought by paying cash the samples of Zero Calorie Sweetener and found in the packing placards with the containers on which the ingredients were shown and it was stated that "Sucralose is Safe for Children". He also seized the remaining stock of the food articles in presence of the witness and the vendor under Sec. 10(4) of the Act. He sent one of the samples for analysis to the public analyst and the report as aforesaid was produced along with other papers at Exh. 63. In his cross-examination, he, *inter alia,* stated that no standard of quality for Zero Calorie Sweetener was specified in Appendix-B; that the sample was tested by public analyst as "artificial

sweetener"; that it was true that the sample was of proprietary food; that according to nomination (Exh. 67), accused No. 2 was the nominee of the company and he was not the nominee when the sampled food article was produced; that neither on the label nor on any other papers produced by him was "Table Top Sweetener" mentioned and he could not say whether the sample taken was of "Table Top Sweetener". He further stated that his complaint was about misbranding and adulteration and it was true that it was not his case that the sample of Table Top Sweetener was taken by him. Thus, in short, Food Inspector, the complainant himself, did not fully and properly support the case of prosecution even as a copy of the placard of the product (Exh. 39) was produced on record for the Court to arrive at its own conclusion about compliance with the provisions of the Act and the Rules.

3. The placard which appeared to be enlargement of the label on the container (Exh. 39) clearly showed, *inter alia,* that "ZERO" was the brand of the product which was marketed as "Zero Calorie Sweetener" and contained sucralose in the proportion of 9% and the filler material included crospovidone. Other witness included P.W. 2 (Exh. 90) who was a witness to taking of samples and seizure of goods, but who turned hostile and did not support the prosecution. Another witness (P.W. 3, Exh. 96) was the Local Health Authority in the office of Deputy Commissioner and Local Health Authority, Commissioner of Food and Drugs, Gandhinagar and was a formal witness.

4. The trial Court framed two issues as to whether there was a valid sanction for prosecution and whether the accused persons had violated the provisions of Secs. 7(i), (ii) and (v) by manufacturing and packing adulterated and misbranded Zero Calorie Sweetener; and decided both the issues in the negative. It held that respondent No. 2 was not nominated by respondent No. 3 as nominee at the time of production of the food article and despite thereof, sanction was granted, and hence, it was not proved to be legal under Sec. 20 of the Act as it appeared to be without application of mind. In respect of the second issue, the Court relied upon cross-examination of the complainant to hold that no standards were prescribed for Zero Calorie Sweetener in Appendix-B of the Act, and relying upon judgment of the Apex Court in *Hindustan Lever Ltd. v. Food Inspector,* 2006 (1) SCC (Cri.) 288, the sample was held to be not adulterated. It also accepted the argument that there was material discrepancy between the statement of the complainant and the Local Health Authority (Exh. 96). However, as the stock of goods seized as *muddamal* was not claimed by anyone and it was stated to be "Best before 24 months from the date of manufacture" and there was no evidence of it being fit for human consumption, it was ordered to be destroyed.

5. It was submitted for the appellant by learned A.P.P. that, by all indications, the sweetener of which samples were taken was meant to be sold, marketed and used as Table Top Sweetener and the reports of analysis had clearly indicated it to be in violation of Rules 42 and 47. Although, it was true that nomination of respondent No. 2 was dated 4-4-2005, it was accepted on 15-4-2005 and the samples were taken on 29-4-2005, respondent No. 2 could be held responsible as nominee and it being a continuing offence, neither the company could escape responsibility nor could the nominee avoid minimum imprisonment, leaving no discretion for the Court, as held by the Supreme Court in *State Government of N.C.T. of Delhi v. Amar Singh,* 2005 (10) SCC 279. She vehemently argued that judgment of the Apex Court in *Hindustan Lever Ltd.* (supra) did not apply in the facts of the present case. And artificial sweetener is the genus of which Zero Calorie may be a species; but it did not cease to be a Table Top Sweetener. She also submitted that the product in question was manufactured, stored and being marketed in conscious and flagrant violation of the express rules made in respect of Table Top Artificial Sweetener containing sucralose, and therefore, the respondents were required to be convicted and properly punished.

