

Rakesh Kumar Vs. State of H.P. and Another

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Court : Himachal Pradesh

Decided On : Nov-09-2011

Reported in : 2012CrLJ2330

Judge : Kuldeep Singh

Appeal No. : CR. MMO. NO. 136 OF 2011

Appellant : Rakesh Kumar

Respondent : State of H.P. and Another

Judgement :

Kuldeep Singh, J.

1. This petition has been filed for quashing order dated 20.4.2010 summoning the petitioner under Section 16 (1) (a) (i) of the Prevention of Food Adulteration Act, 1954 (for short 'Act'), order dated 11.5.2011 putting notice of accusation under Section 16(1) (a) (i) read with Section 7 (i) of the Act and complaint No. 46/3 of 2010 pending in the Court of learned Judicial Magistrate, Theog.

2. The facts, in brief, as stated in the petition are that on 8.10.2009 respondent No.2 Food Inspector visited the shop of the petitioner and expressed her intention to take sample of "Atta" which was kept for sale in sealed packs of different quantities viz. 5 Kg./10 Kg. The respondent No. 2 instead of collecting the sample in the same form i.e. in the packed and sealed form in which it was kept for sale,

opened the packet and purchased 900 grams of wheat flour out of 5 Kg. sealed pack by cutting it open.

3. The respondent No.2 sent one part of the sample to the Public Analyst, Kandaghat. The spot memo of taking the sample was drawn by the respondent No.2. It is clear from the spot memo that Atta was in sealed pack which was opened to take requisite quantity of Atta. It has been alleged that once the sealed packet is opened and the contents are sold loose the vendor cannot plead warranty from the dealer or distributor or manufacturer as the same is hit by Section 19 (2) (b) of the Act.

4. The sample of Atta after analysis was reported to be adulterated which according to the report of the public analyst started on 12.10.2009 and was concluded on 16.11.2009. The analyst report alleged that the sample had 'alcoholic acidity of 0.21% as against the maximum prescribed standard of 0.18%'.

5. The consent from Local Health Authority to prosecute the petitioner was obtained and thereafter complaint was filed before the learned Judicial Magistrate 1st Class, Theog alleging that the petitioner had committed an offence under Section 16 (1) (a) (i) read with Section 7 (i) of the Act by selling adulterated Atta.

6. The sample was taken on 8.10.2009 and the notice under Section 13 (2) of the Act was served on the petitioner on 25.2.2010 i.e. more than 4 months after the date of taking sample, thereby defeating the whole purpose of the right provided to the petitioner under the Act to get the food article re-examined.

7. The learned Magistrate on the complaint filed by respondent No.2 took cognizance on 20.4.2010 in mechanical manner without considering whether prima facie case is made out in the complaint and without looking into the relevant provisions of law. The learned Magistrate has ignored that entire process of taking sample was carried out in utter disregard of statutory provisions and in violation of the statutory rights of the petitioner.

8. The petitioner has assailed the summoning order and notice of accusation on the grounds that the prosecution launched is gross abuse of process of law. The

petitioner is neither manufacturer nor the packer of the sealed product. The sample was taken in utter disregard of statutory provisions. The right of the petitioner under Section 19 (2) of the Act has been defeated by the acts of respondent No.2, who took the sample by cutting the sealed pack, ignoring the fact that the petitioner is supposed to sell an item of food in the same state in which it was purchased by him in order to claim the protection under Section 19 (2) of the Act.

9. There is no allegation in the complaint against the petitioner with regard to improper storage of the defective food product. The quantity of the sample taken and sent to the public analyst is not in accordance with Rule 22 of the Prevention of Food Adulteration Rules, 1955 (for short 'Rules'). The failure on the part of respondent No.2 to send the sample for testing in prescribed manner, tainted the entire testing process and vitiated the result thereof. The sample was taken by respondent No.2 in irregular manner and contrary to the provisions of the Act and the Rules. The learned Magistrate has failed to appreciate that food sold in package condition is required to be sent for analysis in its original condition without opening the package, which was not done in the present case.

10. The notice under Section 13 (2) of the Act was given after the 'best before date' of the product, thereby the right of the petitioner was defeated to get the sample analyzed by the Central Food Laboratory. The sample was taken on 8.10.2009 and notice under Section 13 (2) of the Act was served on the petitioner on 25.2.2010 almost four months after the taking of the sample which has diluted the scope of the sample to be re-examined at such a belated stage.

