

Hanuman Vs. State of Rajasthan

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Court : Rajasthan

Decided On : Jul-10-1997

Reported in : 1998CriLJ32; 1997(3)WLC376; 1997(2)WLN36

Judge : Amaresh Ku. Singh, J.

Acts : [Prevention of Food Adulteration Act, 1954](#) - Sections 13 and 13(2); Code of Criminal Procedure (CrPC) - Sections 313 and 482; [Constitution of India](#) - Article 22(2); Prevention of Food Adulteration Rules - Rule 9A

Appeal No. : Criminal Misc. Petn. No. 484 of 1996

Appellant : Hanuman

Respondent : State of Rajasthan

Advocate for Def. : C.R. Jakhar, Public Prosecutor

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

Disposition : Petition allowed

Judgement :

ORDER

Amaresh Ku. Singh, J.

1. Heard the learned counsel for the petitioner and the Public Prosecutor.

2. This Criminal Misc. Petition under Section 482, Cr.P.C. is directed against the order dated 22nd March, 96 passed by the learned Chief Judicial Magistrate, Jodhpur in Criminal Case No. 291 /94 'State v. Hanuman.'. By the aforesaid order, the learned Chief Judicial Magistrate rejected the prayer of the accused petitioner for sending one of the samples to the Central Food Laboratory, Calcutta under Section 13(2) of the Prevention of Food Adulteration Act, on the ground that the application under Section 13(2) of the Food Adulteration Act (in short the Act hereinafter) was not submitted within a period of ten days as required by Section 13(2) of the Act. The learned counsel for the petitioner has submitted that the order passed by the learned Chief Judicial Magistrate is against the provisions of Section 13(2) of the Act and it resulted in depriving the petitioner of his right to defend himself against the charge for which he was being tried. He has placed reliance on a decision, dated 6th January, 96 given by the learned single Judge of this Court in S.B. Criminal Revision Petition No. 25/96 by which the learned single Judge held that the order passed by the learned Chief Judicial Magistrate rejecting the prayer made by the accused to send the second part of the sample to Central Food Laboratory, Calcutta was against the law and was therefore, set aside.

3. The learned Public Prosecutor has supported the order passed by the learned Chief Judicial Magistrate and submitted that the order passed by him is in accordance with law, because the application under Section 13 of the Act was not filed within a period of ten days.

4. The only question which need be decided in this case is whether the right conferred on the accused person/persons, by Sub-section (2) of Section 13 of the Prevention of Food Adulteration Act is automatically extinguished if such right is not exercised by the accused person/persons within a period of ten days prescribed by Sub-section (2) of Section 13 of the P.F.A. Act?

5. The learned Chief Judicial Magistrate has relied on the following observations of the Hon'ble Supreme Court in *Tulsi Ram v. State of Madhya Pradesh* (1984) 4 SCC 487 (at page 495) : 1984 Cri LJ 1731 at pp. 1736-37 :

Section 13(2) requires the Local (Health) Authority to forward to the person from whom the sample was taken a copy of the report of the Public Analyst, if the report

is to the effect that the article of food is adulterated. The report is to be forwarded in such manner as may be prescribed, after the institution of the prosecution. Thereafter the person from whom the sample was taken is given the right to apply to the Court within ten days of the receipt by him of the copy of the Public Analyst's report to get the sample kept by the Local (Health) Authority analysed by the Central Food Laboratory. It is no longer open to the accused vendor to wait till the very last minute to apply to the Court to have the sample analysed by the Central Food Laboratory. If he wants to exercise the statutory right of having the sample analysed by the Central Food Laboratory he has to exercise that right by applying to the Court within ten days of receipt by him of the Public Analyst's report. It is to be noticed that the amended Section 13(2) does not prescribe any point of time before which the report of the Public Analyst is to be forwarded to the accused vendor.

