
(2012) 05 RAJ CK 0109

In the Rajasthan High Court

Case No : Criminal Miscellaneous Petition No. 336 of 2011

Leela Devi (Smt.) and Others

APPELLANT

Vs

State of Rajasthan and Another

RESPONDENT

Date of Decision : 23-05-2012

Acts Referred:

Constitution of India, 1950 — Article 21, 22(2)

Prevention of Food Adulteration Act, 1954 — Section 13(2), 14(A), 16, 25, 7

Citation : (2013) 1 RLW 51

Hon'ble Judges : Sandeep Mehta, J

Bench : Single Bench

Advocate : B.K. Vyas, for the Appellant; K.K. Rawal, Public Prosecutor for State, for the Respondent

Judgement

Hon'ble Sandeep Mehta, J.—The instant miscellaneous petition has been preferred by the petitioners against the order dated 24.6.2006 passed by the learned Chief Judicial Magistrate, Jodhpur in Criminal Case No. 214/2006 taking cognizance against the petitioners for the offence u/s 7/16 of the Prevention of Food Adulteration Act, as affirmed in Criminal Revision Petition No. 29/2009 by the learned Additional Sessions Judge No. 2, Jodhpur by his order dated 04.11.2009. The short question involved in the matter is as to whether the prosecution of the accused-petitioners for the offence under the Food Adulteration Act, 1954 (for short, "the Act") can be permitted in relation to a failed sample of prepackaged food article after nearly five years from the date when the sample was taken.

2. The petitioners are the Directors of M/s. Sun Shrine Food Products, F-88-89, Bichhwal Industrial Area, Bikaner. The company manufactures savouries (Namkins) under the brand name "Bhika Ram Chandmal." The Food Inspector, Jodhpur took samples of packaged potato "Bhujiya" manufactured under the brand-name "Bhikaram Chandmal" from the shop of "Shahi Sweets", Sabji Mandi, Ratanada, Jodhpur on 02.8.2001. The sample was sent to the Public

Analyst for analysis, from where a report was received on 05.9.2001 concluding that the sample of potato Bhujia was adulterated because the fat extracted from the Bhujia was allegedly not conforming to the standards prescribed for groundnut oil under the Prevention of Food Adulteration Rules and the Schedule. The Food Inspector collected information u/s 14(A) of the Act from the vendor and it was revealed that the Bhujia was manufactured and sold to the vendor by company Sunshine Foods Products. Strangely enough, despite the report having been received regarding the sample of Bhujia being found to be adulterated in the year 2001 itself, the consent to prosecute the accused was granted as late as on 02.5.2006.

3. Upon receiving the sanction to prosecute, a notice u/s 13 (2) of the Act was given to both the Directors of the M/s. Sun Shine Food Products, which is the manufacturer of potato Bhujia as well as the vendor in the year 2006. Thereafter the complaint was presented in the Court of the learned Chief Judicial Magistrate, Jodhpur by the Food Inspector in the month of June 2006. On presentation of the complaint, the learned Magistrate proceeded to take cognizance against the petitioners and other co-accused persons by the order dated 24.6.2006. The petitioners challenged the order dated 24.6.2006 taking cognizance against them by preferring a revision petition and the revision petition filed by them came to be rejected by the learned Additional Sessions Judge No. 2, Jodhpur by the order dated 04.11.2009. Hence the instant miscellaneous petition has been preferred by the petitioners seeking quashing of the order taking cognizance as well as all the subsequent proceedings sought to be taken against them.

4. Learned counsel for the petitioners submits that because of the delay, which was occasioned in the filing of the complaint, the right of the petitioners to challenge the report of the Public Analyst by having the second sample of the food article examined by the Central Food Laboratory as per Section 13 (2) of the Act has been frustrated and, therefore, the prosecution of the petitioners in this case is absolutely vitiated. He contends that in this case the analysis, which has been conducted, is of the groundnut oil extracted from the potato Bhujia. He submits that during the course of manufacture of potato Bhujia, certain changes are bound to occur in the oil which is used for preparation of Potato Bhujia. He submits that the expiry date of the food article has to be compulsorily mentioned on a packaged food article, i.e. the potato Bhujia as per rule 32 (i) of the Prevention of Food Adulteration Rules, 1955 (for short, "the Rules of 1955"). Learned counsel submits that in a case of potato Bhujia, the shelf-life, i.e. date, till which the food retains its optimum quality, is six months from the date of its manufacture. He contends that by the effect of mentioning this last date before which the potato Bhujia is to be consumed, the necessary corollary is that the manufacturer bars the sale of such a food article after lapse of the said period of six months. Learned counsel, therefore, submits that if at all the petitioners had to be prosecuted for the offence under the Act, then it was necessary that the analysis of the potato Bhujia should have been done within the said outer limit

of the best before date of the potato Bhujia and the information to the accused regarding the report of the Public Analyst should also have been given within the said period only. Learned counsel submits that had it been the case of the prosecution that the best before date (shelf life) was not mentioned on the packing of the potato Bhujia, then the Food Inspector would have recommended the prosecution of the petitioner for the violation of rule 32 (i) of the Rules of 1955.