11. The consenting authority has not applied his mind to any of the issues involved and thereby the order of consent itself is void, abinitio and the complaint is liable to be quashed. The learned Magistrate has not considered the Act and Rules while issuing process and putting the notice of accusation to the petitioner.

12. The petition has been contested by the respondents by filing reply in which preliminary objection has been taken that the petition is not competent, the petitioner can avail alternative remedy of invoking provision prescribed in Section 20 A of the Act by filing appropriate application before the learned Magistrate. On

merits, it has been stated that it is not possible to take whole of the packet of wheat flour because three sealed parts of sample are to be taken as per law and out of same one is required to be sent for analysis. Only the required approximate quantity is to be taken and the same was rightly taken by respondent No.2. It has been denied that once the sealed packet is opened and the contents are sold loose, the vendor cannot plead the warranty from the dealer, distributor and manufacturer.

13. The consent was given by the Chief Medical Officer, Shimla competent authority and not by the Local Health Authority. The notice under Section 13 (2) of the Act is served on the accused only after filing the complaint before the Court. The notice under Section 13 (2) of the Act was issued as per the provisions of law and rules. The petitioner has not availed the remedy under the Act to reanalyze the sample as provided under the Act.

14. It has been denied that cognizance was taken without considering the material on record. It has been denied that the sample was taken in utter disregard of the Act and Rules. On the contrary, the sample was taken in accordance with Act and Rules. It has been stated that the learned Magistrate has rightly taken the cognizance and rightly put notice of accusation to the petitioner.

15. The petitioner filed the rejoinder and reiterated the stand taken in the petition. It has been stated that the quantity of sample collected and sent to public analyst as per Rule 22 has to be atleast 500 grams of 'Atta' whereas in the present case only 300 grams of 'Atta' was sent for examination. It has been stated that on the pack of 'Ashirwad Atta' from which the sample was taken the declaration 'best before three months from the packing' was provided.

16. I have heard Mr. R.L.Sood, Senior Advocate, appearing on behalf of the petitioner and learned Additional Advocate General for the State. The learned counsel for the petitioner has submitted that the sample was taken by respondent No.2 from 5 kg. sealed packet after cutting the sealed packet. In all 900 grams of flour sample was taken. In the complaint, it has been stated that the purchased 'atta' was put into three empty dry glass bottles in equal proportion. In the complaint, it has also been stated that one part of the sample was sent to the

public analyst, Kandaghat. In other words, 300 grams of flour was sent to public analyst as against 500 grams provided in Rule 22. The spirit of 'Note' to Rule 22 has not been complied by respondent No.2, who instead of taking the sealed packet of flour, cut open the sealed packet and then took 900 grams of flour from 5 kg sealed pack of flour. The procedure adopted by respondent No.2 for obtaining the sample of flour from sealed packet has seriously prejudiced the defence of the petitioner under Section 19 (2) (b) of the Act.

17. It has been contended that Section 13 (2) of the Act has not been complied in substance inasmuch as the sample was taken on 8.10.2009, the prosecution was launched by filing complaint in the Court on 24.2.2010. The notice under Section 13 (2) of the Act was served on the petitioner on 25.2.2010 after more than 4 months of taking the sample. On the sealed 5 Kg 'Ashirwad Atta' packet from which sample was taken there was a declaration 'best before three months from the packaging'. It has been submitted that even if it is assumed that the date of packaging and date of taking sample is the same i.e. 8.10.2009 still the service of notice under Section 13 (2) of the Act on petitioner on 25.2.2010 is against the spirit of Section 13 (2) of the Act inasmuch as the petitioner has been deprived the effective use of sub section 2 of Section 13 of the Act.

18. The learned Senior Advocate has further contended that the sample was allegedly found containing alcoholic acidity 0.21% against the maximum prescribed standard of 0.18% on 16.11.2009 by public analyst. The deficiency is marginal. The sanction has been granted mechanically for prosecuting the petitioner. The learned counsel for the petitioner has relied **Cr.MMO No.108 of 2010 ITC Ltd. vs. State of Himachal Pradesh judgment dated 28.3.2011, State of Haryana vs. Unique Farmaid (P) Ltd. And Others 1999 (8) SCC 190 and Northern Mineral Ltd. vs. Union of India and Anr AIR 2010 SC 2829**. The prayer has been made for setting aside the summoning order dated 20.4.2010, notice of accusation order dated 11.5.2011 and quashing of the proceedings against the petitioner. The learned Additional Advocate General has supported the impugned orders and has submitted that the petitioner has not made out any case for quashing the proceedings.

