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Court : Kerala

Decided On : Jan-16-1967

Reported in : 1967CriLJ1430

Judge : M.U. Isaac, J.

Appellant : T.A. Ouseph

Respondent : State of Kerala Represented by the Food Inspector, Trichur Municipality

Judgement :

ORDER

M.U. Isaac, J.

1. The petitioner was convicted by the District Magistrate of Trichur in C. C. No. 177 of 1965 for an offence under Section 16(1)(a)(ii) of the Prevention of Food Adulteration Act, 1954 (hereinafter referred to as the Act) read with Section 7(1) thereof, and sentenced to undergo one year's rigorous imprisonment and to pay a fine of Rs. 2,000. He filed Cri. Appeal No. 109 of 1985 before the Sessions Judge of Trichur who dismissed the appeal upholding the conviction, but reduced the sentence to three months' rigorous imprisonment and a fine of R3. 500. The petitioner has filed this revision petition against the aforesaid conviction and

sentence.

2. The case against the petitioner was that the Food Inspector, who is P. W. I in this case, purchased from the petitioner, who is a trader within the Trichur Municipality, poor dhall on 16-3-1965 along with other articles of food, and on analysis by the public analyst the poor dhall was found dyed with coal tar dyes and therefore adulterated. Exhibit P-4 is the report of the public analyst. The conviction of the petitioner is based on this report. The petitioner's learned Counsel contended that Ex. P-4 should not be acted on ; and he raised three points in support of this contention.

They are (1) the Food Inspector did not comply with the requirements of Sub-sections (5) and (7) of Section 10 of the Act, (2) there is no evidence that the public analyst complied with the requirements of Rule 7, and the Food Inspector complied with the requirements of Rules 17 and 18 of the Prevention of Food Adulteration Rules, 1955 (hereinafter referred to as the Rules) with regard to sample taken and sent for examination to the public analyst and (3) Ex P-4 does not contain any data or the reasons for the finding that the sample analysed contained coal tar dye and was adulterated. These points may be considered in seriatim.

3. The second proviso to Sub-section (5) of Section 10 of the Act states that

the Food Inspector shall, in exercising the powers of entry upon, and inspection of any place under this section, follow, as far as may be, the provisions of the Code of Criminal Procedure (Act 5 of 1898) to the search or inspection of a place by a police-officer executing a search warrant issued under that Code.

Section 103 of the Criminal P. C., relating to search, of which Sub-sections (1) and (2) alone are relevant here, reads as follows:

(1) Before making a search under this Chapter, the officer or other person about to make it shall call upon two or more respectable inhabitants of the locality in which the place to be searched is situated to attend and witness the search and may issue an order in writing to them or any of them so to do.

(2) The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses; but no person witnessing a search under this section shall be required to attend the Court as a witness of the search unless specially summoned by it.

* * * *

4. It is contended that the Food Inspector, while entering into the petitioner's shop and purchasing the articles of food did not call upon person to attend and witness his entry into the shop and the purchasing of the articles. Section 10(7) of the Act reads as follows:

Where the food inspector takes any action under Clause (a) of Sub-section (1), Sub-section (3), Sub-section (4) or Sub-section (6), he shall, call one or more persons to be present at the time when such action is taken and take his or their signatures.

It is stated that this provision of the Act was also violated by the Food Inspector. I agree with the petitioner's learned Counsel that the above provisions of the Act are mandatory, and they are intended for the protection of the citizen from any false charge being levelled against him and to ensure that the Food Inspector acts properly and in accordance with law, But the submission of the learned Counsel that the action taken by the Food Inspector was not witnessed by any person as required by the aforesaid provisions of the Act, is not correct. Exhibit P. 3 is the intimation given by P. W. 1 to the petitioner under Rule 12 stating that he had taken the sample for analysis. It contains the signature of the petitioner acknowledging receipt of its copy, and also the signatures of two witnesses stating that they saw the sample being taken.

P. W. 1 Bays in chief examination that he acted in accordance with the requirements of Section 10 of the Act in the matter of purchasing the sample of the article concerned in this case, and he also deposes, in further cross-examination made by the petitioner's counsel that these two witnesses were present throughout. So the contention that Section 10(7) was not complied with cannot

stand. Then the objection is that P. W. 1 did not prepare a list of all the things seized by him and of the places in which they were found as required by 6. 103 (2) of the Criminal P. O. Exhibit P-3 which is in Form VI as prescribed under B. 12 and the particulars contained therein appear to satisfy the requirements of the above Section. No doubt it is more desirable to prepare a separate list of the articles seized by the Food Inspector complying with the requirements of Section 103 of the Criminal P. C., as far as may be, when he takes action under Section 10 of the Act. Apparently it is such a procedure that is contemplated by the aforesaid statutory provisions.

