

(2018) 08 MP CK 0076

In the Madhya Pradesh High Court

Case No : Writ Petition No.6416 Of2018

Madhusudan Modi & Others

APPELLANT

Vs

State Of M. P. & Others

RESPONDENT

Date of Decision : 09-08-2018

Acts Referred:

Constitution Of India, 1950 — Article 226, 227

Food Safety And Standards Act, 2006 — Section (2)(ii)(V), 3(zf), 3(zf)(A)(i), 26, 26(1), 26(1)(2)(ii), 26(1)(2)(v), 27, 27(1), 27(2)(c), 27(3)(c), 36(3)(E), 52, 58

Code Of Criminal Procedure, 1973 — Section 482

Food Safety And Standard Rules, 2011 — Rule 2.4.1(3)

Food Safety And Standards (Food Products Standards And Food Additives)

Regulations, 2011 — Regulation 2.12, 3.1.11

Food Safety And Standards (Packaging And Labelling) Regulations, 2011 — Regulation 2.3, 2.3(1)(5), 2.4.5(18)

Citation : (2018) 08 MP CK 0076

Hon'ble Judges : S. C. Sharma, J

Bench : Single Bench

Final Decision : Allowed

Judgement

01- The petitioner No.4, M/s. Nestle India Limited is a Company registered under the Companies Act having its registered office at 100/101, World

Trade Centre, Barakhamba Lane, New Delhi along with its nominee petitioner No.3 as well as Proprietors who are selling the food products

manufactured by M/s. Nestle India Limited, are before this Court being aggrieved by orders dated 12/05/2016 and 04/10/2017 by which the

adjudicating Officer has rejected the representation of the petitioners in respect of prosecution of the petitioner for violating the provisions of Food

Safety and Standards Act, 2006 read with Regulation 2012 of the Food Safety and Standards (Food Products Standards and Food Additives)

Regulation, 2011.

02- The petitioners' contention is that certain samples of Maggi Noodles were picked up from the shop of petitioner No.1 and the Food Safety Officer

has submitted the sample for analysis to the Food Analyst, State Food Testing Laboratory, Bhopal and the sample was subjected to examination. The

samples were collected on 29/05/2015 and a report was submitted on 22/12/2015. The report is on record and the same reflects that no MSG was

added. In spite of the aforesaid, it was observed that sample has been misbranded.

03- Learned Senior Counsel appearing for the petitioners has argued before this Court that only declaration, which is creating problem in his case is

that the company has mentioned over the product that no MSG is added. He has vehemently argued before this Court that it was not at all established

that the MSG was added and in those circumstances, the question of misbranding, as alleged, doesn't arise. He has prayed for quashment of

impugned orders, which are subject matter of the present petition. He has also drawn the attention of this Court toward the judgment delivered in the

case of ITC Limited Vs. State of M.P. & Others in Writ Petition No.5427/2016, which was also delivered by a co-ordinate Bench of this Court in

similar circumstances.

04- On the other hand, the learned Government Advocate has argued before this Court that by printing over the product that it does not contain MSG,

the samples have been misbranded and as the samples have been misbranded, they have rightly initiated action against the petitioner under the

provisions of Food Safety and Standards Act, 2006 read with Regulation 2.12 of the Food Safety and Standards (Food Products Standards and Food

Additives) Regulation, 2011.

05- However, it has not been disputed by the learned Government Advocate that the report submitted by the laboratory does not reveal that any MSG

was added by the manufacturer i.e. the petitioner company. A prayer has been made for dismissal of the writ petition.

06- Undisputedly, the petitioner before this Court has stated categorically over the food products manufactured by him that no MSG has been added

by him. The sample was sent to the laboratory and the report of the laboratory also does not reveal the detection of any Mono-Sodium Glutamate

(MSG).

07- In similar circumstances, in case of ITC Limited (supra), the ITC Limited was again being prosecuted for mentioning "NO MSG ADDED"

and co-ordinate Bench of this Court has passed a detailed and exhaustive order in Writ Petition No.5427/2016. Paragraphs No.02 to 21 of the

aforesaid judgment reads as under:-

2/ In brief, the petitioner's case is that it is engaged in the business of manufacturing and marketing of various packaged products including

"noodles" and "pasta" under the brand name "Sunfeast". The Food Safety Officer, Dewas had taken sample of "Sunfeast Yippee

Noodles Magic Masala" from retail premises of M/s Neelkamal Multi Trade Pvt. Ltd. on 1.6.2015 and had issued notice in Form VA under Rule