5. Learned counsel, thus, submits that there is no averment in the complaint that the last date of consumption of the food article, i.e. potato Bhujia, was not mentioned on the packing of the potato Bhujia. He contends that as a necessary corollary thereto, in view of the undisputed fact emerging from the record that the complaint was filed long after the expiry of the best before date (shelf life) of the food article, then the obvious inference from filing of such a belated complaint, would be that the accused have been deprived of their statutory right to challenge the report of the Public Analyst by having the second sample of the food article analysed by the Central Food Laboratory u/Sec. 13 (2) of the Act. He, therefore, prays that the order impugned taking cognizance and the proposed prosecution of the petitioners in this case is absolutely illegal and amounts to an abuse of process of the court.

6. The learned Public Prosecutor, on the other hand, has supported the order of the learned Magistrate taking cognizance against the petitioners and submits that the petitioners are always at liberty to have the second sample of the food article sent to the Central Food Laboratory for analysis and if the Central Food Laboratory gives a finding that the article of food was not fit for analysis, then only the accused can claim the benefit of the delay.

7. Having heard the arguments advanced at the bar and upon going through the material available on record, it is evident that the complaint in this case was filed nearly after five years of taking of the sample of the potato Bhujia. The report of the Public Analyst was received in the year 2001 itself and the complaint was filed in the year 2006. Though the Food Inspector has deliberately not mentioned in the Form-VI or the spot memo as to what was the best before date mentioned on the sealed packaging of potato Bhujia, but by no stretch of imagination, the date could have been to the extent of five years. If the best before date was not mentioned on the packaged food, then the Food Inspector would also have recommended prosecution of the accused for violation of rule 32 and 32 (i) of the Rules of 1955. The relevant portions of the rules are quoted below.

8. Rule 32.- Every prepackaged food to carry a label.

Rule 32 (i) of the Rules of 1955 reads as below:-

(i) the month and year in capital letters upto which the product is best for consumption, in the following manner, namely:-

BEST BEFORE.....MONTH AND YEAR.

OR

BEST BEFORE.....MONTHS FROM PACKAGING.

OR

BEST BEFORE.....MONTHS FROM MANUFACTURE;

OR

BEST BEFORE UPTO MONTH AND YEAR

For the period upto

and inclusive of 1st

September 2001

OR

BEST BEFORE WITHIN..... MONTHS FROM THE DATE OF PACKAGING/
MANUFACTURE.

Provided that in case of wholesale packages the particulars under clauses (b), (f), (g), (h) and this clause need not be specified.

9. When a manufacturer puts a best before date on a packaged article of food then the necessary implication of this action is that there is an intimation to the vendor not to sell such a packaging after the expiry date has lapsed. The rule has been enacted for the purpose of warning the consumer not to purchase a food article beyond the outer limit or the best before date. The Parliament, in its wisdom, has enacted the rule 32 prescribing that an outer limit is necessary to be mentioned on a packaged food article so that a consumer could be warned against consuming a food article beyond the period for which it would retain its optimum quality. It is obvious that the quality of a packaged food article cannot be tested by senses.

10. The analysis, which the Public Analyst has conducted in this case is of the oil extracted from the potato Bhujia. Some changes are bound to occur in the oil after going through the manufacturing process of preparation of potato Bhujia. In any event, the accused have a statutory right to challenge the report of the Public Analyst by having the second sample analysed by the Central Food Laboratory and that too, before the expiry date or the best before date. Now, in the recently introduced Food Safety & Standards Act, 2006, the sale of an article of food by the seller after the expiry date has been made an offence u/s 27 (3) of the Act. The wholesaler and the distributor have also been made liable to be punished for supply of an article of food after its expiry date as per Section 27 (2).

11. The complaint in this case, having been filed after nearly five years of the date of taking the samples, the said right of the petitioners has been

comprehensively frustrated on account of this unreasonable delay, which has resulted into a gross failure of justice.

12. A reading of the complaint reveals that the delay was occasioned because of the time consumed in the office of the Chief Medical & Health Officer, Jodhpur for the grant of sanction. A letter sent by Shri C.P. Mathur, the then Chief Medical & Health Officer, Jodhpur praying for condonation of delay in filing the complaint, is available on record, as per which the delay was occasioned in the Office of the Chief Medical & Health Officer, Jodhpur.