5. There are a number of decisions of our Court in which the question whether the non-compliance with the requirements of Section 10(7) of the Act would vitiate the action taken by the Food Inspector and the prosecution instituted on the basis of the said action has been considered. In *State v. Mohammed Ibrahim* : AIR1959 Ker351 a Division Bench held that taking action under Section 10(7) of the Act without calling and witness is a flagrant violation of the provisions of Act, and that, even if it is to be treated only as an irregularity, it caused prejudice to the accused. This decision was followed by a learned single Judge in *State v. S.V. Natesa Gounder* 1959 Ker LT 657. The same question arose before another Divisions Bench of this Court in *City Corporation of Trivandrum v. Arunachalam Reddiar* : AIR1960 Ker356 .

The learned Judges held that non-compliance with the requirements of Sub-section (7) of Section 10 of the Act is a serious irregularity, and it has caused material prejudice to the accused in that case. It may be pertinent to observe that the question whether non-compliance of the statutory procedure would cause prejudice or occasion failure of justice within the meaning of Section 537 of the Criminal P.C., depends on the facts and circumstances of each case. I do not understand the above decisions as laying down a proposition that prejudice would be presumed for the mere fact of non-compliance with the requirements of Section 10(7) of the Act. There is also no warranty for such a proposition. Hence these decisions can be read only as holding that on the facts and circumstances of those cases : prejudice was actually caused by the failure of the Food Inspector to comply with the requirements of Section 10(7), though it is not stated in those

cases how the prejudice was caused.

6. There is a detailed consideration of the above question by Mr. Justice S. Velu Pillai and Smt. Justice Anna Chandy in Criminal Appeals 92, 113 and 114 of 1960 (Ker) which were jointly disposed of by the learned Judges. This decision is not unfortunately reported. Mr. Justice Velu Pillai held that Section 10(7) of the Act and Section 103, Criminal P. C. are in pari materia as regards the requirements of calling witnesses to be present, when taking action under Section 10(7) of the Act or making a search under Section 103, Criminal. P. C. The learned Judge then referred to *Sunder Singh v. State of Uttar Pradesh* : 1956 CriLJ801 where the Supreme Court stated as follows : --'Hence at the highest, the irregularity in the search and the recovery in so far as the terms of Section 103 had not been fully complied with would not affect the legality of the proceedings. It only affected the weight of evidence which is a matter for courts of fact...'

On the authority of the above decision of the Supreme Court, Mr. Justice Velu Pillai held that non-compliance with Section 10(7) of the Act is only an irregularity, and that it does not vitiate the action taken by the Food Inspector or the prosecution initiated on the basis of the said action. Mr. Justice S. Velu Pillai also took the view that the provisions of B. 10(7) were only directory and not mandatory. Smt. Justice Anna Chandy while agreeing with Mr. Justice S. Velu Pillai in the disposal of the case did not share his view on the interpretation of Section 10(7) of the Act, and held that it was mandatory. Dealing with this, she stated as follows:

The words used are 'shall as far as possible, call.' 'Shall' means 'must' and ordinarily connotes a mandate. The argument, however, is that the use of the words 'as far as possible' derogates from the mandate and gives the food inspector the right to decide whether or not to call witnesses. I confess I am not impressed with this argument. The words 'shall, as far as possible, call' means 'shall call, unless it is not possible to call' and it implies nothing more than the recognition of the fact that under certain circumstances it would be impossible to call witnesses. The recognition of this eventuality does not reduce the imperativeness of the need for witnesses. It only means that if the absence of

