

(2015) 10 KL CK 0148
In the High Court Of Kerala
Case No : WP(C) No. 30005 of 2015 (A)

K.K.R. Food Products

APPELLANT

Vs

T.V. Anupama and Others

RESPONDENT

Date of Decision : 13-10-2015

Acts Referred:

Food Safety And Standards Act, 2006 — Section 3(zx), 16, 26, 26(2)(ii), 28, 30(2)(a), 31, 32, 32(3), 34, 51, 54, 92
Constitution Of India, 1950 — Article 21, 47
Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011

Citation : (2015) 5 KHC 578 : (2015) 4 KLT 623

Hon'ble Judges : A. Muhamed Mustaque, J

Bench : Single Bench

Advocate : Mathai M. Paikaday, Senior Advocate, V. Renjith Shankar, Shiju Abraham Verghis, Bijimol Jose, K. Ramesh, B.N. Shivsankar and Megha Mukundaswar, for the Appellant

Final Decision : Disposed off

Judgement

A. Muhamed Mustaque, J—This writ petition is filed by a company engaged in manufacture and distribution of spices powder and other food products. They challenge Ext. P1 order passed by the Commissioner of Food Safety, Kerala prohibiting manufacture, storage, sale and distribution of Nirapara Brand of chilly, turmeric, and coriander powder, manufactured by the petitioner.

2. The impugned order is produced as Ext. P1. It is seen from the impugned order that the Food Safety Officers in the State took random samples of Nirapara brand spices powder from different parts of the State on different dates. The report of the Food Analyst would indicate that the products referred as above contain added starch.

3. It is stated in Ext. P1 that 30 cases of the same nature have been reported in various parts of the State containing extraneous starch in the products. It is

noted that in spite of the notices issued under the Food Safety and Standards Act, 2006 (for short, the "FSS Act") the petitioner was continuing manufacture and sale of adulterated spices powder. Since the manufacturer did not stop the unscrupulous activity of adulterating spices powder with cheaper starch, an order has been issued prohibiting manufacture, storage, sale, and distribution of the Nirapara brand of chilly, turmeric, and coriander powder, manufactured by KKR Food Products, Kalady, under relevant provisions of the Food Safety and Standards Act of India, to protect the interest of the consumers.

4. Heard Shri Mathai M. Paikeday, learned Senior Counsel appearing for the petitioner and Shri Tom K. Thomas Special Government Pleader.

5. The learned Senior Counsel would submit that the petitioner has not been finally found in adulterating spices powder. It is submitted that various proceedings are pending and they have challenged reports of referral lab. Therefore, it is submitted that in the absence of the matter attaining finality, the prohibitory order is illegal. It is further submitted that the Commissioner of Food Safety has no power referable in the order to issue such a prohibition. The learned Senior Counsel also submitted that the Commissioner exceeded his authority by issuing the order. The learned Senior Counsel pointed out to the definition of "sub-standard" under the FSS Act. According to the learned Senior Counsel, the findings in Ext. P1 for prohibition is that prohibition is necessitated on account of the fact that the spices powder of the petitioner is of sub-standard. It is further submitted that there is no provision to prohibit sale of sub-standard food. The learned Counsel also attempted to demonstrate mala fides in issuing such an order. It is also submitted that Ext. P1 was issued without giving an opportunity of being heard to the petitioner.

6. On the other hand, the learned Special Government Pleader referred to the statement filed by the fifth respondent. It is submitted that there were 33 cases of adulteration of spices product and various Adjudicating Officers imposed penalties ranging from Rs. 10,000/- to Rs. 5 lakhs. It is also submitted that the cases are pending before the Authority for adjudication across the State. In view of large number of reports of cases of adulteration and in the interest of public at large, it is submitted that the Commissioner of Food Safety was constrained to take such an action against the petitioner.

7. Though, a specific ground of mala fides has been alleged, no notice was issued to the officials in personal capacity.

8. On going through the pleadings and after hearing both sides, the following points arise for consideration:

"i. Whether the Commissioner of Food Safety is justified in issuing the order of prohibition?

ii. If the Commissioner is not justified in issuing order of prohibition, what is the extent of the power that could be exercised when spices powder or condiments

are found as sub-standard?

iii. Whether there exist any mala fides on the part of the Commissioner of Food Safety for issuing Ext. P1?