In the same judgment, at page 497 (of SCC): (at p. 1738 of Cri LJ), the Supreme Court observed :-

if after receiving the Public Analyst's report he never sought to apply to the Court to have the sample sent to the Central Food Laboratory, as in the present case, he may not be heard to complain of the delay on the receipt of the report by him, unless, of course, he is able to establish some other prejudice.

6. In view of the observations marked as (A) it must be held that the law requires the accused person to exercise the right conferred by sub section (2) of Section 13 of the P.F.A. Act within ten days of the receipt of the copy of the report of the Public Analyst. But, there is nothing in these observations to indicate that if the right conferred by Sub-section (2) of Section 13 is not exercised by the accused within 10 days prescribed by sub section (2) of Section 13, then his right shall stand extinguished.

7. The observations marked as (B), show that the accused can exercise the right conferred by Sub-section (2) of Section 13 of the P.F.A. Act, at any time even after the expiry of the period often days prescribed by Section 13(2) because the use of the expression 'never applies' show that the accused can apply for sending one sample to Central Food Laboratory at any time during the trial. If the Hon'ble

Supreme Court intended to lay down the law that the accused cannot exercise the right conferred by Sub-section (2) of Section 13 of the P.F.A. Act, after the expiry of the period of ten days, then in place of the words 'never applies' their lordships would have used the words 'does not apply within the period of 10 days'. Thus two different conclusions are likely to be drawn from the observations marked as (A) and the observations marked as (B). Since the Hon'ble Supreme Court has not laid down that the right conferred by Section 13(2) of the P.F.A. Act is automatically extinguished if it is not exercised within a period of ten days from the date of receipt of the copy of the report of the Public Analyst, it is necessary to 'find out whether the right of the accused under Section 13(2) of the P.F.A. Act is automatically extinguished after the expiry of period of ten days prescribed by Sub-section (2) of Section 13, if not already exercised within the said period?

8. The learned Public Prosecutor has submitted that the provisions of Sub-section (2) of Section 13 are 'mandatory' and therefore the right conferred by Section 13(2) of the P.F.A. Act must be held to be extinguished if it is not exercised within the period of ten days. On the other hand the learned counsel for the petitioner has submitted that the direction contained in Section 13(2) of the P.F.A. Act, regarding the exercise of right by the accused within ten days is 'directory' and therefore the right is not extinguished if it is not exercised within ten days prescribed by Section 13(2) of the P.F.A. Act.

9. There is nothing mysterious about the expressions 'mandatory' and 'directory'. These expressions are used by the Courts to indicate the consequences of non-compliance of a legal provision.

10. If the consequence of non-compliance of a legal provision is in the nature of extinction or forfeiture of a legal right, or (b) extinction of legal duty/obligation/liability, or (c) exposure to penalty or punishment of any kind, or (d) vitiation of the action/proceedings in question, or (e) harm/ loss/prejudice which is sufficient to vitiate the proceedings or extinguish the right or-the liability without any proof of the degree of harm/loss or prejudice, then the legal provisions is called as 'mandatory'. On the other hand if the non- compliance of the legal provision does not result in any one or more of the above mentioned

consequences, and either does not cause any harm/loss or prejudice to any one, or causes such harm/loss or prejudice which would not by itself vitiate the proceedings nor extinguish the right or liability but may vitiate the proceedings and result in extinction of right or liability only if the harm/loss or prejudice caused to any person is of the required degree or magnitude which is to be determined by the Court, then such legal provision is entitled to be called 'directory'. The expressions 'mandatory' and 'directory' signify the result of interpretation of a legal provision by the Court. They cannot be used as means for finding out whether the proceedings are vitiated, or the right or liability is extinguished due to non-compliance of a legal provision. The crucial question is whether the right conferred by Sub-section (2) of Section 13 of the P.F.A. Act is extinguished, if it is not exercised within a period of ten days from the date of receipt by the accused of the copy of the result of the Public Analyst and this question can be answered properly by considering the nature of the right, the object of the right and the context in which Section 13(2) of the P.F.A. Act. must be interpreted. If this right is extinguished after the expiry of ten days period, the direction contained in Section 13(2) may be called 'mandatory'. On the other hand if the right is not extinguished, the direction contained in Section 13(2) may be called 'directory'.

