
(2013) 07 KL CK 0175
In the High Court Of Kerala
Case No : Criminal R.P. No. 671 of 2002

Gopalakrishnan

APPELLANT

Vs

Food Inspector

RESPONDENT

Date of Decision : 17-07-2013

Acts Referred:

Prevention of Food Adulteration Act, 1954 — Section 13(2), 23, 23(1A)(ee), 23(1A)(hh)

Citation : (2014) 1 CCR 93 : (2013) CriLJ 4031 : (2013) 4 ILR (Ker) 780 : (2013) 3 KHC 275 : (2013) 3 KLJ 401 : (2013) 3 KLT 455

Hon'ble Judges : B. Kemal Pasha, J

Bench : Single Bench

Advocate : B. Vinod, for the Appellant; V.S. Sreejith), for the Respondent

Final Decision : Allowed

Judgement

B. Kemal Pasha, J.—Petitioner, who is the second accused in S.T. No. 347/1993 of the Judicial First Class Magistrate's Court-II, Neyyattinkara, has unsuccessfully challenged his conviction and sentence before the Sessions Court, Thiruvananthapuram, through Criminal Appeal No. 49/1995. The learned Additional Sessions Judge concurred with the findings entered by the trial court, confirmed the conviction and sentence, and dismissed the appeal. Samples of ice cream were drawn by PW1, Mobile Squad Food Inspector, Thiruvananthapuram, from the first accused. The present petitioner, being the owner of the shop, who is the licensee, was arraigned as A2. AI died during the pendency of the appeal before the learned Additional Sessions Judge and thereby, the charge against him abated.

2. On going through the procedure adopted by PW1, it seems that he had complied with all the legal formalities. The sampling was proper, and the sample was forwarded to the Public Analyst, and he obtained Ext. P12 report. On getting Ext. P12 report, the complaint was preferred before the Judicial First Class Magistrate's Court-II, Neyyattinkara. Thereupon, the parties, on getting notice

under S. 13(2) of the Prevention of Food Adulteration Act, 1954, approached the court and applied for forwarding the sample to the Central Food Laboratory.

3. The learned Magistrate directed the Local Health Authority (LHA) to produce the second sample before Court for forwarding it to the Central Food Laboratory. Ultimately, the sample was forwarded to the Central Food Laboratory and on analysis, Ext. P16 certificate was received, which also revealed that the said food article does not conform to the standard prescribed for ice cream in Appendix BA. 11.02.07 of the Prevention of Food Adulteration Rules, 1955 and thereby, the same is adulterated.

4. There were no procedural lapses either on the part of PW1 or on the part of the Local Health Authority. Both the courts below entered concurrent findings that the said food article is adulterated and thereby entered the conviction and sentence. The petitioner stands sentenced to undergo rigorous imprisonment for six months and to pay a fine of Rs. 1,000/-, in default, to undergo simple imprisonment for three more months. Presently, the questions are confined to the conviction and sentence relating to the second accused, who is the petitioner herein.

5. The one and only point argued by the learned counsel for the petitioner is based on Ss. 23(1A)(ee) and (hh) of the Prevention of Food Adulteration Act, 1954 (hereinafter referred to as "the 1954 Act"). According to the learned counsel for the petitioner, as the laboratories where samples of articles of food or adulterants to be analysed by Public Analysts under the Act have not been defined within the meaning of S. 23(1A)(ee) of the 1954 Act, the report of the Public Analyst in this case cannot be looked into. Further, according to the learned counsel for the petitioner, even in a case where by having recourse to the provisions under S. 13(2) of the 1954 Act, the second sample was sent to the Central Food Laboratory for analysis, the mandatory provision contained in S. 23(1A)(hh) is applicable. In short, the argument is that, in the case of a report by the Public Analyst, it will be hit by the mandatory provision contained in S. 23(1A)(ee) as long as the laboratories are not defined within the meaning of the said provision. Further, even in cases where the second sample was sent to the Central Food Laboratory, the accused will be prejudiced in two ways, according to the learned counsel for the petitioner. Firstly, he will be losing an opportunity to have a proper analysis of the concerned food articles through a proper laboratory as contemplated under S. 23(1A)(ee). Secondly, even in case where there is analysis by the Central Food Laboratory, the accused will be prejudiced under S. 23(1A)(hh) as long as the method of analysis has not been defined. It is also argued that, when the specific method of analysis has not been defined, it is as good as no proper methodology of analysis is there.

6. Sections 23(1A)(ee) and (hh) read as follows:--

23(1A). In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:--

.....

(ee) defining the laboratories where samples of articles of food or adulterants may be analysed by Public Analysts under this Act;

.....

(hh) defining the methods of analysis.

The said provisions were incorporated in the Prevention of Food Adulteration Act, 1954 with effect from 01.04.1976 only through Act 34 of 1976.

7. Through notification dated 25.03.2008 of the Ministry of Health and Family Welfare published in the Gazette of India (Extraordinary), in exercise of the powers conferred by S. 23 of the 1954 Act, the Central Government has incorporated R.4(9) in the Prevention of Food Adulteration Rules, 1955, through Prevention of Food Adulteration (Second Amendment) Rules, 2008. The present R.4(9) reads as follows:--

The manuals Of method of analysis brought out by Ministry of Health and Family Welfare shall be adopted for analysing the samples of food articles. However, in case the method for analysing any parameter is not available in these manuals, the method of analysis prescribed in the AOAC/ISO/Person's/JACOB/IUPAC/Food Chemicals Codex/BIS/Woodmen/Winton-Winton/Joslyn shall be adopted. Further, in case of non-availability of method of analysis in these manuals, the method prescribed in other standard published literature or publication shall be adopted.

It has to be noted that the said notification has come into force only on 25.03.2008.