Point No. (i):

i.a. FSS Act is a consolidated law relating to food safety and standards in India. A right to have food without contamination or without any element which poses risk to human life can be treated as a larger right of a citizen in terms of Article 21 of the Constitution. The statutory provisions in the FSS Act are only to supplement Constitutional obligation of the State to protect a citizen by way of FSS Act. The FSS Act need not be understood as a wholesome scheme or in exclusive domain within the statutory scheme therein to protect human. Therefore, even in the absence of any statutory provisions, the paramount power is invested with the State under the Constitution, as an obligation to act to protect human from the possible contamination of adulterated food from stand point of view of health.

i.b. The Hon"ble Supreme Court in the Centre for Public Interest Litigation Vs. Union of India (UOI) and Others, (2013) 12 AD 426 : AIR 2014 SC 49 : (2013) 14 JT 1 : (2013) 13 SCALE 210 has held as follows:

"21. We may emphasize that any food article which is hazardous or injurious to public health is a potential danger to the fundamental right to life guaranteed under Article 21 of the Constitution of India. A paramount duty is cast on the States and its authorities to achieve an appropriate level of protection to human life and health which is a fundamental right guaranteed to the citizens under Article 21 read with Article 47 of the Constitution of India.

22. We are, therefore, of the view that the provisions of the FSS Act and PFA Act and the rules and regulations framed thereunder have to be interpreted and applied in the light of the Constitutional Principles, discussed above and endeavour has to be made to achieve an appropriate level of protection of human life and health. Considerable responsibility is cast on the Authorities as well as the other officers functioning under the above mentioned Acts to achieve the desired results. Authorities are also obliged to maintain a system of control and other activities as appropriate to the circumstances, including public communication on food safety and risk, food safety surveillance and other monitoring activities covering all stages of food business.

23. Enjoyment of life and its attainment, including right to life and human dignity encompasses, within its ambit availability of articles of food, without insecticides or pesticides residues, veterinary drugs residues, antibiotic residues, solvent residues, etc. But the fact remains, many of the food articles like rice, vegetables, meat, fish, milk, fruits available in the market contain insecticides or pesticides residues, beyond the tolerable limits, causing serious health hazards. We notice, fruit based soft drinks available in various fruit stalls, contain such

pesticides residues in alarming proportion, but no attention is made to examine its contents. Children and infants are uniquely susceptible to the effects of pesticides because of their physiological immaturity and greater exposure to soft drinks, fruit based or otherwise."

i.c. It appears that on account of adulteration of the spices powder manufactured by the petitioner and repetition of the offence, the Commissioner of Food Safety was constrained to pass such an order. The question is whether there exists any health risk conditions warranting immediate action?

i.d. it is to be noted that the finding in the impugned order is that the petitioner's spices powder contained added starch. In some of the cases, the petitioner compounded the offence by payment of fine; in other cases, the adjudication is pending. As noted in the impugned order, the petitioner's product is now classified as sub-standard. Section 3(zx) of the FSS Act defines "sub-standard" as follows:

"An article of food shall be deemed to be sub-standard if it does not meet the specified standards but not so as to render the article of food unsafe."

i.e. The adulteration in the case in hand would clearly indicate that it does not cause any health risk condition. It is not a food substance of unsafe nature. The prohibition is an ultimate act to avert harmful effects on health. The sub-standard in this context would clearly indicate that the attempt of the manufacturer is only to mislead the public or, to make maximum gain or profit by adding starch or any extraneous substance. No doubt the Commissioner of Food Safety or any other officer under him would have the power for prohibition; even in the absence of any statutory provisions, to prohibit manufacture and sale of foods, which are unfit for human consumption or pose risks to the human life or health.

i.f. The learned Special Government Pleader heavily relied upon the provisions under Sections 51 and 54 and under the FSS Act for imposing penalty for manufacturing or selling food articles of sub-standard and argued that the Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011 (for short, the "Food Additives Regulation 2011") clearly prohibit any added starch in the food products banned.

