
(2012) 11 KL CK 0166
In the High Court Of Kerala
Case No : Criminal M.C.No. 204 of 2007

Prasanth

APPELLANT

Vs

Food Inspector, Kannur Municipality

RESPONDENT

Date of Decision : 22-11-2012

Acts Referred:

Constitution of India, 1950 — Article 20(1)
Prevention of Food Adulteration Act, 1954 — Section 16(1)a(i), 2(ia)(m), 7(i)
Probation of Offenders Act, 1958 — Section 11

Citation : (2013) 1 ILR (Ker) 218 : (2013) 1 KLJ 44 : (2012) 4 KLT 895

Hon'ble Judges : N.K. Balakrishnan, J

Bench : Single Bench

Advocate : M. Ramesh Chander, for the Appellant; V.H. Jasmine, for the Respondent

Final Decision : Allowed

Judgement

N.K. Balakrishnan

1. Petitioners are accused Nos. 1 and 2 in C.C. No. 115 of 2005 on the file of the J.F.C.M. I, Kannur. The second accused is the firm represented by the 1st accused. The first accused is also the nominee of that firm. Offence alleged is under S. 16(1) a (i) read with S. 2(ia)(m) and S. 7(i) of the Prevention of Food Adulteration Act, 1954 ("P.F.A. Act" for short). The allegation is that A1 was conducting sale of food article. After serving Form VI notice, P.W. 1 purchased 600 ml. of pickle from out of a vessel containing 15 litres. It was stated to have been stirred and homogenized. The procedural formalities were complied with in regard to the purchase, packing, sampling, labeling etc., as provided under the provisions of the P.F.A. Act and Rules. As per Form III report issued by the Public Analyst it was certified that the sample of pickle did not conform to the standard prescribed for pickle as per Item No. A.16.16 of Appendix B of P.F.A. Rules, 1955 and thus adulterated.

2. The petitioners allege that the prosecution initiated against them was mainly

on the ground that the pickle sold to P.W. 1 was "pickle in oil" but in fact only "pickle" was sold by the accused and as such it cannot be said that the sample sold did not conform to the standard prescribed in A. 16.16 of Appendix B. It is further submitted that there was amendment to the Rule as per which the standard prescribed is shown in A. 16.42. There was great variance in respect of different items of pickle. A new item, as Item No. IV-"pickle without medium" was also introduced whereas as per the old Rule there was no separate item as "pickle without medium". The learned counsel appearing for the petitioners submits that since in the receipt or complaint or even in evidence it was not specifically stated that the pickle purchased by P.W.1 and which was sold by A1 to P.W. 1 was pickle in oil, the standard prescribed for "pickle in oil" cannot be taken as the basis to contend that the sample did not conform to the standard prescribed for "pickles in oil".

3. As it originally stood (based on which Form III Report was prepared by the Public Analyst), the standard prescribed as per Appendix A. 16.16 is as follows:-

A. 16.16. PICKLE means the preparation made from sound, clean, raw or sufficiently mature fruits or vegetables or a combination of both free from insect damage or fungus attack, preserved in salt, acid, sugar, jaggery, edible oils, spices, spice exact or oil of turmeric, pepper, chillies, fenugreek, mustard seed or powder, vegetable ingredients, asafetida, bengal gram, lime juice, lemon juice, green chillies, vinegar or acetic acid, citric acid, dry fruit including raisins and fruits nuts. Pickles shall be free from added synthetic food colours.

Combination of pickles may be:

i) Pickles in citrus juice or brine:-- The percentage of salt in covering liquid shall not be less than 10 per cent when salt is used as major preserving agent. When packed in citrus juice, acidity of the covering liquid shall be not less than 1.2 per cent calculated as citric acid. Soluble calcium salt and permitted preservatives may be used in such type of pickles. Pickles shall be free from copper, alum and mineral acids.

ii) Pickles in oil:-- The fruit or vegetable percentage in the final product shall not be less than 60 per cent. The pickle shall be covered with oil so as to form a layer of not less than 0.5 c.m. above the contents or the percentage of oil in pickle shall be not less than 10 per cent. The pickle shall be free from copper, alum and mineral acid. It may contain rapeseed (rai), ajwain, saunf, black pepper and like spices, etc. Permitted preservatives may be used in pickles.

(iii) Pickles in vinegar:-- Pickles in vinegar mean the preparation from sound, clean, raw or sufficiently matured fruits or vegetables free from insect damage or fungus attack, which have been cured in brine or dry salt or salted and dried stack with or without natural fermentation. It shall contain vinegar or acetic acid and the percentage of acid in the fluid portion shall not be less than 2 per cent w/w calculated as acetic acid. It may contain sugar, whole or ground or semi-ground spices, dried fruits, green and red chillies, ginger etc. dry fruit. Citric acid

may also be added in such type of pickles. Spice extract or essences may also be used. The drained weight of the product shall not be less than 60 per cent Pickles shall be free from copper, mineral acid, alum synthetic colours and shall show no sign of fermentation. The product shall be reasonably free from sediments. Permitted preservatives may be used in pickles.

