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Court : Madhya Pradesh

Decided On : Sep-07-1995

Reported in : 1996(0)MPLJ649

Judge : U.L. Bhat, C.J. and ;S.K. Dubey, J.

Acts : [Prevention of Food Adulteration Act, 1954](#) - Sections 9, 13(2) and 16

Appeal No. : Criminal Revision No. 468 of 1993

Appellant : Govind Prasad Lalgare

Respondent : State of Madhya Pradesh and anr.

Advocate for Def. : A. Choudhary, Adv. General

Advocate for Pet/Ap. : N.P. Dubey, Adv.

Disposition : Petition dismissed

Judgement :

ORDER

U.L. Bhat, C.J.

1. While revision petitioner was carrying two cans of milk (mixture of cow milk, buffalo milk and goat milk) for sale on 9-6-1988, Food Inspector accosted him and after observing the statutory formalities, purchased the requisite quantity of milk

from him for analysis and dealt with the sample as required by the [Prevention of Food Adulteration Act, 1954](#), (for short 'the Act') and the Rules framed thereunder and sent one part of the sample to the Public Analyst. The Public Analyst received the same on 10-6-1988; found the sample properly sealed and fastened and found the seal intact and unbroken. The seal fixed on the container and the outer cover of the sample tallied with the specimen impression of the seal separately sent by the Food Inspector to the Public Analyst, and the sample was in a fit condition for analysis. He found 2.6% of fat and 3.99% of solids non-fat in the sample. Starch was present. Formalin was present. The sample was adulterated within the meaning of Section 2(l-a)(a)(m) of the Act. The Public Analyst sent his report dated 18-7-1988 to the Local Authority who duly informed P.W. 1 who filed the complaint on 4-3-1989.

2. The Local Authority sent a copy of the report with due intimation to the accused on 25-3-1989. Summons was served on him and he appeared in due course and pleaded not guilty. The revision petitioner did not apply to the Court under Section 13(2-A) of the Act to send another part of the sample to the Director, Central Food Laboratory for analysis. On the basis of evidence adduced, the trial Court found the revision petitioner guilty and convicted and sentenced him under Section 16, read with Section 9 of the Act. The Sessions Judge in appeal confirmed the conviction and sentence. Hence this revision.

3. One of us, (Bhat, C.J.) who heard the case, referred it to a Division Bench in view of the importance of the question urged on behalf of the revision petitioner.

4. The only contention urged by learned counsel for the revision petitioner is that though there was no delay in the analysis of the sample by the Public Analyst, prosecution was launched nearly 9 months after taking the sample, intimation was sent to the Local Health Authority after taking the sample and during this period, second and third parts of the sample of milk would have deteriorated and decomposed and become unfit for analysis and thus the valuable right vested in the accused to obtain expert opinion of the Director, Central Food Laboratory, was frustrated. Since the revision petitioner has been prejudiced thereby, he is entitled to an acquittal.

5. Section 13 and certain other provisions of the Act have been amended by Act No. 34 of 1976 and consequently some Rules have also undergone change. Undoubtedly, a person accused of an offence under the Act, has a right to apply to the Court to have another part of the sample sent to the Central Food Laboratory for analysis so that better expert opinion may be obtained. If the sample is found fit for analysis the report issued by the Director, Central Food Laboratory shall supersede the report given by the Public Analyst. If on account of laches or other action of the prosecuting agency the accused is denied this right, he may be prejudiced in his defence. The revision petitioner in this case did receive a copy of the report with due intimation. It was open to him to apply to the Court to obtain another part of the sample in the custody of the Local Authority and send the same to the Director, Central Food Laboratory, for analysis. If the Director reports that the sample had become decomposed or unfit for analysis, it would then be open to the revision petitioner to show that the decomposition took place on account of lapse of time caused by the action or inaction on the part of the prosecuting agency and that since such action or inaction led to denial of his right, he is prejudiced. According to the learned counsel for the revision petitioner, it is not necessary for the accused to actually move an application and even without moving an application, he is entitled to an acquittal on the supposition that sample of milk may get decomposed within a period of 4 to 6 months.