witnesses is due to the impossibility of procuring them, then the search will not, for that reason alone, become illegal. If that be so, then there could hardly be any 'discretion' given to the food inspector to decide whether or not to call witnesses. To tell a man to do something unless it cannot be done is to leave him little option in the matter. The question whether it is possible to call witnesses or it is impossible to do so, does not depend upon how the food inspector views the problems, but in certain circumstances which are, at the relevant time, either existent or non-existent. If it were a matter of subjective opinion or a matter of discretion, the words used would not have been 'shall, as far as possible, call,' but 'shall, as far as convenient, call' or 'may, if he thicks fit so to do, call.' That the section is to be construed strictly will be dear when one realises that the result of the investigating officer's action under this section is not, as it would be in most cases of crimes under the Penal Code, the discovery of incriminating circumstances, but is the discovery of the entire body of evidence that need be brought against the accused. The prosecution need only show that the material taken by the food inspector from the accused's shop was seen to be adulterated on subsequent analysis and the accused will be convicted. No other evidence of any sort is needed to substantiate the charge (Even the defences available to him are prescribed in the Act Section 192). If a man is to be convicted on a solitary item of evidence it stands to reason that it should then be of highest quality. The only guarantee of its quality lies in the procedure law prescribes for its procurement.

I respectfully agree with Smt. Justice Anna Chandy that the requirements of Section 10(7) are mandatory and with the reasons stated by the learned Judge for holding so. But this controversy is not very material for the question I am concerned with. It is important to notice that Smt. Justice Anna Chandy also held that Section 10(7) of the Act and Section 103, Criminal P. C. are in pari material, and that the principle laid down regard, ing the latter hold good in the former case also.

7. Reference may now be made to the decision of the Supreme Court in *Badha Kishan v. State of Uttar Pradesh* : (1963)11LLJ667SC where their Lordships observed as follows regarding the alleged illegality of a search conducted under

Section 103 of the Code:

So far as the alleged illegality of the search is concerned it is sufficient to say that even assuming that the search was illegal the seizure of the articles is not vitiated. It may be that where the provisions of ss. 103 and 165, Criminal P. C. are contravened the search could be resisted by the person whose premises are sought to be searched. It may also be that because of the illegality of the search the Court may be inclined to examine carefully the evidence regarding the seizure. But beyond these two consequences no further consequence ensues.

It, therefore, follows that, on the authority of the last mentioned Division Bench decision of our Court and the above two Supreme Court decisions, the non-compliance of s. 10(7) of the Act does not vitiate the action taken by the Food Inspector, but it only makes the evidence relating to the action taken by him liable to a more careful scrutiny by the Court.

8. The effect of non compliance with the provisions of Section 10(7) of the Act was considered by Mr. Justice P. Govinda Menon in *Food Inspector, Cannanore Municipality v. P. Kannan* : AIR1964 Ker261 . His Lordship after reviewing the authorities, followed the decision of the Division Bench in *Cri. Appeals Nos. 92, 112 and 114 of 1960 (Ker)*. The same view was taken by Smt Justice Anna Chandy in *State of Kerala v. K.K. Gopinathan Nair* 1964 Ker LT 593. It is, however, contended by the petitioner's learned Counsel on the authority of a decision of Mr. Justice M. Madhavan Nair in *Subramaniam Chettiar v. Food Inspector, Palghat Municipality* : AIR1967 Ker192 that compliance with the requirements of Section 10(7) of the Act is mandatory, that its violation would vitiate the action taken by the Food Inspector, and that the decision of this Court which takes a different view requires reconsideration.

I do not agree that Mr. Justice Madhavan Nair laid down any such proposition. A close reading, of this decision shows that it is not in any manner inconsistent with the earlier decisions of this Court on this question. All what His Lordship said was that the direction in Section 10(7) of the Act was mandatory. He has not held that the non-compliance of this provision would vitiate the action taken by the Food Inspector : on the other hand His Lordship examined the prosecution evidence in

the background that the Food Inspector failed to comply with the mandate contained in the above section of the Act, and came to the conclusion that it was not worthy of credit, and that the guilt of the accused could not be said to have been established beyond reasonable doubt.

9. Reliance was also placed by the petitioner's learned Counsel on the following passage appearing in the above decision:

If the requirement of calling persons to witness the action of the Food Inspector is to assure fairness in the action-I have no doubt that it is designed to that end -the persons called must be independent and disinterested, and not susceptible to influence of the Food Inspector. It is essential then that the witnesses concerned must be persons unconnected with trade in articles of food.