11. Every provision of the Statute, deserves compliance because the statute is enacted in exercise of the legislative powers of the sovereign. In this sense every legal command is mandatory. It deserves compliance by those whom it is given. Even in those cases in which the law confers a discretion on an authority to act or not to act in the matter or to act or not to act in the manner indicated by law, there is legal duty to exercise the discretion conferred by law in accordance with sound principle and not arbitrarily. Therefore, even those statutes which confer discretion on the author/authorities are mandatory for, they impose the duty exercise the discretion properly according to guidelines indicated by law. But mere fact that laws are mandatory in sense that they should be obeyed, does not lead to the conclusion that non-compliance with law would positively result in a certain consequence. The consequences which may result from non-compliance of a legal provision, may be (a) such consequences as are prescribed by the law, or (b) such consequences as may inevitably occur in the ordinary course of nature. The consequences of former kind, depend on the legislature. If the legislature

prescribes certain consequences, such consequences must occur. On the other hand if the legislature omits to point out the consequences which may result from non-compliance of a law, then only those consequences can occur which occur in ordinary course of nature. Extinction of right or liability : vitiation of proceedings; vitiation of the proceedings or extinction of the right or the liability, are not the inevitable consequences of non-compliance of a legal provision. For the same reason no one can be penalised for non-compliance of a legal provision unless the penalty is provided by or under the law in force.

12. What consequence would occur from non-compliance of a law is primarily a matter for the legislature to decide. If the legislature thinks it necessary to prescribe a certain consequence or consequences for non-compliance of a legal duty, the legislature may and should prescribe such consequence for non-compliance of law. If the legislature fails to prescribe the consequences of non-compliance of a law, then only those consequences may be taken note of which occur in ordinary course of nature.

13. The doctrine of vitiation of proceedings due to non-compliance of law, can be applied in two cases; (a) when the legislature has provided that non-compliance of law would vitiate the proceedings, and (b) when the consequences resulting from the non-compliance of law, in ordinary course of nature are so important that the Court has no other way than to apply the doctrine of vitiation of proceeding for non-compliance of law. Similarly in the case of rights and liabilities, it is for the legislature to consider, whether non-compliance of a legal provision should result in extinction of a right or liability and whether it is within its competence to prescribe such a consequence. If the legislature is competent to extinguish the right or the liability and prescribed that non-compliance of a law would have the consequence extinguishing the right or the liability, then the doctrine of extinction of right/liability will be applied. If the legislature does not prescribe that a certain right or liability would be extinguished due to non-compliance of a law, then it would be necessary to find out the natural consequences arising from non-compliance of law, in ordinary course of nature. If the consequences arising from non-compliance of law, are important, then the Court may apply the doctrine of extinction of right or liability if there be no way to undo the consequences arising

from the non-compliance of law. In all other cases, it would not be proper to apply the doctrine of vitiation of proceedings or the doctrine of extinction of rights or liability due to non-compliance of law.

14. The legislature has not provided that if the accused person does not exercise the right conferred/recognised by Section 13(2) of the P.F.A. Act, within 10 days then his right shall be extinguished. The legislature has not provided that in the event of not exercising aforesaid right within the period often days, the accused person shall be penalised by forfeiture of the right recognised/protected/conferred by Sub-section (2) of Section 13 of the P.F.A. Act.

15. In the above mentioned circumstances, neither the doctrine of vitiation can be applied nor the doctrine of extinction of rights/liabilities can be applied, unless in view of the consequences of non-compliance of Section 13(2) of the P.F.A. Act, occurring in ordinary course of nature, the Court finds no other way than to apply the doctrine of extinction of rights/liabilities.