8. The learned counsel for the petitioner, in support of his arguments, has invited my attention to the decision in Pepsico India Holdings Pvt. Ltd. Vs. Food Inspector and Another, (hereinafter referred to as Pepsico). The 1st point raised for consideration in the said decision in paragraph 2 (para 1 as published in KLT) was:

In the absence of any prescribed and validated method of analysis under S. 23(1A)(hh) of the Prevention of Food Adulteration Act, 1954, hereinafter referred to as "the 1954 Act", could a prosecution have been launched against the appellants based on a report submitted by the Public Analyst using the method of the Directorate General of Health Services (DGHS)?

This point has been answered in paragraphs 42 to 45 (paras 33 to 36 as published in KLT) of the judgment.

9. The learned Public Prosecutor as well as the learned counsel for the petitioner have pointed out that two learned Single Judges of this Court had occasions to consider the question whether the dictums laid, down in Pepsico can be applied to all cases wherein food articles were analysed by Public Analysts in the absence of defined laboratories where samples of articles of food or adulterants may be

analysed by Public Analysts as contemplated under S. 23(1A)(ee) and in the absence of defined method of analysis as contemplated under S. 23(1A)(hh) of the 1954 Act, and have taken divergent views in the matter. One view is that it is applicable to all such cases. The other view is that the dictums laid down in Pepsico is confined to the question regarding the detection of the percentage of Carbofuran in the sample of Pepsi, which is sweetened Carbonated water. The learned Public Prosecutor has argued that, in Pepsico, the main question mooted for consideration is with regard to the detection of the tolerance limit of the pesticides in Pepsi and it was at that juncture, the said decision was rendered, and has persuaded me to subscribe to that view.

10. A careful scrutiny of the judgment of the Apex Court in Pepsico does not persuade me to subscribe to such a view in the matter, especially when the main point considered by the Apex Court in the said decision is as the one noted earlier, as item No. (1) in paragraph 2 (para. 1 as published in KLT) of that judgment. Further, paragraph 41 of the judgment in Pepsico (para. 32 as published in KLT) makes it clear that the question before the High Court in that case also was relating to the challenge regarding the non framing of Rules under Ss. 23(1A)(ee) and (hh) of the 1954 Act. In paragraph 42 of the decision (para. 33 as published in KLT), the Apex Court has considered the fact that the High Court was not convinced with the submission made on behalf of the appellants in that case that in the absence of any prescribed and validated method of analysis under Ss. 23(1A)(ee) and (hh) of the 1954 Act, the report of the Public Analyst, who had used the DGHS method, could not be relied upon.

11. In paragraph 43 of Pepsico (para. 34 as published in KLT) the Apex Court held that, if the view taken by the High Court is accepted, it can lead to a pick-and-choose method to suit the prosecution.

In paragraph 44 (para. 35 as published in KLT) it was held that:--

The High Court also misconstrued the provisions of Ss. 23(1A)(ee) and (hh) in holding that the same were basically enabling provisions and were not mandatory and could, in any event, be solved by the Central Government by framing the Rules thereunder, by which specified tests to be held in designated laboratories could be spelt out. Consequently, the High Court also erred in holding that the non-formulation of rules under the aforesaid provisions of the 1954 Act could not be said to be fatal for the prosecution.

In paragraph 45 (para. 36 as published in KLT) it was held that:--

As far as Grounds 3, 4, and 5 are concerned, the High Court failed to consider the reasons given on behalf of the appellants for not sending the Company's sample to the forensic laboratory, to the effect that, since neither any validated method of analysis had been prescribed under Ss. 23(1A)(ee) and (hh) of the 1954 Act, nor had any laboratory been particularly specified for such examination, such an exercise would have been futile.

12. In the decision in *Pepsico*, the Company did not take steps for getting the second sample analysed by the Central Food Laboratory. Even in such a case, the Apex Court held that since neither any validated method of analysis had been prescribed under Ss. 23(1A)(ee) and (hh) of the 1954 Act, nor had any laboratory been particularly specified for such examination, such an exercise would have been futile. Matters being so, even in a case wherein the second sample was sent to the Central Food Laboratory under the then existing structure and a result was obtained, still, the accused can validly contend that the said exercise was futile, as no validated method of analysis had been prescribed and no laboratory has been particularly specified for such examination. On going through the decision in *Pepsico*, it cannot be said that the said decision is confined to the food article involved in that case only.

13. On going through the judgment in *Pepsico*, it seems that the Apex Court has approved the argument of the appellant in that case, that the provisions under Ss. 23(1A)(ee) and (hh) are mandatory. When the liberty of a citizen, who is an accused in a case under the 1954 Act, is in question, its provisions are to be construed strictly. When it relates to severe consequences on the penal provision, Ss. 23(1A)(ee) and (hh) have to be held as mandatory. There is absolutely nothing to show that the said provisions are directory. Further, it seems that the view taken by the High Court in the case in *Pepsico* that, if the arguments of the appellant relating to Ss. 23(1A)(ee) and (hh) were to be accepted, the mechanism of the Act and the Rules framed thereunder would come to a grinding halt, was repelled by the Apex Court specifically in paragraph 43 (para. 34 as published in KLT) of the judgment. Matters being so, the dictums laid down by the Apex Court in *Pepsico* are squarely applicable to the present case also. As such laboratories are not defined for the analysis by Public Analyst and the methods of analysis were not then defined, the argument of the learned counsel for the petitioner in this case that Ext. P12 as well as Ext. P16 cannot be relied on, is only to be accepted. Therefore, this CrI. R.P. is only to be allowed, and the conviction and sentence passed by the trial court, which are upheld by the appellate court, are only to be set aside, and I do so.

In the result, this CrI. R.P. is allowed as above.