4. According to the prosecution, as per Appendix B there should be oil layer not less than 0.5 cm above the vegetable matter where as in the sample taken by P.W.1, the oil layer was absent. Similarly, as per A. 16.16, not less than 10% of sodium chloride should have been there. But as per Annexure A4, it was found to be only 6.71 percent. Besides those two variations, the other variation is regarding acetic acid, which as per the standard should be not less than 2%, whereas in the sample analysed it was found to be only 1.45 per cent. Therefore, in view of the three variations as mentioned above, it was certified that the sample did not conform to the standard prescribed.

5. As per the amended Rule, the standard prescribed for the pickle is as follows:

A. 16.42 - Pickles means the preparation made from fruits or vegetables or other edible plant material including mushrooms free from insect damaged or fungal infection, singly or in combination preserved in salt, acid, sugar or any combination of the three. The pickle may contain onion, garlic, ginger, sugar, jaggery, edible vegetable oil, green or red chillies, spices, spice extracts/oil, lime juice, vinegar/acetic acid, citric acid, dry fruits and nuts, It shall be free from copper, mineral acid, alum, synthetic colours and shall show no sign of fermentation.

The product may contain food additives permitted in Appendix C. The product shall conform to the microbiological requirements given in Appendix D. Pickles may be of combinations as given below:-

(1) Pickles in Citrus Juice or Brine conforming to the following requirements:-

iv) Pickle without medium means the pickles other than enumerated above. This may contain ingredients given in para 1 of this specification. Such pickles shall be labelled as (give the name of vegetables or fruits) Pickle.

As per category (iv) relating to pickle without medium it is also stated "such packets shall be labelled (give the name of vegetables or fruits) Pickle.

6. Here there is no case for the accused that the name of the vegetable or fruit of which the pickle was made was specified. If it was pickle simpliciter without any medium then how it happened to contain 1.45 per cent. of acetic acid, is the question posed by the prosecution.

7. The learned Public Prosecutor would submit that as it originally stood, pickles were of three types of combinations. One, pickle in citrus juice or brine; the second pickle in oil; and the third one, pickle in vinegar. Accused has no case that it was pickle in citrus juice or brine, or pickle in vinegar and so it can only be

pickle in oil.

8. The learned counsel for the petitioner would submit that even as per the earlier Rule, there could be pickle simpliciter or pickle without any medium since the opening paragraph would show that pickle means the preparation made from sound, clean, raw or sufficiently mature fruits or vegetables or a combination of both. It is also stated therein that pickle may contain onion, garlic ginger, sugar, jaggery, edible oils, spices, spice extract or oil of turmeric, pepper, chillies, fenugreek, mustard seed or powder etc. As per the amended Rule/Standard (A. 16.42) pickle without medium may contain acetic acid, but the percentage, minimum or maximum, has not been specified.

9. It is vehemently argued by the learned counsel for the petitioners that the mahazar and other records do not show that the food article; namely, the pickle sold was "pickle in oil". Since it was not specifically mentioned that it was pickle in oil, it is only to be treated as pickle simpliciter, i.e., pickle without any medium, it is argued. But that contention is strongly resisted by the learned Public Prosecutor since in the pickle which was analysed, presence of acetic acid and other ingredients of pickle in oil were found, and, therefore, it can only be treated as pickle in oil and not pickle simpliciter or pickle without any medium. The other argument that has been vehemently pressed into service by the learned counsel for the petitioner is that the subsequent amendment to the Rule which brought about a new standard A. 16.42 which is a beneficial provision is applicable to the facts of this case since it has not culminated in a judgment.

10. In *Rattan Lal Vs. State of Punjab*, it was declared by the Apex Court that an ex post facto criminal law which only mollifies the rigour of law is not hit by Article 20(1) of the Constitution and that if a particular law makes provision to that effect, though retrospective in operation, it would still be valid. The principle enunciated above was re-iterated by the Apex Court in *T. Barai Vs. Henry Ah Hoe and Another*, that if an amending Act reduces the punishment for an offence there is no reason why the accused should not have the benefit of such reduced punishment. It was held by the Apex Court:

The rule of beneficial construction requires that even ex post facto law of such a type should be applied to mitigate the rigour of the law. The principle is based both on sound reason and common sense.

11. It is submitted by the learned counsel for the petitioners that the Central Government makes or amends rules in consultation with the expert committee defining the standards and quality, fixing the limits of variability permissible in respect of any article of food.

12. The learned Public Prosecutor has also relied upon the decision of the Supreme Court in *Dayal Singh Vs. State of Rajasthan*, in support of his submission that new standard which came into force subsequently cannot have any retrospective operation. But in *Dayal Singh*, it was a case where the new standard came into force during the pendency of the appeal against conviction.