6. Learned Senior Advocate Mr. K. S. Nanavati, appearing for the respondents, with learned Counsel Mr. Prabhav Mehta, submitted that apart from technical flaws in the prosecution, it was clearly based upon report of the public analyst which was statutorily superseded by the report of C.F.L. And the complainant himself had clearly deposed in his cross-examination that the stock and the sample were not taken by him to be food article falling under category of "Table Top Sweetener". Even the charge framed against the respondent (Exh. 83) by the Court did not state that the offending samples were that of "Table Top Sweetener" and only alleged misbranding and violation of the provisions of Secs. 7(i), (ii) and (v). He also pointed out that when the accused were called upon to make their statement to explain the circumstances appearing against them, under Sec. 313 of Cr.P.C., it was not put to them that the food article in question was "Table Top Sweetener". On that basis, it was submitted that the respondents were deprived of the opportunity of defending themselves and leading necessary evidence as to whether the food article was marketed as "Table Top Sweetener" and otherwise, there was no evidence of the sweetener being or having been marketed as "Table Top Sweetener". As even a question was not put under Sec. 313 in that regard, the acquittal could not be converted into conviction. Learned Counsel relied upon a three-Judge Bench decision of the Supreme Court in *Inspector of Customs, Akhnoor, Jammu & Kashmir v. Yashpal,* 2009 (2) SCC (Cri.) 593, wherein it was observed :

"16. Contextually, we cannot bypass the decision of a three-Judge Bench of this Court in *Shivaji Sahabrao Bobade v. State of Maharashtra,* 1973 (2) SCC 793, as the Bench has widened the sweep of the provision concerning examination of the accused after closing prosecution evidence. Learned Judges in that case were considering the fallout of omission to put to the accused a question on a vital circumstance appearing against him in the prosecution evidence. The three-Judge Bench made the following observations therein :

> 16. .....It is trite law, nevertheless fundamental, that the prisoner's attention should be drawn to every inculpatory material so as to enable him to explain it. This is the basic fairness of a criminal trial and failures in this area may gravely imperil the validity of the trial itself, if consequential miscarriage of justice has flowed. However, where such an omission has occurred, it does not *ipso facto* vitiate the proceedings and prejudice occasioned by such defect must be established by the accused. In the event of evidentiary material not being put to the accused, the Court must ordinarily eschew such material from consideration. It is also open to the Appellate Court to call upon the Counsel for the accused to show what explanation the accused has as regards the circumstances established against him but not put to him and if the accused is unable to offer the Appellate Court any plausible or reasonable explanation of such circumstances, the Court may assume that no acceptable answer exists and that even if the accused had been questioned at the proper time in the trial Court he would not have been able to furnish any good ground to get out of the circumstances on which the trial Court had relied for its conviction."

He also relied upon the observations made by the Apex Court in *Shaikh Maqsood v. State of Maharashtra,* JT 2009 (7) SC 554, wherein it was observed :

"8. The word "generally" in sub-sec. (1)(b) does not limit the nature of the questioning to one or more questions of a general nature relating to the case, but it means that the question should relate to the whole case generally and should also be limited to any particular part or parts of it. The question must be framed in such a way as to enable the accused to know what he is to explain, what are the circumstances which are against him and for which an explanation is needed. The whole object of the Section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him and that the questions must be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. A conviction based on the accused's failure to explain what he was never asked to explain is bad in law. The whole object of enacting Sec. 313 of the Code was that the attention of the accused should be drawn to the specific points in the charge and in the evidence on which the prosecution claims that

the case is made out against the accused so that he may be able to give such explanation as he desires to give.

