
(2016) 05 CHH CK 0003
In the Chhattisgarh High Court
Case No : Writ Petition (Cr) No. 220 of 2015

Ramakant Gupta

APPELLANT

Vs

The State of Chhattisgarh

RESPONDENT

Date of Decision : 12-05-2016

Acts Referred:

Citation : (2016) 164 AIC 557 : (2016) 4 CGLJ 192 : (2016) CriLJ 3386 :
(2017) 1 Crimes 212 : (2016) 4 RCRCriminal 781

Hon'ble Judges : Sanjay K. Agrawal, J.

Bench : Single Bench

Advocate : Mr. Parag Kotecha, Advocate, for the Appellant; Mr. Arun Sao, Dy.
A.G, for the Respondent

Final Decision : Allowed

Judgement

Sanjay K. Agrawal, J.—Feeling aggrieved against the order dated 28.11.2014 passed by the Additional District Magistrate-cum-Adjudicating Officer under the Food Safety and Standards Act, 2006 (hereinafter called as "the FSS Act of 2006"), Rajnandgaon in Case No.01/F.S.S.A./2013, the petitioner herein has challenged the impugned order by which the said Authority in exercise of powers conferred under Section 51 of the FSS Act of 2006 has imposed a penalty of 75,000/- to him for violation of Section 26 (2) (I) of the FSS Act of 2006.

2. Facts necessary to judge the legality, validity and correctness of the impugned order are as under:-

2.1 That, on complaint made by the Station House Officer, Police Station-Kotwali, District Rajnandgaon against the petitioner herein for selling adulterated cow milk on 22.5.2012 at 12 at noon, the Food Safety Officer served notice and took sample of cow milk from the petitioner and prepared Form VA after making payment of cost of the milk and four samples were prepared containing each of 500 grams and out of four samples, one sample was sent for its analysis to the Food Analyst under Section 45 of the FSS Act of 2006. After analysis it was

reported by the Food Analyst that sample is unsafe under the Act as per standard laid down under the Act of 2006 and Rules 2011 & Regulation made thereunder.

2.2 Against the report of the Food Analyst holding the sample to be unsafe; the petitioner herein preferred an appeal challenging the report of the Food Analyst dated 5.6.2012 before the Food Safety Officer and accordingly, second sample was sent to the Referral Food Laboratory, Pune on 12.7.2012 by the office of the Designated Officer, in which it was reported that sample does not conform to the standard of cow milk and thereafter it was reported to the Commissioner, Food Safety vide letter dated 24.8.2012. Designated Officer under FSS Act of 2006 while exercising the powers conferred under Section 36 (3) (e) of the Act of 2006 accorded sanction for prosecution against the petitioner as the case pertains to contravention of provisions of the Act punishable with fine only. Thereafter, the Adjudicating Officer while exercising the powers conferred under Section 68 of the FSS Act of 2006 has passed the impugned order levying penalty of 75,000/- to the petitioner for violation of the provisions contained in Section 26 (2) (i) of the FSS Act of 2006.

2.3 Since the order passed by the Adjudicating Officer is appealable before the Food Safety Appellate Tribunal and since the Tribunal has not been constituted in the State of Chhattisgarh, therefore, the instant writ petition has been filed finding no remedy against the order of the Adjudicating Officer as the revision preferred by the petitioner was dismissed by the Court of Sessions, Rajnandgaon holding the appeal under Section 77 of the FSS Act of 2006 is maintainable before the Food Safety Appellate Tribunal.

3. The present writ petition has been filed stating inter-alia that order passed by the Adjudicating Officer under FSS Act of 2006 is not accordance with law as reasonable and fair opportunity of hearing which is mandatory under sub-section (2) of Section 68 of the FSS Act of 2006 was not afforded to the petitioner. No enquiry was made before recording a finding that the petitioner has committed contravention of the provisions of the Act of 2006 and Rules and Regulation made thereunder and therefore, order of the Adjudicating Officer deserves to be set aside.

4. Respondents No.1 to 4 have filed their return stating inter-alia that the petitioner was found selling sub-standard cow milk, accordingly, sample of milk was taken and analysis was made and it was found that milk does not conform to standard of cow milk in its report dated 27.7.2012 and therefore, imposition of fine against the petitioner is absolutely justified and no interference is warranted in exercise of supervisory jurisdiction under Article 227 of the Constitution of India.

5. I have heard learned counsel appearing for the parties, given thoughtful consideration to the submissions raised therein and also gone through the record with utmost circumspection.

6. A careful perusal of the order passed by the Adjudicating Officer would show

that the said authority has relied upon two reports, first made by the Food Analyst dated 5.6.2012, whereby the said Food Analyst has held the sample to be unsafe under Section 3 (1) (a) (zz) (v) (xi) of the Act of 2006 and on appeal being preferred by the petitioner, it was referred to the Director, Referral Food Laboratory, Pune, in which, it has been held that sample does not conform to the standard of cow milk as per Food Safety and Standards Act, 2006 and Rules made thereunder. The Adjudicating Officer further relied upon clause 2.1.8 of the Food Safety and Standards (Food Products Standards & Food Additives) Regulations, 2011 to hold that sample taken from the petitioner was of the sub-standard and it was violation of Section 26 (2) (i) of the FSS Act of 2006 punishable under Section 51 of the said Act for which 75,000/- is proper penalty which the petitioner is liable to pay for contravention of the provisions of the FSS Act of 2006.