13. The Hon''ble Apex Court, in the case of *Nebh Raj Vs. State (Delhi Administration)* and Another, while dealing with a case of oil extracted from "Dal Bizi" held that a delay of three years in examination by the Analyst of the oil extracted from "Dal Bizi" could lead to the possibility of free fatty acid contents of the oil increasing by oxidation during storage. The Hon''ble Apex Court held as below: -

Foo Laboratory sent his report on October 26, 1973. The precise date of analysis by the Director, Central Food Laboratory is not evident from the record. According to the report the sample was adulterated as the vanaspati used in the samples of Dal Biji contained 42.2% of "free fatty acid as oleic acid" as against the permissible.25%. The report also mentioned that "added coal tar dyes" were absent. The appellant was convicted by the Metropolitan Magistrate, Delhi, u/s 16 read with Section 7 of the Prevention of Food Adulteration Act, 1954, and sentenced to undergo rigorous imprisonment for a period of six months and to pay a fine of Rs. 1000/-. The conviction and sentence were confirmed, on appeal, by the learned Additional Sessions judge, Delhi. A revision preferred to the High Court of Delhi was dismissed in limine. One of the submissions made before the lower Courts and the only submission now made before us is that the analysis by the Director, Central Food Laboratory, Calcutta was made nearly three years after the sample was taken. There was every possibility of the free fatty acid content of the sample having increased enormously by oxidation during storage. We are afraid that on the facts of this particular case we have to accept the submission made on behalf of the appellant. The report of the Director, Central Food Laboratory, Calcutta having superseded the report of the Public Analyst, the prosecution must stand or fall on the report of the Director, Central Food Laboratory. The report shows that there was 42.2% of "free fatty acid as oleic acid" as against the permissible.25%. Prima facie the sample was adulterated. The burden of providing that the free fatty acid content of the vanaspati had increased due to natural causes was upon the appellant. But, in the present case the burden is sufficiently discharged by the very passage of so long a time as three years from the date of taking the sample to the date of the analysis by the Director Central Food Laboratory. That oxidation due to exposure to air has the effect of increasing the free fatty acid content of edible fats and oil cannot be disputed. Woodman in his *Food Analysis* 4th Edn. p. 170 points out:

When acted on by the oxygen of the air, especially in the presence of light and

moisture, free fatty acids are liberated and altered with the accompanying production of various aldehydes and acids of lower molecular weight having a disagreeable odour and acrid taste, the fat, or oil then being turned "rancid".

David Pearson in his Chemical Analysis of Foods - 7th Edition, page 494, says : "Fats undergo changes during storage which result in the production of an unpleasant taste and odour, which is commonly referred to as rancidity. Rancidity is brought about by the action of air or by micro-organisms. Oxidative rancidity is accelerated by exposure to heat and light, by moisture and by the presence of traces of certain metals (e.g. copper, nickel, iron).....

14. Thereafter again the Hon"ble Apex Court, in the case of Girishbhai Dahyabhai Shah Vs. C.C. Jani and Another, , held that delay in providing opportunity for examination of second sample by the Central Food Laboratory is fatal to the prosecution. The Hon"ble Apex Court held that the delay of fifteen months in communicating to the accused about the report of the Public Analyst led to the sample being deteriorated and thus, the Hon"ble Apex Court quashed the proceedings against the accused as the valuable right available to the accused u/s 13 (2) was frustrated.

15. The Hon"ble Apex Court, while considering the similar provisions providing a right to the accused to challenge the report of the Government Analyst by having the referee sample analysed by the Central Laboratory, quashed the proceedings wherein a reasonable opportunity to challenge the report of the Government Analyst was not provided to the accused before expiry date. In the case of Medicamen Biotech Ltd. and Another Vs. Rubina Bose, Drug Inspector, the Hon"ble Apex Court was dealing with the provisions of Drugs and Cosmetics Act, and particularly Section 25 thereof, which akin to Section 13 (2) of the P.F. Act, gives a right to the accused to challenge the report of the Government Analyst by making a request for having the referee sample of the seized drug analysed by the Central Laboratory. The Apex Court, on the consideration of the facts, held that the delay in intimating to the accused about the report of the Government Analyst, which resulted into the expiry date of the sample lapsing, would vitiate the proceedings.

16. In the case of Gupta Chemicals Pvt. Ltd. and Others Vs. State of Rajasthan and Another, the Hon"ble Apex Court was dealing with the provisions of the Insecticides Act, which also entitle the accused to challenge the report of the Government Analyst by having the referee sample analysed by the Central Laboratory and the Hon"ble Apex Court quashed the proceedings holding that the delay caused by the Insecticides Inspector in intimating the accused about the report of the Government Analyst resulted into self-life of the sample expiring before the accused could challenge the report of the Government Analyst and thereby the proceedings were held to be vitiated.