9. The importance of observing faithfully and fairly the provisions of Sec. 313 of the Code cannot be too strongly stressed. It is not sufficient compliance to string together a long series of facts and ask the accused what he has to say about them. He must be questioned separately about each material substance which is intended to be used against him. The questionings must be fair and couched in a form which an ignorant or illiterate person will be able to appreciate and understand. Even when an accused is not illiterate, his mind is apt to be perturbed when he is facing a charge of murder. Fairness, therefore, requires that each material circumstance should be put simply and separately in a way that an illiterate mind, or one which is perturbed or confused, can readily appreciate and understand."

It was accordingly submitted that, even as the words "Table Top" are not defined in the Act or the Rules, the accused persons were entitled to an opportunity to lead evidence and explain as to how "Zero Calorie Sweetener" was different from and not treated or marketed as "Table Top Sweetener" in respect of which labelling requirements and restrictions are imposed in the provisions of Rule 42 (ZZZ) and Rule 47. Other submissions were also made on other aspects of the case orally, and in writing, but they may not be decisive if the aforesaid submissions were to be accepted for not reversing the impugned order of acquittal.

7. In view of the limited controversy projected before this Court, it maybe pertinent to reproduce relevant parts of the relevant Rules as under :

"Rule 42 (ZZZ) (1) Every package of food which is permitted to contain artificial sweetener mentioned in table given in Rule 47, and advertisement for such food shall carry the following label, namely-

(i) This…..(Name of goods) contains…… (Name of artificial sweetener)

(ii) Not recommended for children.

(iii) (a) Quantity of sugar added…..gm/100 gm.

(b) No sugar added in the product.

(iv) Not for Phenyl ketoneurics (If Aspertame is added).

(1) (A) & (B) … … …

Sec. 42(ZZZ)(2) Every package of Aspertame (Methylester), Acesulfame K. Sucralose and Saccharin Sodium marketed as Table Top Sweetener and every advertisement for such Table Top Sweetener shall carry the following label, namely-

(i) Contains…….(name of artificial sweetener)

(ii) Not recommended for children

Provided that… …. …. …. …. …

Rule 47. *Restriction on use and sale of artificial sweeteners :*

(1) No artificial sweetener shall be added to any article of food:

Provided that artificial sweetener may be used in food articles mentioned in the table below in quantities not exceeding the limits shown against them and as per provision contained in Appendix-C to these rules and shall bear the label declarations as provided in sub-rule (ZZZ)(1)(A), (ZZZ)(1)(B) and (ZZZ)(12) of Rule 42.

Table

… … …

Explanation I … … …

Explanation II … … …

Provided further that Saccharin Sodium or As pertame (Methye lester) or Acesulflame Potassium or sucralose may be sold individually as Table Top Sweetener and may contain the following carrier or filler articles with label declaration as provided in sub-clauses (1) and (2) of sub-rule (ZZZ) of Rule 42, namely-

1. Dextrose
2. Lactose
3. Maltodextrin
4. Mannitol
5. Sucrose
6. Isomalt
7. Citric acid
8. Calcium silicate
9. Carboxymethyl Cellulose
10. Cream of Tartar, I.P.
11. Cross Carmellose sodium
12. Colloidal silicone dioxide
13. Glycine
14. L-leucine
15. Magnesium stearate I.P.
16. Purified Talc
17. Polyvinyl Pyrrolidone
18. Providone
19. Sodium hydrogen carbonate
20. Starch
21. Tartaric acid

Provided also that where sucralose is marketed as Table Top Sweetener, the concentration of sucralose shall not exceed six mg. per hundred mg. of tablet or granule.

(2) … … …

(3) No person shall sell Table Top sweetener except under label declaration as provided in clauses (1) and (2) of sub-rule (ZZZ) of Rule 42.