In other words, as the law stood at the time of commission of the offence, it was found that the article of food did not conform to the standard prescribed. That case ended in conviction. In Dayal Singh (supra), the Supreme Court decision in Rattan Lal Vs. State of Punjab, was referred to by the appellant therein contending that the principle that an ex post facto law which only mollifies the rigour of a criminal law did not fall within the said prohibition. But it was observed by the Apex Court in Dayal Singh that if a particular law made a provision to that effect, though retrospective in operation it will be valid. It was also found that Ratanlal was decided on an interpretation of S. 11 of Probation of Offender's Act which was not a penal statute in the sense that it did not create an offence and provide for punishment thereof. Therefore, it was held in Dayal Singh that the principles laid down in Ratanlal do not depart from the well-settled principle that the penal statute which creates new offences is always prospective and a person can be punished for an offence committed by him in accordance with law as it existed on the date on which an offence was committed. But the learned counsel for the petitioners distinguishes the decision in Dayal Singh since in that matter the case had already ended in conviction and it was during the pendency of the appeal the standard mollifying the rigour was introduced. But so far as the case on hand is concerned, the case is still pending before the Trial Court and so the rule which mollifies the rigour of the standard is well applicable to the petitioners as well, the learned counsel for the petitioners argues. The standard as regards pickle in oil was modified taking into account the fact that the presence of salt at a particular percentage or the presence of oil at a particular level i.e. 0.5% above the vegetable matter was intact unnecessary and is actually not conducive to the health of the consumer. In the case on hand, according to the learned counsel, it was not even specified that the pickle purchased by the Food Inspector was pickle simpliciter or pickle without medium and it was only in the report of the Public Analyst it was noted that it did not conform to the standard prescribed for "pickle in oil". That aspect also may have to be considered, the learned counsel submits.

13. The decision of the Delhi High Court in B.L. Kohli and Another Vs. Delhi Administration, has also been cited in connection with this case where it was held that so long as the prosecution of the accused is not concluded by a judgment of conviction, the proceedings against him are to be regarded as inchoate and the law applicable to him would be the law as amended by the legislature. The rule of beneficial construction requires that even ex post facto law in such a case should be applied to mitigate the rigour of the law. The principle is based on sound reason and common sense, the learned counsel argues.

14. It is true that in all the other cases referred to earlier, the issue involved was whether the subsequent amendment as per which the punishment was reduced which is beneficent in nature to the accused is to be given to the accused. When a particular statute deals with a class of offences and a subsequent Act is passed which deals precisely with the same offence and a different punishment is imposed by the latter Act it has to be found that in effect the legislature has

declared that the new Act shall be substituted for the earlier Act. If that principle is followed, then the Rule introduced as per the subsequent amendment re-fixing the standard as per Appendix A. 16.42 in relation to pickle in oil being beneficial in nature is available to be taken advantage of by the accused since the case has not been concluded by a judgment. The decision of the Apex Court in *Basheer @ N.P. Basheer Vs. State of Kerala*, has also been referred to here. That was a case dealt with under the provisions of the N.D.P.S. Act. Act 9 of 2001 introduced significant and material changes in the parent Act which affected the trial itself. It was held that application of the amended Act to cases where the trials had concluded and the appeals were pending on the date of its commencement could possibly result in the trials being vitiated and thereby defeating at least the first objective or avoiding delay in trials. It was held that in respect of pending trials and cases pending investigation and where the trial is yet to conclude the retrospective modification of rigour of punishment can be made applicable. Therefore, it is argued that even in cases under the provisions of the N.D.P.S. Act, the beneficial part of the subsequent amendment has been extended to the accused who are facing trial and since in this case also the case has not been concluded by a judgment and so the benefit of the amendment to the standard introduced in 2005 must certainly be extended to the accused, the learned counsel submits. In *Municipal Corporation of Delhi Vs. Charanjit Lal*, the question considered was whether the amendment of R.29(e) applied to pending proceedings. The Full Bench answered the question in the negative and held that in appeal the appellant could not get the benefit and the amended Rule could not have retrospective effect after conviction. The aforesaid decision was distinguished by the Madhya Pradesh High Court in *Dinesh Chand Kanoongo v. State of M.P.* (2003 (1) FAC 283) pointing out that in *Charanjith Lal*, the case was concluded by a judgment by the time the Rule was amended. But in the case on hand the case was pending trial and was not concluded by a Judgment. Relying on the decision in *M/s. Dalmia Dairy Industries Ltd. Vs. State of Haryana and Prem Chand v. State of Haryana* (1993(2) FAC 178) cited supra, the learned counsel submits that when the prescribed standard is changed by the amendment to Rules and Appendix and when the sample did conform to the requirements of the substituted Rule, (the amended standard) then the benefit of the substituted Rule must be given to the accused. Since the effect of the amendment is mollification of the rigour imposed by the earlier Rule, certainly the standard or Rule which has substituted the earlier one, being beneficial in nature, must certainly be made applicable and if so the benefit must be extended to the accused, since the case has not been concluded by a judgment of conviction. But, it cannot be extended to cases, which after trial, ended in conviction. As such, I find that the further proceedings against the petitioners have to be quashed.

In the result this petition is allowed. Further proceedings against the petitioners in C.C. No. 115 of 2005 of the J.F.C.M. I, Kannur will stand quashed.

Dated this the 16th day of November, 2012.