i.g. It is to be noted that the above Regulation prescribes standard of various food products. No doubt, for want of such standards, an action can be initiated for imposing penalty either under Section 51 or under Section 54 of the FSS Act. However, that does not extend a power to issue an order in the nature of prohibition.

i.h. In exercise of the powers under Section 92 of the FSS Act, a Regulation was formulated by the Food Safety and Standards Authority of India under the title Food Safety and Standards (Prohibition and Restrictions on Sales) Regulations, 2011 (hereinafter referred to as the "Prohibition Regulation 2011") It empowers

prohibition and restriction on sales of certain items of food referred therein. The food items now banned in this case do not figure in the above Regulation. Therefore, prohibition can be effected only if otherwise satisfied that the banned food items would cause health hazards or risk to human life.

i.i. It appears that the Commissioner has acted invoking power under Section 34 of the FSS Act. This power can be invoked if there exist health risk condition. The Commissioner of Food Safety has power under Section 30(2)(a) to prohibit manufacture, storage, distribution or sale of any article of food in the interest of public health. The pre-requisite of exercise of this power is satisfaction, in respect of article of food that it is unsafe for human consumption. Existence of this jurisdictional fact is sine qua non for exercise of this power. In the absence of any finding relating to the unsafe nature of food, this power cannot be exercised. Section 26 of the FSS Act places responsibility on the food business operator. This responsibility includes not to manufacture or sell sub-standard food [see Section 26(2)(ii)]. But it is to be noted that violation would entail only in penalty under Section 51 of the FSS Act. Withdrawal of a food under Section 26 or recall under Section 28 would arise only if the food is "unsafe" for human consumption. There is no finding in Ext. P1 that the banned foods are unsafe for human consumption. The statutory provision under the FSS Act clearly delineate proportionate measures in case of "food" which is found unsafe for human and food of sub-standard which is fit for human consumption. This proportionality stems from different provisions related to prohibition and penalty for sub-standard food. The power prohibition can be invoked either with reference to Prohibition Regulation 2011 or on being satisfied that food is unsafe for human consumption.

i.j. In the absence of any finding that banned food are unsafe or can be banned invoking power of Prohibition Regulation 2011, prohibition now effected is unwarranted and is done in excess of the jurisdiction vested with the Commissioner of Food Safety. It is also to be noted that the adjudication and challenge regarding report from referral labs are pending. It is also seen from the impugned order that the petitioner was not heard in the matter. Therefore, the irresistible conclusion is that Ext. P1 order is unsustainable in as much as there is no finding that extraneous substance would cause threat to human life and health or it is unsafe.

Point No. II:

ii.a. "Informed choice" is the right of choice in selecting a food product by a consumer. If the manufacturer claims certain standards either by depiction or otherwise, the Authorities under the FSS Act have to ensure that those standards are maintained by the manufacturer. If certain standards are to be required to be maintained in terms of the standards prescribed under the Additives Regulation 2011, those standards have to be achieved. It is a perplexed question when a violator continues to violate the standards even after imposition of punishment without further remedy available to the officials against the violator. The

consumer cannot be deceived by merely paying penalty by the manufacturer of such food products. The consumer has every right to know what is the standard of the product. A sub-standard product can also be sold provided, the consumer must know what are the contents of it. The penalty imposed under Section 51 of the FSS Act is as a deterrent measure. Certainly, when violation remains unabated even after imposition of the penalty, it is a question that perplexes the mind of the Court as well. There is no provision to prohibit manufacture or sale of sub-standard food products which are safe for human consumption. "Deception" of consumers has to be distinguished from "sale of unsafe food products" to the consumers. Therefore, in those circumstances, responsibility attached with the food officers is to avert deception. This is a Constitutional obligation, even in the absence of statutory provision, as it directly intermeddles the "right of choice" of the consumers.