Provided that … … …"

8. The scheme of the Act and the Rules made thereunder would show that manufacture for sale, storage, sale or distribution of any misbranded food or of any article of food in contravention of any other provision of the Act or any rule made thereunder is prohibited by Sec. 7 of the Act. The word "misbranded" is defined in Sec. 2(ix) of the Act to stipulate, *inter alia,* that an article of food shall be deemed to be misbranded if the package is deceptive with respect to its contents [clause (g)], or if it is not labelled in accordance with the requirements of the Act or the Rules made thereunder [clause (k)]. In light of the applicable rules as aforesaid, it needs to be examined whether, by labelling or packaging, the food article was misbranded or was it in violation of the rules, as there is no dispute about the fact that it was manufactured for sale and it did contain sucralose to the extent of 9% with crospovidone as one of the ingredients. It is also undisputable that crospovidone is not one of the ingredients which is permitted to be added as carrier or filler article and the concentration of sucralose did exceed the permissible limit of 6.0 mg/100 mg. of tablet. Therefore, the restrictions contained in Rule 47 were clearly violated, if the product were sold as and held in the eye of law to be "Table Top Sweetener". The requirements of label declaration as contained in sub-rule (3) of Rule 47 were to be found in clauses (1) and (2) of sub-rule (ZZZ) of Rule 42. As Rule 42(ZZZ)(1) is admittedly applicable only to package of food which is permitted to contain artificial sweetener, it may not apply to artificial sweetener itself which is sold as such. But the provisions of Rule 42(ZZZ)(2) do require every package of particular artificial sweetener marketed as Table Top Sweetener to state on its label which particular artificial sweetener it contains and that it is "not recommended for children". It could, however, be argued in the facts of the present case that in the list of artificial sweeteners enumerated in Rule 42(ZZZ)(2), sucralose was added by GSR-679 (E), dated 31-10-2006 with effect from 1-1-2007, and hence, could not be applied in the facts of the present case. However, the provisions of Rule 47 were amended by GSR-388 (E), dated 25-6-2004 with effect from 25-6-2004 to permit selling of sucralose as Table Top Sweetener, containing permissible carriers or fillers

subject to label declaration as provided in clauses (1) and (2) of sub-rule (ZZZ) of Rule 42; which means that the label requirements as contained in Rule 42(ZZZ)(2) were incorporated in Rule 47 itself while permitting sale of sucralose as Table Top Sweetener. Therefore, not only in terms of manufacturing sucralosebased artificial sweetener with concentration thereof in excess of the permissible limit and adding as filler an impermissible ingredient, *i.e.* crospovidone, but labelling it with "sucralose is safe for children" instead of "Not recommended for children", the provisions of Rule 47 were clearly violated.

9. While provisions of Sec. 7 of the Act imposes prohibition on manufacture, sale, etc. as aforesaid, the provisions of Sec. 16 makes distinction for the purpose of punishment between the articles of food which are adulterated, misbranded or the sale of which is prohibited and where the offence is related to contravention of any rule made under clause (a) or (g) of sub-sec. (1A) of Sec. 23 or under clause (b) of sub-sec (2) of Sec. 24, in which case for any adequate and special reasons, the Court may impose sentence for a term which may extend to three months, or fine which may extend to Rs. 500 only. Section 23 confers upon the Central Government power to make rules to carry out the provisions of the Act and sub-sec. (1A), in clause (b) and (g), *inter alia,* provides as under :

"Sec. 23. *Power of the Central Government to make rules* -

(1) The Central Government may, after consultation with the Committee and after previous publication by notification in the Official Gazette, make rules to carry out the provisions of this Act;

Provided.....

(1A) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely -

(a) ....

(b) defining the standards of quality for, and fixing the limits of variability permissible in respect of, any article of food.