16. It is true that having regard to the context, in which a law is entitled to be interpreted, the Court may come to conclusion that the consequences arising from non-compliance of law are so serious that it is necessary to apply the doctrine of vitiation for non-compliance of law or to apply the doctrine of extinction of rights/liabilities on account of non-compliance of law. But the judicial discretion must be exercised on sound judicial principles after proper appreciation of the context of such law and the actual consequences arising from the non-compliance of law. The justification for applying the doctrine of vitiation or the doctrine of extinction of rights/ liabilities can come only from the doctrine of necessity. Therefore, unless it is absolutely necessary to apply the doctrine of vitiation or the doctrine of extinction of rights/liabilities, the Court cannot apply these doctrines and in these cases what can be done is to ascertain the natural consequences of non-compliance of a law and find out their result. If the harm/loss/prejudice caused by non-compliance with law is incapable of being remedied, the benefit will go to the party who has suffered due to non-compliance of law. If the harm/loss/prejudice caused to a party can be compensated properly or rectified, then neither the proceedings would be vitiated nor the right/ liability would be extinguished.

17. So far as the nature of right conferred recognised/protected by Sub-section (2) of Section 13 of the P.F.A. Act is concerned, the accused person has the right to defend himself against false accusations or the accusations which have been made against him on account of any mistake of law or fact and this right includes the right to challenge those prosecutions which have been initiated otherwise than according to procedure established by law. The accused therefore has the right to question the legality of prosecution initiated against him; the right to test the truthfulness of the witnesses examined during trial; the right to question the admissibility and relevancy of evidence produced against him; the right to cross-examine the witnesses produced by the prosecution to prove the charge made against him and the right to produce evidence in defence. Since the right to produce evidence in defence is included in the right to be defended conferred by Article 22(2) of the Constitution, the right to get the sample examined by an expert other than the Public Analyst and produce such expert in defence must be deemed to be included in the right to be defended conferred by Article 22(2) of the Constitution. It means that even if there were no provision like Sub-section (2) of Section 13 of the P.P. A. Act, the accused would have been entitled to get one of the samples analysed by an expert other than the Public Analyst and produce such expert in defence to show that the report of the Public Analyst is not reliable or is wrong or is not free from reasonable doubt. That right being an integral part of the fundamental right conferred by Article 22(2) of the Constitution, can be subjected to reasonable controls for the sake of facilitating early disposal of the case by the Court but cannot be taken away completely by the Legislature. The right of the accused to defend himself against the charge, is regulated by the provisions of Criminal Procedure Code. The right to produce evidence in defence, is given to the accused after the close of prosecution evidence and after he has been examined under Section 313 of the Criminal Procedure Code. This right does not come to an end so long the final judgment is not passed by the Court. In view of this legal position, it cannot be said that the right of the accused to produce evidence in defence can be totally be taken away by the legislature or that such right can be extinguished by prescribing the time limit which has no rational nexus with the object of a fair trial.

18. Since the legislature cannot deprive any accused person of his/her right to defend himself/ herself against the charge for which he/she is being tried, as such deprivation would be violative of Article 22(2) of the Constitution, any such construction of Section 13(2) of the P.F.A. Act, as would result in totally depriving the accused of his fundamental right to defend himself, would render Section 13(2) of the P.F.A. Act as ultra vires Article 22(2) of the Constitution. It is well established that if two constructions be possible, that construction should be adopted by the Court which would not make the provision ultra vires. It is possible to hold that the right conferred by Section 13(2) of the P.F.A. Act is not extinguished if it is not exercised within 10 days and this construction would not render Section 13(2) of the P.F.A. Act ultra vires Article 22(2) of the Constitution. Therefore, in my opinion this interpretation should be adopted and it should be held that Section 13(2) of the P.F.A. Act does not lay down that if the accused does not exercise the right under Sub-section (2) of Section 13 within 10 days, then that right shall be extinguished.