2.4.1

(3) of Food Safety and Standard Rules, 2011 to the retailer only. The sample was submitted for analysis to the Food Analyst, State Food Testing

Laboratory, Bhopal and the report dated 4.7.2015 was obtained, in which no Monosodium Glutamate (MSG) was detected yet the Food Analyst in the

report dated 22.12.2015 declared the samples to be misbranded on the ground that mentioning of "No MSG Added" is misleading under

Regulation 2.3(1)(5) of the Packaging and Labelling Regulation. The further case of the petitioner is that sanction for prosecution was wrongly

granted by order dated 28.5.2016 by the designated officer and in pursuance to the said sanction the Food Safety Officer, Dewas had preferred a

complaint before the Court of Additional District Magistrate-cum-Adjudicating Officer, Dewas alleging violation of Section 26(1),(2)(ii)(v), 3(zf)(A)(i),

of the Food Safety and Standards Act, 2006 and Regulation 2.3(1)(5) of the Packaging and Labelling Regulation and being liable under Section 27(1)

of the Act and punishable under Section 52 and Section 58 of Food Safety and Standard Act, 2006. The petitioner was issued notice by the

Adjudicating Authority and the petitioner by appearing before the Adjudicating Authority had filed objection with respect to the maintainability of the

complaint and prayed for dropping the proceedings on the ground that charge was not made out. By the order dated 26.7.2016 the Adjudicating

Officer has rejected the objection and has held the complaint to be maintainable.

3/ Learned counsel for the petitioner submits that since no MSG was detected in the laboratory test of the sample, therefore, it is not a case of

misbranding. He further submits that the petitioner had neither added MSG nor its natural presence was found, therefore, prosecution cannot be

sustained. He has also submitted that the sanction was granted by the concerned authority mechanically without application of mind.

4/ As against this, learned counsel for the respondents has supported the impugned action submitting that the petitioner had mentioned in the label that

“No MSG Added” which was misleading since no negative declaration could be given and the petitioner could only mention the contents which

were present on the label and could not have mentioned the contents which were not present.

5/ I have heard the learned counsel for the parties and perused the record.

6/ On the perusal of the record, it is noticed that the petitioner is sought to be prosecuted under the provisions of the Food, Safety and Standard Act,

2006 (for short “the Act”) and the F.S. & S. (Packaging and Labelling) Regulations, 2011 (for short “the Regulations”) on the ground of

misbranding the product namely “Sunfeast Yippee Noodles Magic Masala”. The sample collected by the Food Safety Officer and analyzed by

the Food Analyst was sent to the notified laboratory and its report was obtained vide Annexure P/2. The report reveals that “No MSG” was

detected in the sample. In the reply also the respondents have admitted that as per the report of the Food Analyst MSG content was not found in the

sample. The petitioner is being prosecuted only on the ground that printing of declaration “No MSG Added” in the sample label was misleading

under Regulation 2.3(1)(5) of the Regulations and it was misbranding under Section 3(ZF)(A)(i) of the Act.

7/ The order sanctioning prosecution reveals that the petitioner is being prosecuted for violating Section 3(zf)(A)(i), Section 26(1)(2)(ii), (v) of the Act

and regulation 2.3(1)(5), 27(3)(c), 27(2)(c) of the Regulations and is said to have committed offence punishable under Section 52 & 58 of the Act.

8/ The entire prosecution is based upon the report of the Food Analyst, hence the issue is if mere mentioning of “No MSG Added” in the label

coupled with the fact that actually No MSG was found in the sample, can be held to be misbranding.

9/ Section 3(zf) of the Act defines misbranded food and Section 3(zf)(A)(i) relevant for the present purpose reads as under:-

Section 3(zf) "misbranded food" means an article of food-

(A) if it is purported, or is presented to be, or is being-

(i) offered or promoted for sale with false, misleading or deceptive claims either-

(a) upon the label of the package, or

(b) through advertisement; or

10/ For attracting this provision the label of the package of an article of food offered for sale should have false, misleading or deceptive claim. In a

case of the present nature where no variance is found on the declaration made on the label of package and the contents thereof and "no MSG

added" is mentioned in label to enable the consumer to make an informed choice, it cannot be held that the declaration was false, misleading or

deceptive. Section 26(1)(2)(ii)(v) of the Act and the Regulation 2.3(1),(5) and Section 27(3)(c) and Section 27(2)(c) provides for the prosecution for

misbranding of the product or substandard product or product containing extraneous matter or unsafe product but the only allegation against the

petitioner is of misbranding of product. Relevant part of these provisions read as under:-

Section 26. Responsibilities of the food business operator

(1) Every food business operator shall ensure that the articles of food satisfy the requirement of this Act and the rules and regulations made

thereunder at all stages of production, processing, import, distribution and sale within the business under his control.