(g) defining the conditions of sale or conditions for licence of sale of any article of food in the interest of public health;"

Therefore, it appears that if the offence consists of contravention of any rule made under Sec. 23(1A)(a) or (g), prescribed punishment is not the minimum sentence of imprisonment (as in the case of violation of the rules providing for the matters contained in clause (b) defining the standards of quality and fixing the limits of permissible variability). While Rule 42 falls in Part VII, entitled : "Packing and Labelling of Foods" and prescribes forms of labels, Rule 47 falls in Part VIII entitled

: "Prohibition and Regulations of Sales". Therefore, it could be contended that the alleged offence in the present case consisted of contravention of the regulations imposed upon sale of artificial sweeteners as such, but its sale was certainly not completely prohibited and only sought to be regulated. And the rules made in that behalf could be held to be made in exercise of the power conferred by Sec. 23(1A)(g). However, since the labelling requirements of Rule 42(ZZZ)(1) and (2) have been incorporated by amendment of the Second Proviso to Rule 47 and sub-rule (3) of Rule 47 also independently provides for the labelling requirements as provided in Rule 42(ZZZ)(1) and (2), it cannot be said that the alleged contravention was, at the worst, violation of the rules which were made in exercise of the powers conferred under Sec. 23(1A)(g). Therefore, the alleged violation amounted to misbranding within the meaning and definition of Sec. 2(ix)(k) of the Act. The rule making power of the Central Government cannot be so compartmentalized that the authority to make a particular rule could be traced exclusively to the power conferred by one of the clauses of sub-sec. (1A) of Sec. 23. In other words, the Central Government can be presumed to have made a particular rule deriving authority from more than one of the clauses of sub-sec. (1A) of Sec. 23 and made a composite rule in its wisdom, so as to facilitate drafting, understanding or application thereof. It would also be improper and illegal to hold that, because the standards of quality were not defined and limits of permissible variability were not fixed in respect of artificial sweetener, prosecution would be unsustainable in the facts of the present case.

Therefore, the sole and central issue, besides the issues decided by the trial Court, which arises for decision in this appeal is as to whether the sweetener manufactured for sale by the respondent was Table Top Sweetener and whether it was properly put before them as the charge sought to be proved.

10. Before addressing the aforesaid issue, the two issues framed and disposed by the trial Court may be examined. As regards the first issue of sanction, it is seen that consent for prosecution as envisaged in Sec. 20 of the Act is held to be not legal and held to be without application of mind only on the ground that nomination of respondent No. 2 was accepted after the date of production of the food article of which samples were taken. The reasoning of the trial Court is obviously perverse and illegal insofar as the alleged offence consisted of marketing as Table Top Sweetener the product containing sucralose in violation of the rules regarding content, concentration and labelling. Even otherwise, the authority granting sanction is not required to delve into merits of the case and decide upon them before the trial. As recently held by this Court on

30-9-2009 in Criminal Appeal No. 1096 of 2009, the consent order under Sec. 20 of the Act need not record any reason for granting consent for prosecution. The consent envisaged in the provisions of Sec. 20 of the Act as condition precedent to prosecution is a written consent for instituting the prosecution under the Act and such defence as may be put up by the accused has to be considered by the Court in light of the evidence on record. In the facts of the present case, respondent No. 2 was obviously liable to be prosecuted as the article of food was stored and sold while he was nominated by the company as the person responsible.

10.1. Similarly, the impugned decision on the second issue is mired in muddled logic and based on supposed contradiction between the depositions of the complainant and the Local Health Authority (Exh. 96). It requires no elaboration that, in the facts of the present case, the Court was required to come to its own conclusion mainly from reading of the label and the placard of the product rather than relying upon opinions of the Public Analyst, Central Food Laboratory or the officers required to enforce the law. Thus, in short, decision of the trial Court on both the issues framed by it, scuttling the central issue, was wrong and the appeal is required to be allowed to that extent.