19. Some of the facts which are not in dispute are that respondent No.2 has drawn sample of 900 grams 'Ashirwad Whole Wheat Atta' from the shop of the petitioner on 8.10.2009. The flour so purchased was put into three empty glass bottles in equal proportion. One part of the sample was sent for public analyst, who found the sample to be adulterated vide report dated 16.11.2009 and opined that alcoholic acidity is 0.21% against the maximum prescribed standard of 0.18% and the sample of 'atta' was found adulterated. The Chief Medical Officer, District Shimla had given written consent on 20.1.2010 to launch prosecution against the petitioner. The complaint was filed on 24.2.2010 and the petitioner was served notice under Section 13 (2) of the Act on 25.2.2010.

20. Item No. 39 of Rule 22 provides that 500 grams of Atta to be sent to public analyst/director for analysis. The Rule 22 B provides notwithstanding anything contained in Rule 22 and Rule 22C the quantity of sample sent for analysis shall be considered as sufficient unless the public analyst or the Director reports to the contrary. On the file of the court below there is a receipt of public analyst indicating that on 9.10.2009 he received sealed sample bearing code number and serial number S-1/3912 with form No. VII and one sealed letter sent separately by the Government Food Inspector, District Shimla. In the public analyst report dated 16.11.2009 or otherwise there is nothing on record to indicate that public analyst had stated that the quantity of flour sent for analysis was not sufficient for analysis.

21. In **State of Kerala etc.etc.vs. Alaserry Mohammed etc.etc. 1978 (1) FAC Page 145**, the Supreme Court determined the question whether non-compliance with the requirement of Rule 22 of the Act vitiates trial or conviction recorded under Section 16(1)(a) (i) of the Act. The Supreme Court after noticing **Rajaldas Gurunamal Pamanani vs. The State of Maharashtra 1975 (1) F.A.C.1**, has held that a lesser quantity also could enable the Analyst to make a correct analysis. The Supreme Court has noticed Rule 22B and held that the new Rule has been added for the purpose of clarifying the law and not by way of amending it. The Supreme Court has further held that **Pamanani's** case on the point at issue was not correctly decided. It is thus clear that simply because respondent No.2 had purchased 900 grams of flour and sent only 300 grams of flour to public analyst for analysis will not vitiate the proceedings against the petitioner in view of Rule 22 B

and more particularly when there is nothing on record to show that the public analyst has shown inability to analyse the sample on account of insufficiency of sample. Thus, the contention of the learned counsel for the petitioner that prosecution of the petitioner for non-compliance of Rule 22 is liable to be quashed, is rejected.

22. It has been then contended that respondent No.2 had drawn sample of 900 grams of flour from sealed 5 kg packet of 'Ashirwad Atta' after cutting open the sealed packet. This has caused serious prejudice to the defence of petitioner under Section 19 (2) (b) of the Act. The petitioner has filed an application under Section 20-A of the Act in the court below on 21.1.2011 for impleading the distributor or dealer M/s 'Himachal Whole Sale Syndicate Distributors/Stockist and Wholesalers as an accused in the case. In the application it has been stated that product of Ashirwad Atta 5 kg from which the sample was taken by Food Inspector on 8.10.2009 from petitioner was purchased by the petitioner from 'M/s Himachal Wholesale Syndicate Distributors/Stockist and Wholesalers, S.C.F. No. 7, Sector-1, Parwanoo on 12.9.2009 vide bill No. V-4418. The para-5 of spot memo placed on record indicates that at the time of sale of flour to respondent No.2 the petitioner had not disclosed that petitioner had purchased the flour in question on 12.09.2009 under bill No. V-4418. The petitioner, however, disclosed that flour was manufactured by M/s Vishwas Foods Pvt. Ltd. w-9, Third Floor, Greater Kailash, Part- II, New Delhi 110048.