17. A Division Bench of this Court, in the case of Onkar Lal Vs. State of Rajasthan, while dealing with Section 13 (2) of the Prevention of Food

Adulteration Act, held that the deprivation of the opportunity to challenge the report of the Public Analyst virtually amounts to a deprivation of the opportunity to defend oneself. The Court held as below:-

(22) Every criminal trial including the trial for the offence punishable u/s 7/16 of the Prevention of Food Adulteration Act, is governed by two important rules of procedure. The first is that the burden to prove the guilt is always on the prosecution and this burden never shifts to the accused. This rule is founded on the law relating to burden of proof contained in the Evidence Act. Since the burden of proof is always on the prosecution, there is the maxim that an accused is presumed to be innocent till he is found guilty of the offence with which he is charged.

(23) The second important rule governing criminal trials is that the accused person must be given opportunity to defend himself against the charge made against him. This rule is founded on the fundamental right under Article 22 (2) of the Constitution. The law as to burden of proof, and the law conferring right on the accused to defend himself against the charge, together constitute the "procedure established by law" for the purpose of Article 21 of the Constitution which confers one of the most important fundamental rights namely the right against deprivation of life or personal liberty except according to procedure established by law.

(24) In addition to the provisions of Evidence Act, which place burden of proof of guilt on the prosecution, Article 21 of the Constitution also places the burden of proving that the Act resulting in deprivation of life or personal liberty is according to procedure established by law, on the State functionary who wants to deprive any person of his life or personal liberty. Thus, there are two laws (a) the law contained in the Evidence Act and (b) the fundamental right under Art. 21 of the Constitution, which place the burden of proving guilt, on the prosecution.

(25) The law relating to burden of proof, simultaneously does two things; (i) it imposes a positive duty on the party on which the burden to prove the fact in question is placed and (ii) it creates a corresponding right in the other party, which right is to the effect that unless the positive duty to prove the fact in question is discharge, no finding shall be given against it. From this right emerges the right to be acquitted if the guilt is not prove by the prosecution. This right, which arises from the law relating to burden of proof, is very important, in view of the "right to silence" available to the accused during the trial. Right to silence enables the accused to decide for himself, whether he: should appeal in his defence and to further decide, when and at what stage of the trial he should speak. The accused cannot be forced to speak if he decides not to speak nor the accused can be forced to speak at a point or during a certain stage, when he does not to speak in his defence. Thus, the following principles appear to be applicable to the criminal trials:-

(1) the burden to prove the guilt is always on the prosecution and this burden

never shifts to the accused. The accused is therefore entitled to be acquitted, if the prosecution fails to prove the guilt. He need not say anything in his defence nor he need produce any evidence in his defence. Therefore, so on the prosecution has not produced evidence to prove the charge against an accused, the accused cannot be asked to give his statement nor he can be asked to produce his evidence in defence.

(2) In every criminal trial, the accused has unfettered right to silence. He may choose to remain silence either during the whole of the trial or during any part of the trial and no one can force the accused to say anything against his will.

(3) In every criminal trial, the accused has the right to be defended against the charge and this right has its origin in the Criminal Procedure Code from which the right has been lifted to Article 22 (2) of the Constitution of India and given the status of a fundamental right. This right to be defended against the charge accrues to the accused right from the moment he is arrested or process is issued against him and lasts till the trial is finally concluded. The duration for which this right is available to the accused is the period from the instituting of the prosecution to the final conclusion of the trial. Anything which extinguishes the right to be defended, before the trial is finally concluded, would be ultra vires Article 22 (2) of the Constitution.

18. On testing the case at hand on the touch-stone of principles, which have been enunciated by the Hon"ble Apex Court and the Hon"ble Division Bench of this Court and having regard to the above, this Court has no hesitation in holding that the accused have been deprived of their statutory right to challenge the report of the Public Analyst by having the second sample of food article analysed by the Central Food Laboratory.

19. The upshot of the above discussion is that the prosecution of the petitioners in this case cannot be permitted to be continued because of the unreasonable and undue delay in filing the complaint, resulting into deprivation of statutory to challenged the report of the Public Analyst as provided u/s 13 (2) of the Act.

20. Resultantly, the miscellaneous petition succeeds and the impugned order dated 24.6.2006 passed by the learned Chief Judicial Magistrate, Jodhpur in Criminal Regular Case No. 214/2006 taking cognizance against the petitioners, as also the impugned order dated 04.11.2009 passed by the learned Additional Sessions Judge No. 2, Jodhpur in Criminal Revision No. 29/2009 affirming the order of the learned trial court, are hereby quashed. The stay petition stands disposed of. The learned Chief Judicial Magistrate, Jodhpur is directed to issue notice to the erring officers and seek their explanation and then take appropriate steps as per rule 66 of the General Rules (Criminal). Record of the court below be sent back forthwith.