11. Coming to the aforesaid sole and central issue, unfortunately the charge is poorly framed and the offending food article is nowhere described as "Table Top Sweetener", though misbranding and violation of Sec. 7(i), (ii) and (v) are clearly alleged. The important witnesses, namely Food Inspector (Exh. 30) and Deputy Commissioner of Local Health Authority (Exh. 96), have gone on to confirm that the case of prosecution was not that the sample in question was sample of "Table Top Sweetener". To make the matter worse, the trial Court, while recording statements of the respondents, never put it in its elaborate questionnaire the question as to whether the respondents had anything to say about the product being "Table Top Sweetener" and being marketed as such. Therefore, the respondents have relied upon the set of circumstances in which they could contend that specific case of the product being Table Top Sweetener was never even sought to be made out by the prosecution. In this context, learned A.P.P. strenuously argued that when the Public Analyst as well as the Central Food Laboratory had based their opinion about violation of Rule 47 on the assumption of the product being Table Top Sweetener and the complaint and the charge were clearly about violation of that rule, the respondents had sufficient notice of the charge levelled against them. It was submitted that oral statement in cross-examination of the complainant was contrary to the documents on record and immaterial. And, even otherwise, when artificial sweetener was produced and packed to be marketed in retail for immediate use directly by consumer, it could

always be regarded as Table Top Sweetener as distinguished from mere artificial sweetener which could otherwise be, and generally is, used for addition to any article of food. The words "Table Top" are not defined and they are used in common parlance for any product which can be kept on the table for immediate use or consumption. As against that, learned Senior Advocate Mr. Nanavati vehemently contended, relying upon the aforesaid judgments, that the respondents were seriously prejudiced in the defence on account of the complainant clearly admitting that his case was not that of having taken sample of "Table Top Sweetener". He also submitted that the label or the placard no wherein dicated that it was or it was being sold as "Table Top Sweetener". He also sought to capitalize on the absence of anything in that regard in the statement recorded under Sec. 313 of Cr.P.C.

12. Judgment of the Supreme Court in *Zahira Habibullah Sheikh v. State of Gujarat,* 2006 (2) GLR 1493 (SC) : AIR 2006 SC 1367 opens with stanzas (14 and 18) of Eighth Chapter of Manu Samhita of which translation reads as under :

> "Wherein the presence of Judges "*dharma*" is overcome by "*adharma*" and "truth" by "unfounded falsehood", at that place they (the Judges) are destroyed by sin", and
>
> In the *adharma* flowing from wrong decision in a Court of law, one-fourth each is attributed to the person committing the *adharma*, witness, the Judges and the Ruler."

The Apex Court went on to observe in Paras 33 and 38 as under :

> "33. This Court has often emphasised that in a criminal case the fate of the proceedings cannot always be left entirely in the hands of the parties, crime being public wrong in breach and violation of public rights and duties, which affect the whole community as a community and are harmful to the society in general. The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interests of society is not to be treated completely with disdain and as *persona non grata*. Courts have always been considered to have an over-riding duty to maintain public confidence in the administration of justice - often referred to as the duty to vindicate and uphold the 'majesty of the law'. Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a Court of law in the future as in the case before it. If a Criminal Court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer

justice with fairness and impartiality both to the parties and to the community it serves. Courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the Judges as impartial and independent adjudicators.

"38. "Witnesses" as Bentham said : "are the eyes and ears of justice". Hence, the importance and primacy of the quality of trial process. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed, and it no longer can constitute a fair trial. The incapacitation may be due to several factors, like the witness being not in a position for reasons beyond control to speak the truth in the Court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by Courts on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clouts and patronage and innumerable other corrupt practices ingeniously adopted to smother and stifle truth and realities coming out to surface rendering truth and justice, to become ultimate casualties. Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of State represented by their prosecuting agencies do not suffer even in slow process but irreversibly and irretrievably, which if allowed would undermine and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy, oppression and injustice resulting in complete breakdown and collapse of the edifice of rule of law, enshrined and jealously guarded and protected by the Constitution....."