(2) No food business operator shall himself or by any person on his behalf manufacture, store, sell or distribute any article of food-

(i) *****

(ii) which is misbranded or sub-standard or contains extraneous matter; or

(iii) *****

(iv) *****

(v) in contravention of any other provision of this Act or of any rule or regulation made thereunder.

Section 27. Liability of manufacturers, packers, wholesalers, distributors and sellers

(1) *****

(2) The wholesaler or distributor shall be liable under this Act for any article of food which is-

- (a) *****
- (b) *****
- (c) unsafe or misbranded; or
- (d) *****
- (e) *****
- (f) *****

(3) The seller shall be liable under this Act for any article of food which is -

- (a) *****
- (b) *****
- (c) misbranded; or
- (d) *****
- (e) *****

Regulation 2.3 - Manner of declaration

(1) Any information or pictorial device written, printed, or graphic matter may be displayed in the label provided that it is not in conflict with the requirements of these Regulations.

- (2) *****
- (3) *****
- (4) *****

(5) Labels not to contain false or misleading statements: A label shall not contain any statement, claim, design, device, fancy name or abbreviation

which is false or misleading in any particular concerning the food contained in the package, or concerning the quantity or the nutritive value or in

relation to the place of origin of the said food:

Provided that this regulation shall not apply in respect of established trade or fancy names of confectionery, biscuits and sweets, such as, barley, sugar,

bull's eye, cream cracker or in respect of aerated waters, such as, Ginger Beer or Gold-Spot or any other name in existence in international trade

practice.

11/ Under Section 52 the penalty has been prescribed for misbranded product

and Section 58 deals with penalty for contravention, for which no specific penalty is provided.

12/ In view of the above provisions if there is no prima facie proof of misbranding, then the petitioner cannot be prosecuted for the above offences.

13/ The Director (Enforcement) Food, Safety and Standards Authority of India in the Circular dated 31.3.2016 has taken note of the fact that the food

business operators are unnecessarily harassed and prosecuted on the issue of MSG flavour enhancer and has made it clear that the prosecution should

be launched against FBOs only when the label states "No MSG" or "No Added MSG" and MSG is actually found in the impugned food stuff.

The said Circular in clear terms provides as under:-

File No.: 1 (105) Maggi Noodles/2015/FSSAI (Part I)

Food Safety and Standards Authority of India

(A Statutory Authority established under Food Safety and

Standards Act, 2006)

(Enforcement Division)

FDA Bhawan, Kotla Road, New Delhi - 110002

Dated, the 31st March, 2016

Order

Subject: Clarification on use of Monosodium

Glutamate as flavour enhancer in seasoning for Noodles and Pastas.

Under Regulation 3.1.11 of the Food Safety and Standards (Food Product Standards and Food Additives), Regulations, 2011, Monosodium Glutamate

(MSG), a flavour enhancer bearing INS number 621, may be added to specified foods as per the provisions of Appendix A, subject to Good

Manufacturing Practice (GMP) level and under proper declaration as provided in 2.4.5 (18) of the Food Safety and Standards (Packaging and

Labelling) Regulations, 2011.

2. It is widely known that Glutamate is naturally found in several common foods such as milk, spices, wheat, vegetables, etc. MSG is the sodium salt

of Glutamic acid and one of the many forms of glutamate. Presently, there is no analytical method to determine whether MSG was added to the

product during its manufacture or was naturally present in the product. This can

however be checked through inspection of the manufacturing premises.

3. To prevent, both, avoidable harassment/ prosecution of Food Business Operators (FBOs) as well as to ensure that consumers are facilitated to exercise informed choices in respect of what they eat, proceedings may be launched against FBOs only when the labels state "No MSG" or "No added MSG" and MSG is actually found in the impugned foodstuff. Commissioners of Food Safety are advised that specific enforcement/prosecution may not be launched against the manufacturers of Noodles/Pasta on account of presence of MSG/Glutamic Acid unless it is ascertained by the department that Monosodium Glutamate flavour enhancer (INS E-621) was deliberately added during the course of manufacture without required declaration on the label as indicated in Para 1 above.