23. The Section 19 (2) (b) is the defence available to the petitioner which is to be proved. The petitioner in the petition has not specifically pleaded that when the sample was drawn by the respondent No.2 of the flour, the petitioner disclosed to the respondent No.2 that petitioner had purchased 5 kg packet from which the sample was taken from 'M/s Himachal Wholesale Syndicate Distributors/Stockist and Wholesalers, Parwanoo on 12.9.2009 vide bill No. V-4418. In **Murlidhar Shyamlal and another vs. State of Assam (1996) 7 SCC 495**, the Supreme Court after noticing Section 19 (2) Rule 12-A and Form VI-A has held that with a view to absolve the appellant of the liability for being prosecuted, the vendor of the article of the food to the Food Inspector, has to prove that he purchased the article of food with a written warranty in the prescribed Form VI-A in terms of Rule 12-A.

Such proof has not yet come, therefore, defence under Section 19(2) (b) of the Act is still open to the petitioner, who has already filed an application under Section 20-A of the Act for impleading 'M/s Himachal Wholesale Syndicate Distributors/Stockist and Wholesalers from whom the petitioner has allegedly purchased the flour vide bill No. V-4418 dated 12.9.2009 from which the respondent No.2 has allegedly drawn the sample.

24. It has been contended that petitioner was served notice under Section 13 (2) of the Act on 25.2.2010, the sample was drawn on 8.10.2009, the public analyst had analysed the sample on 16.11.2009. On the sealed 5 kg packet of 'Ashirwad Atta' from which the sample was drawn, there was a declaration 'best before three months from the packaging'. The contention has been raised that even if the date of packaging of 5 kg sealed packet is taken 8.10.2009 when the sample was drawn still by serving notice on petitioner on 25.2.2010 under Section 13 (2) the spirit of Section 13(2) has been violated inasmuch as the flour after 4 months from the date of packaging naturally would not remain in the same condition when the flour was originally packed.

25. The learned counsel for the petitioner has relied **State of Haryana vs. Unique Farmaid (P) Ltd. and others (1999) 8 SCC 190**, in that case contention was raised that manufacturing date of the insecticide was March 1994 and its expiry was February, 1995. By the time, the accused was summoned to appear on 6.4.1995, they had lost their right of getting the sample re-analysed from the Central Insecticides Laboratory under sub-section (4) of Section 24 of the Insecticides Act, 1968. In these circumstances making them stand trial would be an abuse of the process of the court. The contention of the State was that shelf life of the sample was not relevant as Insecticides Act, 1968 does not prescribe any expiry date. The Supreme Court rejected the contention and it has been held that if expiry date is not relevant, there was no reason why in the form prescribed for submission of the report by the Insecticide Analyst, the dates of manufacture of the article and expiry date are mentioned. No rule has been cited and no evidence produced showing that the expiry date of the insecticide is inconsequential.

26. In the present case, no provision from the Act or Rules has been shown that some expiry date has been provided under the Act or Rules for the flour after the date of its manufacture nor from Act or Rules some provision has been shown from which inference can be drawn that flour has some fixed shelf life or expiry date. There is nothing in the petition that the petitioner when the sample was drawn had informed respondent No.2 that the packet from which the sample has been drawn had some fixed shelf life. The stand of the petitioner is that on 5 kg sealed packet from which the sample was drawn had declaration 'best before three months from the packaging'. There is no such material on record in support of this contention but assuming it to be so, the declaration 'best before three months from the packaging' cannot be equated with shelf life of flour prescribed under some statute nor this declaration can be said to impress upon the customer that flour is not fit for human consumption after three months of packaging. There is no indication in the said declaration that alcoholic acidity of flour would increase beyond prescribed limit under the Act after three months. The vague or round about declaration of best before three months from the packaging in the facts and circumstances of the present case is of no help to petitioner.

27. The learned counsel for the petitioner has relied **Northern Mineral Ltd. vs. Union of India and anr. AIR 2010 SC 2829** wherein it has been held that whatever was possible for it, its right has been defeated by not sending the sample for analysis and report to Central Insecticides Laboratory. Shelf life of the insecticides had expired even prior to the filing of the complaint. The position, therefore, which emerges is that by sheer inaction the shelf life of the sample of insecticides had expired and for that reason no step was possible to be taken for its test and analysis by Central Insecticides Laboratory. In the present case again it has not been shown that there is any statutory shelf life of 'Atta' after packaging.