In the previous judgment between the same parties *Zahira Habibullah Sheikh v. State of Gujarat,* 2004 (2) GLR 1078 (SC) : 2004 (4) SCC 158, the Apex Court observed as under :

"43. The Courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. Section 311 of the Code and Sec. 165 of the Evidence Act confer vast and wide powers on Presiding Officers of Court to elicit all necessary materials by playing an active role in the evidence collecting process. They have to monitor proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, it can control the proceedings effectively so that ultimate objective *i.e.* truth is arrived at. This becomes more necessary where the Court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The Courts cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency. The prosecutor who does not act

fairly and acts more like a Counsel for the defence is a liability to the fair judicial system, and Courts could not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness.

44. The power of the Court under Sec. 165 of the Evidence Act is in a way complementary to is power under Sec. 311 of the Code. The Section consists of two parts *i.e.* (i) giving a discretion to the Court to examine the witness at any stage and (ii) the mandatory portion which compels the Court to examine a witness if his evidence appears to be essential to the just decision of the Court. Though, the discretion given to the Court is very wide, the very width requires a corresponding caution. In *Mohan Lal v. Union of India,* 1991 Supp (1) SCC 271, this Court has observed, while considering the scope and ambit of Sec. 311, that the very usage of the words such as, 'any Court' "at any stage", or "any enquiry or trial or other proceedings" "any person" and "any such person" clearly spells out that the Section has expressed in the widest possible terms and do not limit the discretion of the Court in any way. However, as noted above, the very width requires a corresponding caution that the discretionary powers should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. The second part of the Section does not allow any discretion but obligates and binds the Court to take necessary steps if the fresh evidence to be obtained is essential to the just decision of the case - 'essential', to an active and alert mind and not to one which is bent to abandon or abdicate. Object of the Section is to enable the Court to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is necessary for a just and proper disposal of the case. The power is exercised and the evidence is examined neither to help the prosecution nor the defence, if the Court feels that there is necessity to act in terms of Sec. 311 but only to subserve the cause of justice and public interest. It is done with an object of getting the evidence in aid of a just decision and to upheld the truth.

56. As pithily stated in *Jennison v. Backer,* 1972 (1) AllER 1006. "The law should not be seen to sit limply, while those who defy it go free, and those who seek its protection lose hope". Courts have to ensure that accused persons are punished and that the might or authority of the State are not used to shield themselves or their men. It should be ensured that they do not wield such powers which under the Constitution has to be held only in trust for the public and society at large. If deficiency in investigation or prosecution is visible or can be perceived by lifting the veil trying to hide the realities or covering the obvious deficiencies. Courts have to deal with the same with an iron hand appropriately within the frame-work of law. It is as much the duty of the prosecutor as of the Court to ensure that full and material facts are brought on record so that there might not be miscarriage of justice.

61. In the case of a defective investigation the Court has to be circumspect in evaluating the evidence and may have to adopt an active and analytical role to ensure that truth is found by having recourse to Sec. 311 or at a later stage also resorting to Sec. 391 instead or throwing hands in the air in despair. It would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the Investigating Officer if the investigation is designedly defective."

13. A comprehensive assessment of the evidence and the record and proceedings of the present case does not *prima facie* leave any room for doubting that the respondents were prosecuted for violation of Rule 47 resulting into misbranding and that rule was attracted only if the product in question was Table Top Sweetener. However, the complainant and main witness, the prosecutor and the Court appeared to have scrupulously avoided use of those words in the complaint, in the charge, in the depositions and in the questionnaire under Sec. 313 of Cr.P.C., except where the complainant was cross-examined and he denied that the samples were taken as samples of Table Top Sweetener. Such curious conspiracy of the circumstances clearly appeared to have resulted into miscarriage of justice, and the Court, the complainant and the prosecutor are clearly found to be remiss in the discharge of their essential duties. The placard at Exh. 39 was a clear and admitted evidence of what the label or the placard clearly depicted and only a few questions by the Court could have cleared the marginal confusion after which the respondents could also have led necessary evidence as to whether the product was sold and marketed as Table Top Sweetener. Thus, the failure of justice is occasioned by a mis-trial. As held by the Apex Court in *Zahira Habibullah Sheikh v. State of Gujarat,* 2004 (4) SCC 158, it would not be proper to confirm acquittal of the accused persons solely on account of such defects and to do so would tantamount to playing into the hands of defective prosecution. It is recently observed by this Court in order *dated 28-7-2009 in Criminal Appeal No. 1809 of 2008* that, according to the figures produced by learned A.P.P. in that case, hardly 14% of the cases of food adulteration in the last five years were resulting into conviction, leading to the conclusion that in rest of the cases the prosecution was failing despite the food article having been found to be adulterated in most of the cases.