It was argued by the learned Counsel that the witnesses called by the Food Inspector to be pre-sent at the time of taking action under Section 10(7) of the Act must be independent persons, that the persons connected with the trade in articles of food are not independent witnesses, and that, in this case, one of the witnesses was the peon of the Food Inspector, and that there was no evidence-that the other witness was an independent witness in the sense that he was unconnected with the trade in articles of food. The question whether the persons to be called to witness the action, under Section 10 of the Act should be independent witnesses, arose for consideration before the Division Bench in Ori. Appeals 92, 112 and 114 of 1960 (Eer).

Mr. Justice S. Velu Pillai dealing with this matter stated that 'the term independent witnesses' is not necessarily related to persons pertaining to the same department as the prosecutor, while there is no presumption, that every person of that category is susceptible to the influence of the prosecutor, other ties of dependence than the official tie, are also conceivable. There is no rule, as seems to have been assumed, that the evidence of officers in charge of police investigations is always to be looked upon with suspicion' His Lordship then referred to the decision of the Supreme Court in *Aher Raja Khima v. State of Saurashtra* : 1956 CriLJ426 , and the Full Bench decision of our Court in *Cochan Velayndhan v. State of Kerala* : AIR1961 Ker8 (FB) and concluded by saying that

'the question in final analysis, is One of reliability or trustworthiness of the evidence, and not of admissibility,' Dealing with the same matter Smt. Justice Anna Chandy stated as follows in the concurring judgment in the above case:

It (S. 10 (7) of the Act) does not say that these persons must be 'independent.' However to construe 'persons' as 'independent witnesses' is not to import something entirely alien to the spirit of the section. The very idea behind requiring other persons to witness the notion of the investigating officer, is the need for corroborating his evidence and his official subordinates are certainly not the best persons to serve that purpose.

I respectfully agree with the above statement and also with Mr. Justice S. Velu Pillai in holding that the question in final analysis is one of reliability of the evidence and not its admissibility, I cannot, therefore, accept the contention that Mr. Justice M. Madhavan Nair has laid down any different proposition in 1966 Ker L T 788 : AIR 1967 Ker 192. I have no doubt that His Lordship's observation in that decision that persons connected with trade in articles of food would not be independent witnesses, was not intended as a general proposition of law. but was made with reference to the particular facts and circumstances of that case.

10. Coming to the evidence in the case before me, the fact that toor dhal was taken by the Food Inspector from the petitioner's shop is not denied by him. His contention is that it was taken not from the stock that was kept for sale but it was taken from a back room of that shop where it was kept as a rejected stock unfit for sale. Exhibit P-1 is the bill relating to the sale of the article by the petitioner to the Food Inspector. Exhibit P-2 is the receipt given by the petitioner acknowledging receipt of one of the three parts into which the sample purchased by the Food Inspector was separated. Exhibit P-3 is the notice in Form VI, copy of which was given to the petitioner as required by Rule 12 of the Rules.

All these documents contain the signature of the petitioner. Thus the evidence of the Food Inspector stands corroborated by these documents and the admissions of the petitioner contain therein. No valid objection can, therefore, be taken in accepting the evidence of the Food Inspector on this point, on the ground that he did not comply with the requirements of Section 10(7) of the Act. The contention of

the petitioner's learned counsel on the first point cannot, therefore, stand.

11. The next contention of the petitioner's learned Counsel is that there is no evidence that the Public analyst has complied with the requirements of Rule 7, and that the Food Inspector has complied with the requirements of Rules 17 and 18 of the Rules, regarding the taking of the sample of food and sending it for examination, and that, in the absence of such evidence, Ext. P.4 the report of the Public analyst, cannot be acted on. These Rules may be quoted below for convenient reference:

Rule 7 (1), 'On receipt of a package containing a sample for analysis from a Food Inspector or any other person the Public analyst or an Officer authorised by him shall compare the seals on the container and the outer cover with specimen impression received separately and shall note the condition of the seals thereon.

(2) The public analyst shall cause to be analysed such samples of articles of food as may be sent to him by food inspector or by any other person under the Act.

(3) After the analysis has been completed he shall forthwith supply to the person concerned a report in Form III of the result of such analysis.

Rule 17. The container or sample for analysis shall be sent to the public analyst by registered post or railway parcel or air freight, or by hand in a sealed packet, enclosed together with a memorandum in Form VII in an outer cover addressed to the public analyst.

Rule 18. A copy of the memorandum and a specimen impression of the seal need to seal the packet shall be sent to the public analyst separately by registered post or delivered to him or to any person authorised by him.