28. The sub section 2 of Section 13 provides that after receipt of the information mentioned in sub section 2 of Section 13 concerned person may make an application within period of 10 days from the date of receipt of copy of report to get the sample article of food kept by the local health authority to analyse by the Central Food Laboratory. The purpose of Section 13 (2) of the Act is to give an opportunity to the concerned person to get the sample of the article of food kept by

the local health authority analysed by the Central Food Laboratory. It is not the case of the petitioner that after receipt of intimation under Section 13 (2) of the Act, he applied for sending the sample kept by the local health authority to be analysed from Central Food Laboratory. It appears the petitioner has not taken any step to get the sample analysed from the Central Food Laboratory under Section 13 (2) of the Act.

29. In **State of H.P. Vs. Balbir Singh 1995(2) SLC 70** it has been held that in case accused has exercised his right under Section 13 (2) of the Act and the Director of the Central Food Laboratory because of delayed analysis of the sample sent to the Director had reported or opined that the sample sent for analysis had decomposed and as such, was not fit for analysis, in that event, it can be said that because of delay, the valuable right made available to the accused under Section 13 (2) of the Act to assail report of Public Analyst could not be exercised. In that event, definitely prejudice can be said to have been caused to the case of the accused and on that short ground acquittal could follow. It has also been held in that case the right under Section 13(2) of the Act was not exercised, therefore, it cannot be said that right of the accused or his defence stood prejudiced. In the present case also, there is no averment in the petition that the petitioner has exercised his right under Section 13 (2) of the Act for sending second sample for analysis to Central Food Laboratory. Therefore, it cannot be said that any prejudice has been caused to the petitioner by serving him notice under Section 13(2) of the Act on 25.2.2010.

30. The learned counsel for the petitioner has submitted that written consent has been given by the Chief Medical Officer, District Shimla in routine manner. It is a matter of evidence. It is not possible for this Court in absence of evidence to record a finding either way on this contention. Therefore, this question is left open. The learned counsel for the petitioner has lastly submitted that alleged adulteration is marginal inasmuch as alcoholic acidity in sample was found 0.21% against maximum prescribed standard of 0.18%. It has been submitted in ITC Ltd (supra) also the alcoholic acidity of 0.21% was found in the sample as against the maximum standard of 0.18%. In ITC Ltd. one Sanjay Kumar was prosecuted under the Act. It appears M/s Sadhu Lal Madan Lal through its proprietor Bimal Parkash

was impleaded as an accused on application filed under Section 20A of the Act. It appears another application was filed under Section 20-A for impleading ITC Ltd. which was also allowed. The matter came in this Court and this Court quashed the impleadment of ITC and the case was sent back for fresh decision. The learned Chief Judicial Magistrate, Sirmaur District at Nahan again ordered impleadment of ITC Ltd. In para 10 of the judgment dated 28.3.2011 this Court has held as follows:-

“Adverting to the fact situation of the case, the sample was seized in 1994 and now more than seven years have elapsed. It cannot be said that sample would be fit for analysis even if the petitioner is granted an opportunity now to exercise his right of having the sample analysed from the Central Food Laboratory. That is aside from the fact that the Section itself provides the time limit within which such right is to be exercised. There is no doubt in my mind that the food article can not be analysed after a long period of time. Even otherwise, the adulteration found is one of marginal increasing in acidity and foodstuff would naturally increase its acidity after such a long spell of time. In these circumstances, this petition is allowed. Order dated 14th December, 2009 is quashed and set-aside.”

31. The ratio of judgment dated 28.3.2011 is not that if the increase in acidity is marginal in the foodstuff to the standard prescribed under the Act, then prosecution is liable to be quashed. The court has held that sample was taken in 1994 and after seven years (sic) it cannot be said that sample would be fit for analysis even if the petitioner is granted an opportunity now to exercise his right of having the sample analysed from the Central Food Laboratory. Food article cannot be analysed after a long period of time. In that context, it has been observed that even otherwise the adulteration found is one of the marginal increase in acidity and foodstuff would naturally increase its acidity after such a long spell of time. On the basis of material on record, it cannot be said that learned Magistrate has erred in summoning the petitioner vide order dated 20.4.2010. Similarly, it cannot be said that accusation put to the petitioner on 11.5.2011 under the Act is wrong and illegal. Thus, seen from any angle, there is no merit in the petition.

32. In view of above discussion, the petition fails and is accordingly dismissed. Interim order dated 2.8.2011 is vacated. The parties through their counsel are directed to appear before the Court below on 22.11.2011. The record of the court below be sent back so as to reach before the date fixed. The pending application being Cr.M.P. No. 542 of 2011 is also disposed of.

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