19. Another reason for coming to the conclusion that non-exercise of right by the accused within the limit of 10 days does not extinguish that right, is this; the legislature has nowhere provided that if the accused does not exercise the right within 10 days then his right shall be totally extinguished nor the legislature has provided that if the accused does not exercise the right within 10 days then his right shall be forfeited. When the legislature has in its wisdom omitted to make the law that non exercise of right, within the period often days shall extinguish the right or make the accused liable for forfeiture of that right, it would require strict proof of necessity to declare that such right shall stand extinguished if not exercised within 10 days. What is the necessity of declaring that the right recognised protected or conferred by Section 13(2) of the P.F.A. Act shall stand extinguished if not exercised within 10 days? The right of the accused under Section 13(2) of the P.F.A. Act, cannot be exercised independently of the report of the Public Analyst. Right under Section 13(2) of the P.F.A. Act can be exercised after the supply of the copy of the report of result of analysis by the Public Analyst, the occasion for the exercise of right under Section 13(2), by the accused does not arise. It shows that the period of 10 days prescribed by Section 13(2) of the P.F.A. Act is in continuity with the period during which the Local (Health) Authority does not supply

the copy of the report of the Public Analyst to the accused. If the legislature intends any urgency, such urgency must be in respect of both e.g., the supply of the report of the Public Analyst to the accused by the Local (Health) Authority and the exercise of right conferred by Section 13(2) by the accused. It does not appeal to reason that the legislature would give full liberty to the Local (Health) Authority to take as much time as it likes in sending the copy of the report of the Public Analyst to the accused, but impose a time limit of 10 days for the accused to exercise his right under Section 13(2) and after the expiry of the said period of 10 days, the right of the accused shall stand extinguished.

20. The legislature is required to be fair in enacting the laws so that the procedure prescribed by law is fair to the prosecution as well as to the accused. In *T.H. Hussain v. M.P. Mondkar* AIR 1958 SC 376 : 1958 Cri LJ 701, the Supreme Court pointed out that the trial must be fair to the accused as well as to the prosecution. Since the legislature has not laid down that if the copy of the report of Public Analyst is not supplied to the accused by the Local (Health) Authority within 10 days (as required by Rule 9-A of the P.F.A. Rules), the Local (Health) Authority shall not be competent to supply the copy of the report of the Public Analyst to the accused after the expiry of ten days period prescribed by Rule 9-A, and the prosecution against them shall be dropped and accused shall be acquitted of the charge, it is proper to infer that omission on the part of the accused to exercise the right conferred by Section 13(2) of the P.F.A. Act does not extinguish that right. There is no necessity to declare that if the right under Section 13(2) of the P.F.A. Act is not exercised by the accused within the period of ten days then his right shall stand extinguished because, the sample can be sent to the Central Food Laboratory even after the expiry of the period of ten days prescribed by Section 13(2) and such sample may be analysed if it is fit for analysis and a report may be sent to the Court by the Director, Central Food Laboratory. No prejudice would be caused to the prosecution if the sample is sent to the Central Food Laboratory after the expiry of the period of ten days prescribed by Section 13(2) of the P.F.A. Act.

21. For reasons mentioned above, the view taken by the learned Chief Judicial Magistrate that if the right conferred by Section 13(2) of the P.F.A. Act is not

exercised by the accused within the period of 10 days prescribed by Section 13(2), then such right shall stand extinguished, s erroneous and impermissible in view of Article 22(2) of the Constitution and the provisions of Criminal Procedure Code as well as the words used in Section 13(2) of the P.F.A. Act. The order dated 22nd March, 1996 passed by the learned Chief Judicial Magistrate deserves to be set aside and quashed and is hereby quashed and set aside. The learned Chief Judicial Magistrate is hereby directed to dispose of the application of the accused-petitioner in accordance with the observations made in this order.

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