14. There is neither an application nor any scope for leading of additional evidence before this Court in view of poorly framed charge. At the same time, it is the tenacity and perseverance of learned A.P.P. that has brought to the fore the real issues and made the order of retrial imperative. Therefore, in the facts and for the reasons discussed

hereinabove, the appeal is allowed, the impugned judgment is set aside and the matter is remanded for retrial *de novo* after framing a proper charge and for conducting the trial in accordance with law. The charge need to clearly allege that the respondents are alleged to have stored and sold the food article marketed as "Zero Calorie Sweetener" in violation of the provisions of Rule 47 of the Prevention of Food Adulteration Rules, 1955 and it amounted to misbranding prohibited under Sec. 7 and punishable under Sec. 16 of the Prevention of Food Adulteration Act, 1954. It is clarified that this Court has not pronounced finally on any issues of fact or facts in issue and the parties shall be at liberty to raise other issues of law emerging from the evidence that may be recorded as also the issues of law which are not addressed in this judgment.

(SBS) *Matter remanded for retrial.*

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SPECIAL CIVIL APPLICATION

Before the Hon'ble Mr. Justice Ravi R. Tripathi

MANISH AGRAWAL v. STATE OF GUJARAT & ORS.*

(A) Constitution of India, 1950 — Art. 226 — Pre-Conception & Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (57 of 1994) — Secs. 4(3), 11(1), 13 & 20 — Several irregularities noticed by the authority during inspection of the hospital of the petitioner — In reply to the show-cause notice, petitioner stated that the shortcomings were "solely due to our *bona fide* ignorance" of the P.N.D.T. Act — Held, only on the basis of such reply "authorities must cancel the registration" — High Court declined to exercise discretionary jurisdiction to interfere with the order suspending the registration.

(એ) ભારતનું બંધારણ, ૧૯૫૦ — આર્ટિ. ૨૨૬ — ગર્ભ પહેલાં અને પ્રસૂતિ પહેલાંની પરીક્ષણ ટેક્નિક(જાતિ પસંદગી મનાઈ) અધિનિયમ, ૧૯૯૪ — કલમ ૪(૩), ૧૧(૧), ૧૩ અને ૨૦ — અરજદારની હૉસ્પિટલના પરીક્ષણ દરમિયાન સત્તાવાળાઓને અનેક અનિયમિતતાઓ ધ્યાનમાં આવેલી — કારણદર્શક નોટિસના જવાબમાં અરજદારે જણાવેલું કે, 'માત્ર અમારી શુદ્ધબુદ્ધિની અજ્ઞાનતાના કારણે' ખામીઓ પી.એન.ડી.ટી. અધિનિયમ હેઠળ હતી — ઠરાવવામાં આવ્યું કે, આવા જવાબના આધાર પર 'સત્તાવાળાઓએ નોંધણી રદ કરવી જ જોઈએ' — હાઈકોર્ટે નોંધણી મોકૂફ રાખતા હુકમમાં દખલગીરી કરવા વિવેકાધીન હકુમતનો ઉપયોગ કરવા ઈન્કાર કર્યો.

For particulars of the irregularities. (*See* Para 4)

For contents of the reply. (*See* Para 6)

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*Decided on 22-7-2009. Special Civil Application No. 6594 of 2009, challenging order suspending registration of the petitioner's hospital under the P.C. & P.N.D.T. Act.