4. This issues with the approval of the Competent Authority.

(Rakesh Chandra Sharma)

Director (Enforcement)

011-23220994

14/ Though the case of the petitioner is prior to the issuance of this circular but the circular is only clarificatory in nature and has been issued with a view to avoid the harassment, therefore, in view of this circular also the petitioner could not have been prosecuted because "No MSG" was actually found in the sample.

15/ In the present case record reveals that there was no basis to prosecute the petitioner for the alleged offence as no MSG was found in the sample, therefore, there was no misbranding by the petitioner. The petitioner could have been said to have committed offence if after mentioning "No Added MSG" in the sample it was found that MSG was added but that is not so. This issue was specifically raised by the petitioner before the adjudicating authority but the same has not been properly considered while passing the impugned order dated 26.7.2016, therefore, the impugned order cannot be sustained. Since there is no prima facie material to show that the petitioner has done misbranding or given any false or misleading statement in the label, therefore, he cannot be accused of violating Section 26(1),(2)(ii)(v) of the Act or Regulation 2.3(1)(5) or Section 27(3)(c) and 27(2)(c) of

the Act.

16/ It is the settled position in law that the prosecution can be quashed in exercise of the extraordinary power under Article 226 or the inherent power

under Section 482 of the Cr.P.C. when the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same,

do not disclose commission of any offence and make out a case against the accused. (See: 1992 Supp(1) SCC 335, State of Haryana and others Vs.

Bhajanlal and others). When it is certain that there is no prospects of the case ending in conviction, the valuable time of the court should not be wasted

for holding a trial only for the purpose of formally completing the procedure to pronounce the conclusion on a future date and that when the trial is

going to be nothing but a farce, such a course of action should not be allowed to take place. [See:(1996) 9 SCC 766, Satish Mehra Vs. Delhi

Administration and Another].

17/ In the matter of Pepsi Foods Ltd. and Another Vs. Special Judicial Magistrate and others reported in (1998) 5 SCC 749 wherein the petitioner was

sought to be prosecuted on the complaint of selling adulterated beverages under the brand name of 'Lehar Pepsi' and had approached the court

after receiving the summons, the Hon'ble Supreme Court has held that:-

28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. it is not that the

complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the

magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine

the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the

complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary

evidence before summoning of the accused. The Magistrate has to carefully scrutinise the evidence brought on record and may even himself put

questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any

offence is prima facie committed by all or any of the accused.

29. No doubt the magistrate can discharge the accused at any stage of the trial if

he considers the charge to be groundless, but that does not mean that the accused cannot approach the High Court under Section 482 of the Code or Article 227 of the Constitution to have the proceeding quashed against him when the complaint does not make out any case against him and still he must undergo the agony of a criminal trial.

The same analogy applies in the present case also.

19/ That apart it is also noticed that the designated officer has granted sanction for prosecution exercising the power under Section 36(3)(e) of the Act

available material any offence or violation of provisions of the Act or Regulations is made out. The law in this regard is well settled that while granting

whether prosecution has to be sanctioned or not. [See: AIR 1997 SC 3400, Mansukhlal Vithaldas Chauhan Vs. State of Gujarat]. It should be clear

case, sanctioned the prosecution. [See: AIR 1958 SC 124 Jaswant Singh Vs. State of Punjab]. The grant of sanction is a serious exercise of power by

whether the facts would reveal the commission of offence under the relevant provisions. [See: AIR 2014 SC 2369, P.L. Tatwal Vs. State of M.P.]. It

the case. Sanction is a weapon to discourage vexatious prosecution and it is a safeguard for the innocent, though not a shield for the guilty.

sanction must ex facie disclose that the sanctioning authority had

considered the evidence and other material placed before it. [See: AIR 2014 SC 827, CBI Vs. Ashok Kumar Aggarwal].

20/ Having regard to the aforesaid, the impugned order of sanction dated 28.5.2016 (Annexure P/7) also cannot be sustained.

21/ In view of the above analysis, the writ petition is allowed. The impugned order dated 28.5.2016 granting sanction and order dated 26.7.2016

rejecting the petitioner's objection and denying the prayer for discharging from prosecution, are hereby set aside and the prosecution launched

against the petitioner is quashed.

08- In light of the aforesaid judgment, as similar issue has already been decided by co-ordinate Bench of this Court, the impugned order dated

12/05/2016 (Annex.-P/3) and order 04/10/2017 (Annex.-P/6) deserve to be quashed and are accordingly quashed. The prosecution lodged against the

petitioners is also quashed.

09- With the aforesaid, writ petition stands allowed.

Certified copy as per rules.