ii.b. The Food Authority has a duty to inform the citizens, as the citizens have a correlated right to know about the standards of food they consume. In this context it is appropriate to refer Section 16 of the FSS Act. In terms of Section 16, every functionary has a duty to ensure that the public, consumers, etc. are put to the notice of the food standards. Food safety matter is not a matter between a manufacturer or a distributor with the Authority under the FSS Act in relation to the standards. It is rather an issue relating to the right of human to protect their life. Therefore, that right cannot be obliterated by allowing the offender to escape by paying penalty.

ii.c. As noted above, informed choice of a consumer is his right. The right of choice to select a food is integral part of his choice, revolved around right to life, subject to any restriction imposed under law. This right is also to protect his life from any possible health hazard or risk in his life. In fact, "shaming penalties" were evoked in our ancient society to punish those who commit crime which may have a repugnance in the ancient Society at large. This is how public flogging and public execution of the offenders were adopted in the Society. This Court is of the view that "shaming penalty" can be resurrected to protect the consumers. The consumers must be put to notice that the manufacturer of sub-standard products have been punished for violation. Therefore, in future, in cases where violation remains unabated, the Commissioner of Food Safety can give a publicity of the offence and also cause manufacturer to label his product with inscription in conspicuous manner that he has been punished for manufacturing sub-standard food products. This is essential to protect the right of the consumers. Even in the absence of statutory provisions, such duty is endowed on the food safety officers based on Constitutional obligation to protect right to life. It is to be noted that the spices powder have to be sold only in packed conditions as per the Prohibition Regulation 2011. Thus, it is open for the Commissioner of Food Safety to put public on notice of sub-standard products manufactured by the petitioner, by directing the manufacturer to label his products in the above manner.

ii.d. It is also equally important to note the power vested with the Designated

Officer under the FSS Act. Section 31 of the FSS Act mandates the licencing and registration of food business. If the licensee violates any Regulations under the Act, a notice for improvement has to be served on the holder of the licence by the Designated Officer under Section 32 of the FSS Act. Section 32(3) contemplates cancellation of licence, if the food business operator fails to comply with the improvement notice. Therefore, it is possible to cancel the licence if violation remains unabated.

ii.e. In this case, this Court is of the view that there are clear findings that the petitioner's products are sub-standard, thus, after giving one more opportunity to the petitioner to comply with the standards, the Commissioner is free to take such measures to put public at alert about sub-standard products sold by the petitioner or to cancel the licence under Section 32(3) of the FSS Act.

Point No. iii:

iii.a The petitioner raises a question of mala fides. The mala fides alleged is based on a personal relationship with the Commissioner of Food Safety. Except describing it in general terms, nothing has been stated in specificity to demonstrate mala fides. It is to be noted that the petitioner has filed a review petition before the Commissioner of Food Safety as against Ext. P1 order and therein, the petitioner has not raised any contention based on mala fides. It is further to be noted that the Commissioner acted based on certain materials before her. The facts otherwise would clearly disclose the bona fides in the matter. It is only in the absence of any materials to act upon, the allegations in the writ petition may have a relevance in considering the issue on mala fides. Mala fide is a state of mind of a person who is acting in a particular circumstance. There is hardly any dispute regarding various actions initiated against the petitioner for violation. Therefore, this Court is of the view that the materials would substantiate that the decision of the Commissioner of Food Safety is based on a bona fide discharge of function. In view of the fact that further probe is not required of projected enmity, the point is answered against the petitioner. It is only when the petitioner makes out a prima facie case, this Court need to issue a notice to the officer concerned in personal capacity to answer the question regarding mala fides. Since no notice was issued to the officer in personal capacity, this Court is of the view that the petitioner shall be spared from imposition of cost for raising allegation of mala fides."

9. Thus, in the light of the above discussions, the writ petition is disposed of as follows:

"i. The prohibitory order in Ext. P1, as against manufacturing, storing, selling and distributing Nirapara brand chilly powder, turmeric powder and coriander powder is set aside.

ii. The Commissioner is free to take samples of the petitioner's products as above and if it is found that it do not meet the standards under the Additives Regulation 2011, the Commissioner is free to take such measures as adverted in

the discussions in para. 8 (Point No. ii). No costs."