6. We may at once refer to a decision of the Allahabad High Court in Baboo v. State, AIR 1970 All. 122, where reference is made to an unreported decision of the Court in Cr. Revision No. 1612/62 where the Court held after thorough investigation into the question that the sample of milk taken in that case remained fit for analysis even after lapse of 10 months from the date of taking sample.

7. There are three decisions of the Supreme Court having a bearing on the question. The earliest is the one in Municipal Corporation of Delhi v. Ghisaram, AIR 1967 SC 970. In that case complaint was filed 8 months after the sample of curd was taken and 11 days later, the accused applied to send sample given to him (under the Act as it stood before the amendment), to the Central Food Laboratory which reported that the sample had become highly decomposed and unfit for analysis. The Court held that though the report of the Public Analyst did

not cease to be good evidence, the accused was prejudiced in his defence as he was denied the valuable right of obtaining the opinion of the Director based on fresh analysis and, therefore, the acquittal was justified. The significance of this decision lies in the fact that the accused actually moved an application under Section 13 of the Act and a part of the sample was sent to the Central Food Laboratory and it was actually found unfit for analysis. The Court, after referring to the right of the accused under Section 13 of the Act, indicated that it is only when the accused exercises the right that the Director has to issue a certificate and that certificate supersedes the report given by the Public Analyst and observed :

'If in any case the accused does not choose to exercise this right, the case against him can be decided on the basis of the report of the Public Analyst. Difficulty, however, arises in case where the accused does exercise right by making a request to the Court to send the sample for analysis to the Director, Central Food Laboratory and the Director is unable to issue a certificate because of some reason including the reason that the sample of the food article has so deteriorated and become decomposed that no analysis is possible.'

In para 5 of the judgment, the court found as a matter of fact that decomposition took place because of long delay in sending the sample to the Director.

8. In para 6 of the judgment, the Court referred to the expert evidence given by an expert examined in the case to show that curd starts undergoing change after a week if kept at room temperature without a preservative, but remains fit for analysis for another 10 days thereafter. On the other hand, if the sample is kept in a refrigerator, it will preserve its fat and non-fatty solids contents for purposes of analysis will be retained for about four months and in case it is kept in a refrigerator after adding the preservative, the total period which may be available for making analysis, without decomposition, will be six months. It was on the basis of this evidence that the Court concluded that decomposition of the sample was on account of delay in sending the sample to the Director which arose on account of delay in launching the prosecution and thus there was denial of the accused' right on account of deliberate conduct of the prosecution and the accused was so seriously prejudiced that it would not be proper to uphold his conviction on the

basis of report of the Public Analyst.

9. In para 8 of the judgment, the Court cautioned thus :

'We are not to be understood as laying down that in every case where the right of the vendor to have his sample tested by the Director of the Central Food Laboratory is frustrated, the vendor cannot be convicted on the basis of the report of the Public Analyst. We consider that the principle must, however, be applied to cases where the conduct of the prosecution has resulted in the denial to the vendor of any opportunity to exercise this right. Different considerations may arise if the right gets frustrated for reasons for which the prosecution is not responsible.'

10. The above decision of a Bench of two Judges was distinguished by a larger Bench of Three Judges in *Babulal Hargovindas v. State of Gujarat*, AIR 1971 SC 1277. In this case, under the unamended Act, complaint was filed more than 4 months after the taking of the sample of milk and it was contended that right of the accused under Section 13 of the Act was denied and he was prejudiced. In that case, the accused did not move the Court for sending another part of the sample to the Central Food Laboratory for analysis. The Court rejected this argument in the following words :

'There is also, in our view, no justification for holding that the accused had no opportunity for sending the sample in his custody to the Director, Central Food Laboratory under Section 13(2) because he made no application to the Court for sending it. It does not avail him at this stage to say that over 4 months had elapsed from the time the samples were taken to the time when the complaint was filed and consequently the sample had deteriorated and could not be analysed.'

Distinguishing the decision in *Ghisaram's case* (supra) the court observed :

'In that case, the sample of the vendor had in fact been sent to the Director, Central Food Laboratory, on his application, but the Director reported that the sample had become highly decomposed and could not be analysed. It is also evident from that case that the Food Inspector had not taken the precaution of adding the preservation. No such defence is available to the appellant in this case

not only is there evidence that the preservative formalin was added, but the appellant had not even made any application to send the sample to the Director of Central Food Laboratory.'