The Food Inspector as Pw. 1 stated in chief examination that he sent the container of the sample to the public analyst, and that he got the report Ext. P.4 from the public analyst. Nothing has been asked to this witness even to suggest, that in doing so, he did not act as required by the Rules. Exhibit P.4 states that the public analyst received the sample of the toor dhal sent by Pw. 1 for analysis properly sealed and fastened, and he found the seal intact and unbroken. Under Section

18(5) of the Act Ext. P-4 is evidence of the facts stated therein. So it is not a case where there is no evidence at all that the requirements of the above Rules were not complied with. There is evidence to the extent indicated above. But it does not say that the procedure required to be adopted under the Rules by the Food Inspector in sending the sample for analysis and by the public analyst on receipt of the sample, was duly followed by these officials. Such evidence is not however necessary,

12. The court may presume 'that judicial and official acts have been regularly performed'- vide Illustration (e) of Section 114 of the Evidence Act. That this presumption will apply to the official acts of the Food Inspector and the public analyst is well settled by the decisions of our court. In *State of Kerala v. Ramakrishna Nair* 1965 Ker. L.J. 47s. Smt. Justice Anna Chandy dealing with a contention stated as follows:

Under Section 114(1) of the Evidence Act the Court may presume that official acts have been regularly performed When the Food Inspector was in the box it was not suggested to him that he did not forward the specimen seal as required by Rule 7, There is the report of the analyst that the seals were found intact and it has to be presumed that he compared the seal with the specimen seal. He could not certify to that effect without making himself sure that there was no tampering of any sort in the seal. As observed by the Allahabad High Court in *Municipal Board, Faizabad v. Lal Chand* AIR 1964 All L99 if the accused wanted to challenge the fact or establish that the sample seal for analysis was tampered with, it was open to him to send the sample with him for analysis as provided in Section 12 of the Act. This decision has been followed by this Court in *Criminal R.P. 41 of 1964* where a similar objection was taken and repelled.

The same is the position in the case in hand. The same contention was repeated before the learned Judge in *Food Inspector, Cannanore Municipality, Cannanore v. Pandavalappil Kannan* : AIR1966 Ker70 and the learned Judge, following the earlier decision, repelled the said contention. I respectfully agree with the view taken by the learned Judge in the above cases and the decisions referred to therein.

13. The last contention of the petitioner's learned Counsel is that Ext. P.4 should not be acted on, as it does not contain any data or the reasons for the finding that the sample analysed by him was adulterated. This is also a point well settled by authorities. It is sufficient to refer to the decision of the Supreme Court. In *Mangaldas v. Maharashtra State* : 1966 CriLJ106 , their Lordships dealing with such a contention advanced with reference to the report of the public analyst, observed as follows ;

We fail to see the necessity of stating in the report as to how the calculations have been made by the 'Public Analyst. Apart from that it is clear that this decision does not support the contention of learned Counsel that a Court of fact could not legally rest solely on the basis of the report of the Public Analyst.

The above statement was made with reference to the observations contained in the decision of this Court in *City Corporation of Trivandrum v. Antony* ILR (1962) 1 Ker 430.

14. Reference may also be made to a Division Bench decision of our Court in *Food Inspector, Cannanore Municipality v. Abdul Azeze* : AIR1964 Ker107 . It was a case of adulteration of toor dhal and the report of the public analyst simply stated that, as a result of the analysis made by him, the sample was found to contain 'metanil yellow (coal tar dye)', and that the sample was adulterated, as it contained the above substance. The report did not indicate what was the sort of examination that the analyst conducted, the quantum of the coal tar dye contained in the sample, or the method by which he worked out the result. Their Lordships held that it was not necessary in a case like this to state any of these matters in the report of the public analyst.

They stated that as the very use of the dye was prohibited there was no need to state as to how much of the dye was used in the sample of the food. The learned Judges have in their decision, referred to a number of authorities in support of their conclusion and it is needless for me to repeat them. I respectfully agree with the views expressed by the learned Judges. Reference may also be made to a recent Division Bench decision of the Punjab High Court in *Municipal Corporation of Delhi v. Chhatis Kanhya* AIR 1966 Punj 328 in which the same view, as held by the

aforesaid decisions of our. High Court, has been adopted. The contention of the petitioner's learned Counsel on this count also fails.

15. In the result, this revision petition is dismissed.

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