7. Chapter X deals with the Adjudication. Section 68 of the FSS Act of 2006 states as under:-

68. Adjudication.-(1) For the purposes of adjudication unde this chapter, an officer not below the rank of Additional District Magistrate of the district where the alleged offence is committed, shall be notified by the State Government as the Adjudicating Officer for adjudication in the manner as may be prescribed by the Central Government.

(2) The Adjudicating Officer shall, after giving the person a reasonable opportunity for making representation in the matter, and if, on such inquiry, he is satisfied that the person has committed the contravention of provisions of this Act or the rules or the regulations made thereunder, impose penatly as he thinks fit in accordance with the provisions relaitng to that offence.

(3) The Adjudicating Officer shall have the powers of a civil court and

(a) all proceedings before him shall be deemed to be judicial proceedings within the meaning of Sections 193 and 228 of the Indian Penal Code (45 of 1860);

(b) shall be deemed to be a court for the purposes of Sections 345 and 346 of the Code of Criminal Procedure, 1973 (2 of 1974).

(4) While adjudicating the quantum of penatly under this chapter, the Adjudicating Officer shall have due regard to the guidelines specified in Section 49."

8. A careful perusal of Section 68(2) of the FSS Act of 2006 that Adjudicating Officer shall after giving the person charged a reasonable opportunity for making representation in the matter and thereafter the Adjudicating Officer is required to make an enquiry into all relevant facts particularly the reliability of test report submitted by the Food Safety Officer and test report given by the Referral Food Laboratory, if he is satisfied that the person concerned has committed the contravention of provisions of FSS Act or the Rules or the Regulations made thereunder, impose such penalty as he thinks fit in accordance with the

provisions relating to that breaches.

9. The Supreme Court in the matter of *Khem Chand v. Union of India and others*, AIR 1958 SC 300 while considering the expression "reasonable opportunity" envisaged to the Government servant by the provision contained in Article 311(2) of the Constitution of India, held as under:-

(a) an opportunity to deny his guilt and establish his innocence, which he can only do if he is told what the charges levelled against him are and the allegations on which such charges are based;

(b) an opportunity to defend himself by cross-examining the witnesses produced against him and by examining himself or any other witnesses in support of his defence; and finally

(c) an opportunity to make his representation as to why the proposed punishment should not be inflicted on him, which he can only do if the competent authority, after the enquiry is over and after applying his mind to the gravity or otherwise of the charges proved the three punishments and communicates the same to the Government servant.

10. Section 51 of the FSS Act of 2006 provides penalty for substandard food which states as under:-

"51. Penalty for sub-standard food.-Any person who whether by himself or by any other person on his behalf manufactures for sale or stores or sells or distributes or imports any article of food for human consumption which is sub-standard, shall be liable to a penalty which may extend to five lakh rupees.

11. Thus, by virtue of provisions contained in sub-section (2) of Section 68 of the FSS Act of 2006 holding of an enquiry by the Adjudicating Officer is sine qua non for arriving at the conclusion that such a person or party has committed contravention of provisions of FSS Act and/or the rules or the regulations made thereunder and satisfaction can be arrived into after making an enquiry into all relevant facts.

12. Fact of the present case would show that on 26.7.2013, the Food Safety Officer filed the report in which on the same day notice was issued by the District Magistrate, Rajnandgaon to the petitioner, reply was filed on 12.3.2014 and thereafter it was directed to file written submission. After filing of the written submission, straightway matter was fixed for final order and on 28.11.2014, order was passed imposing the impugned penalty which gives to show that the Adjudicating Officer has not made any enquiry before passing the impugned order, even the Food Safety Officer was not examined to prove the manner of taking sample and to establish the case of prosecution etc. and the petitioner has not been afforded an opportunity to cross-examine the Food Safety Officer, who has taken the sample and sent it to the Food Analyst and the Referral Food Laboratory, Pune as the Food Safety Officer was not examined. The petitioner has been deprived to cross-examine the Food Safety Officer and merely on the

basis of report submitted by the Food Safety Officer along with reports from Food Analyst and Referral Food Laboratory after taking the reply from the petitioner straightway order has been passed. In the considered opinion of this Court, without making any enquiry into the relevant factors and without giving reasonable opportunity to petitioner to defend himself, imposition of fine over the petitioner is unsustainable in law.