11. Another three Judge Bench of the Supreme Court in *Ajitprasad Ramkishan Singh v. The State of Maharashtra*, AIR 1972 SC 1631 distinguished Ghisaram's case, (supra) and approved the dictum in *Babulal Hargovindas's* case, (supra). In this case, complaint was filed 13 months after taking the sample and summons was served on the accused three months thereafter. Relying on the decision in Ghisaram 's case, it was contended that right of the accused under Section 13 of the Act has been denied and he has been prejudiced. Rejecting this contention, the Court observed in para 6 of the judgment as under :

'We do not think that the case would, in any way, assist the appellant. In that case, the part of the sample delivered to the vendor had been sent to the Director on the application of the vendor, but the Director reported that the sample had become highly decomposed and could not be analysed. It was not disputed in that case that the Food Inspector had not taken the precaution of adding the necessary preservative to the sample. So the Court held that the valuable right given to the vendor under Section 13(2) of the Act could not have availed of and the conviction was bad. In the present case, the appellant never applied to the Court to have the part of the sample with him analysed by the Director.'

After referring to Section 13(2) of the Act, the Court observed :

'It is clear from the sub-section that the appellant should have made an application after paying the prescribed fee if he wanted the part of the sample available with him to be sent to the Director for analysis. If he had made the application after paying the prescribed fee, the magistrate would have had no option but to send the part of the sample for analysis by the Director. If in pursuance of the application, the part of the sample was sent to the Director and he had reported that the part of the sample was incapable of analysis for the reason that it was decomposed, the appellant could perhaps have contended that he was deprived of his right to have the sample analysed by the Director on account of laches of the complainant and that he should be acquitted. But since the appellant never applied

under Section 13(2) of the Act he cannot complain that he has been deprived of any right.'

12. In Babulal Hargovindas's case, (supra) Jaganmohan Reddy, J., speaking for the Court, said that unless an application to send the sample to the Director is made, the vendor cannot complain that he was deprived of his right to have the sample analysed by the Director. The Magistrate in that case thought that no useful purpose would be served by sending the sample to the Director in view of lapse of time. Rejecting this approach, the Court observed :

'It was not for the Magistrate to decide without any data that the sample would be decomposed and was incapable of being analysed. The Food Inspector had sworn as P.W. 1 that he had added 8 drops of formalin to each part of the sample. Though under the Rules he should have added 16 drops to each part, there is no reason to think that the sample became decomposed by the time summons was served for that reason. There was no evidence before the Magistrate that for the reason that the prescribed quantity of formalin was not added to each part, the part of the sample delivered to the vendor was incapable of being analysed by the Director.'

Nor did the Magistrate rely on that circumstance for his conclusion that the sample would have become decomposed. The appellant could have summoned the Public Analyst and examined him if he was serious in his present contention that since the prescribed quantity of formalin was not added, the part of the sample would have become decomposed by the time the summons was served and no useful purpose would have been served by sending the sample for analysis by the Director. There was therefore, no evidence that the part of the sample available with the appellant had so deteriorated at the time the summons was served as to be incapable of being analysed.'

The Court finally held :

'In this case no prejudice of defence has been shown. It has not been established on record that the sample of tea which was available with the appellant, had deteriorated by the time the summons was received. He never utilised the right

under Section 13(2) of the Act of sending the sample to the Director, Central Food Laboratory.'

13. We would like to mention that the larger Benches of the Supreme Court, in the two latter cases, distinguished the case dealt with in Ghisaram's case, (supra) on facts. The case was distinguished on two counts : firstly that in that case there was expert evidence available to the Court to decide whether the sample would have become decomposed or not, and secondly, there was proof of the decomposition of the sample in the form of report of Director, Central Food Laboratory obtained on the application of the accused. The larger Benches of the Supreme Court laid down the proposition that the decision on the question whether right of the accused has been denied and he has been prejudiced in his defence is not a matter of presumption or assumption, and there must be material to show that the sample would not have remained fit for analysis by the time the accused is served in the case and to show that decomposition is traceable to lapse of time occurring on account of laches of the prosecution, either in filing the complaint or otherwise and not due to other reasons. This Court is bound by the principle of law laid down by the Supreme Court in Babulal Hargovindas's case (supra) and of Ajitprasad Ramkishan's case (supra).

14. In the present case, there is no evidence that after a lapse of 8 or 9 months, the sample of milk would necessarily have become decomposed, nor did the revision petitioner apply to the Court under Section 13(2) of the Act to have another part of the sample sent to the Director, Central Food Laboratory, for analysis and there was no report of the Director that the sample had become unfit for analysis. The fact that in certain other cases either on the basis of evidence adduced in such cases or on the basis of other material. Courts have arrived at findings of fact that the sample had become decomposed by the time prosecution was launched or accused was served in the case is no ground to hold that in every case, the same result would follow. The doctrine of precedent applies to principles of law laid down by Courts and not to findings of fact arrived at by Courts. Findings of fact become conclusive on principles of res judicata or the doctrine of issue estoppel. Such principle or doctrine is inapplicable in this case. The finding of fact arrived at by the Supreme Court in Ghisaram's case, (supra) is not applicable to

other cases which are not inter parties. Article 141 of the Constitution renders the law declared by the Supreme Court to be binding on Court in India. The principle of law declared in Ghisaram's case (supra) has been explained by Larger Benches of the Supreme Court in latter cases and we are bound to follow the law declared in the latter cases. Since the revision petitioner did not invoke his right under Section 13(2) of the Act and did not examine the Public Analyst to show that part of the sample of milk in the case would necessarily have become unfit for analysis by the time summons was served on him and did not adduce other evidence to that effect, it cannot be said that the part of the sample would have become decomposed and that it was futile for him to invoke his right under Section 13(2) or that it could be presumed or assumed under these circumstances that he has been prejudiced in his defence.

15. In this view, it would really be unnecessary to refer to the decisions of this Court relied on by learned counsel for the revision petitioner. However, we shall advert to these decisions out of deference to the efforts made by the learned counsel for the revision petitioner. Learned counsel referred to the decision in Cr. Appeal No. 579/66, State of M. P. v. Deola, Short noted in 1970 M.P.L.J. Notes of Cases 47. In that case prosecution was launched nearly 8 months after the milk was purchased for analysis and the accused was served one month thereafter. The trial court acquitted the accused holding that he had been prejudiced in his defence due to laches of the prosecution. A Division Bench of this Court sustained the acquittal, though the accused did not invoke his right on account of lapse of time. The Division Bench relied on the decision in Ghisaram's case (supra). This decision was long before the two latter judgments of the Supreme Court and can no longer be regarded as laying down good law. In State of M.P. v. Tulsiram, 1970 MPLJ 177, a Division Bench of this Court considered practically all the earlier decisions of the Court as also the decision of the Supreme Court in Ghisaram's case, (supra). The Bench noticed conflicting views expressed by learned Single Judges of the Court. In the cases considered by the Court, preservative in the prescribed quantity was not added to the samples. The Court held that prosecution was unduly delayed and right of the accused under Section 13(2) of the Act was defeated. There was no application filed by the accused under Section 13(2) of the Act and there was no evidence produced before the court. This decision also was

rendered before Larger Bench decisions of the Supreme Court referred to above and can no longer be regarded as laying down the correct law.

16. The decision in *A. N. Apte, Food Inspector, Indore Municipal Corporation v. Mohammad Amir Khajarana*, 1974 MPLJ 241, was rendered by a Full Bench of this Court. The facts of the case are not set out in the judgment. In that case, the Food Inspector did not add requisite quantity of preservative and the complaint was filed 2 1/2 months after the sample of milk was taken. The Division Bench formulated 3 questions for the opinion of the Full Bench viz. -

(i) Whether a small deviation about the quantity of formalin to be added will be fatal to the prosecution?

(ii) What should be the normal period by which the accused should be apprised of the prosecution so as to render the delay fatal ?

(iii) Whether slight deviation from the observance of the rules about the quantity of formalin to be added will have its effect of delay in launching the prosecution?