13. There is one more reason for not upholding the impugned order of imposing fine to the petitioner. It is the case of the petitioner that sample was taken by the Food Safety Officer and notice dated 22.5.2012 was given to the petitioner as he was transporting 60 kg. of milk and thereafter the Food Safety Officer has paid 60/- towards cost of milk to the petitioner. Panchnama was also prepared as per rules. A bare perusal of the statement of Shri H. C. Panji, Food Safety Officer would show that the petitioner was carrying 60 kg. of milk in a container out of which on notice and payment of 60/-, two kg. of milk was purchased by the Food Safety Officer and it was sealed, labelled and formalin was mixed. The panchnama nowhere states that the Food Safety Officer before taking the sample of cow milk in a container thoroughly mixed it either from one vessel to another or by shaking it gently or it nowhere records that milk had no globules or bubbles before the sample was taken. Even otherwise, Food Safety Officer was not examined before the Adjudicating Officer to prove the aforesaid fact. It was the imperative duty of the Food Safety Officer while taking the sample to bring evidence on record to show that cowmilk was thoroughly stirred before taking the sample and sent to the Public Analyst for examination in order to make it homogeneous as the Food Inspector had obtained the sample of milk from the container in which the petitioner had 60 kg. of milk. Thus, the Food Safety Officer had taken the sample of milk from the bulk milk kept in the container of 60 kg. without stirring it and without making it homogeneous in order to make the sample truly represent the milk to be tested. Reference in this connection may be made to a book "A Laboratory Manual of Milk Inspection" by A.C. Aggarwala and B.M. Sharma, Fourth Edition, 1961, wherein guidelines have been laid down for careful and accurate sampling of milk. The learned authors observed as follows at page 115 of the said book:-

"General Sampling :

The careful and accurate sampling of milk is of utmost importance in all analysis of milk. Probably more errors are caused through careless preparation of samples than in the actual performance of the tests. The most important thing to bear in mind in this connection is that the whole body of milk from which a sample is to be drawn should be uniform throughout in its composition, and any sample of milk drawn out of it for analysis must necessarily be a true representative of the whole body of milk. The factors disturbing the uniformity of composition of milk are mainly the separation and partial churning of fat. Thorough mixing of milk must first be ensured either by stirring with a long handled dipper if the container is big, or by pouring from one vessel to another

or by shaking gently."

14. In *K. Harikumar, S/o Karunakaran Nair v. Food Inspector, Punaloor Municipality*, 1995 Supp (3) SCC 405, Their Lordships of the Supreme Court while emphasising the legal requirement of stirring to be performed before taking representative sample held as under:

"In order to attain homogeneity in curds stirring and churning, as the case may be, becomes necessary for the ingredients of milk solid non fat and milk solid fat getting a uniform consistency in order to determine the percentage in their completeness."

15. In the light of the rules noticed herein above, law laid-down by the Supreme Court in *K. Harikumar* (supra) and in view of the guidelines laid down for careful and accurate sampling of milk by learned authors A.C. Aggarwala and B.M. Sharma in the aforesaid book, if the facts of the present case are examined, it appears that sample of cow milk was taken by the Food Safety Officer without thoroughly mixing the milk either by stirring with long handled dipper or by pouring with one vessel to another vessel or by shaking it gently, therefore it cannot be said that the sample taken was the representative sample and it is possible that the sample of milk might not have a true representative of a whole body of the milk contained in the container on account of presence of fat globules or bubbles in it. The Food Analyst in its report dated 5.6.2012 has found the milk fat as 3.5% and solid not fat as 8.7% and the Referral Food Laboratory, Pune in its certificate of analyst dated 27.7.2012 found the milk fat 6% and milk solid not fat 8.01% and on account of that it has been held that it does not conform to the standards laid by the Act and the Regulations made under the Act of 2006. Therefore, in a case like present where sampling of cow milk has not been carefully done by the Food Safety Officer, it cannot be safely held that sample of milk sent to the Food Analyst truly represented the milk to be tested. I am of the considered opinion that the sampling done is not in accordance with the FSS Act, 2006 and Regulation, 2011 and therefore, the prosecution has failed to bring home the offence under Section 26(2) (i) of the FSS Act of 2006 and consequently penalty imposed is vulnerable.

16. As a fall out and consequence of the aforesaid discussion, the instant writ petition is allowed and penalty of 75,000/- imposed by the Adjudicating Officer upon the petitioner under Section 51 read with Section 68 of the FSS Act of 2006 is hereby quashed.

17. The writ petition is allowed to the extent indicated herein above leaving the parties to bear their own cost (s).

18. Before parting with the record, I feel it appropriate to mention that order of the Adjudicating Officer passed under Section 68 of the FSS Act of 2006 is appealable before the Food Safety Appellate Tribunal to be constituted under Section 70 of the FSS Act of 2006, whereas the present writ petition has been preferred directly before this Court stating inter-alia that the Tribunal has not

been constituted by the State Government for hearing the appeals and on instructions Mr. Arun Sao, learned Deputy Advocate General would submit that establishment of Food Safety Appellate Tribunal is under way and it will be constituted expeditiously. I hope and trust that the State Government will constitute the Food Safety Appellate Tribunal expeditiously without further loss of time in view of the fact that decision of the Adjudicating Officer is appealable before the Food Safety Appellate Tribunal.

19. Copy of this order be sent to the Commissioner of Food Safety, Raipur, Chhattisgarh for information and needful action.