The Full Bench held that substantial compliance of Rule 20 is sufficient provided that when the sample was examined by the Public Analyst at the request of the Food Inspector and by the Director of Central Food Laboratory at the request of the accused, the sample was found to be in a fit condition of analysis, that mere delay in prosecuting the accused cannot be fatal to the prosecution unless it is established that because of delay attributable to the prosecution agency only any right given to the accused under the said Act to get the sample analysed is denied to him and in normal circumstances, the accused vendor should be informed about his prosecution either within 3 to 4 months of taking of the sample or within such period which would enable him to exercise his right under Section 13(2) of the Act to get the sample of food analysed at the earliest possible opportunity. A slight deviation from the observance of the Rules about the quantity of Preservative will not have any effect on the delay in launching the prosecution unless it is established that the delay and/or inadequate addition of formalin has resulted in denial or frustration of the statutory right under Section 13(2) of the Act. The opinion expressed by the Full Bench is not helpful for us in dealing with the facts of

the present case, but certain observations of the Full Bench may be useful. In para 21 of the judgment, after referring to Ghisaram's case (supra) and Babulal Hargovindas's case, (supra), the Full Bench observed thus :

'It would thus appear that in the aforesaid three decisions of their Lordships of the Supreme Court, emphasis was always on the question of opportunity to the accused to exercise his right under Section 13(2) of the Act. If in spite of the availability of such an opportunity the accused chooses not to exercise this right, they in the event of the report of the Public Analyst being adverse to him, Courts acted upon such report and convicted the accused. The real test prescribed in all these cases was that at the time when the accused has an opportunity to exercise his right under Section 13(2) of the Act, the sample of food should be found in a condition fit for analysis by the Director. If on account of delay which is attributable to the prosecution agency only, the right given under Section 13(2) of the Act to the accused vendor is either denied or frustrated, then certainly the delay would be fatal to the prosecution. In other cases the delay, whatever be its duration, would not be fatal.'

In para 23 of the judgment, referring to the right of the accused to apply under Section 13(2) of the Act, the Court observed :

'If at the stage when such right is exercised, the delay results in the decomposition of the sample which will prove fatal to the prosecution case. In normal circumstances, period of 3 to 4 months prosecuting the accused and making him aware of this prosecution would not be fatal subject to the condition that the provisions of Rule 20 in the matter of addition of preservative are substantially complied with.'

The Court did not have occasion to consider about the effect of delay of more than 3 or 4 months. This decision supports the view we have taken.

17. Learned counsel referred to two decisions of learned Single Judges reported in 1977 MPLJ. One is in case of Shivdayal Saligram Tiwari v. State of M. P., 1977 MPLJ 169 and the other is in case of Jairam Bhaosingh v. State of M. P., 1977 MPLJ 608. In the former case, prosecution was launched more than 9 months

after the sample of milk was taken and the accused appeared nearly three months later. The third sample with the Local Authority was found damaged. Learned Single Judge, on the basis of a passage from the book Milk Production and Control by Harvey and Hill and a passage in Encyclopaedia Britannica, held that the sample would have become deteriorated by the time prosecution was launched and it did not matter that the accused did not make an application under Section 13(2) of the Act, relying on the decision in Ghisaram 's case (supra) and distinguished the latter decisions of the Supreme Court. This decision, in our respectful opinion, goes against the dictum in Babulal Hargovindas's case, (supra) and Ajitprasad Ramkishan's case (supra) since no application was made under Section 13(2) of the Act and no evidence was before the Court. Opinion expressed in books cannot be a substitute for the evidence of expert in Court which is subject to cross examination. A contrary view was taken by another Single Judge in Jairam Bhaosingh's case (supra). The view taken in this case is in accordance with the decisions of the Supreme Court referred to earlier.

18. In the case in hand, the accused did not make an application under Section 13(2) of the Act. Had he made an application, a part of the sample would have been sent to the Central Food Laboratory and the Director would have reported whether or not the sample was fit for analysis and if was fit for analysis, what was the result of the analysis. The report containing the result of analysis would have superseded the report of the Public Analyst. The accused failed to take steps which would have made available such material to the Court. He did not also examine the Public Analyst. He did not adduce other evidence in this behalf. As to whether a particular sample of milk will necessarily decompose within a particular period cannot be a matter of assumption and presumption. The Court has to record a finding of fact on the basis of evidence before it. Such evidence is lacking in the case. We, therefore, reject the contention that on account of delay in launching the prosecution, the sample must have become decomposed and unfit for analysis and consequently the accused has been prejudiced in his defence.

19. In the result, the revision petition is dismissed.