
(1970) 05 CAL CK 0015
In the Calcutta High Court
Case No : Matter No. 223 of 1964

Rameshwarlal Harlalka

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 28-05-1970

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1), 19(2), 226
Prevention of Food Adulteration Act, 1954 — Section 12, 19, 2

Citation : AIR 1970 Cal 520

Hon'ble Judges : D. Basu, J

Bench : Single Bench

Advocate : A.C. Bhabra, for the Appellant; Noni Kumar Chakravarti, for the Respondent

Judgement

D. Basu, J.—The petitioner in this case, who is a trader in edibles such as spices, has challenged the validity of the Prevention of Food Adulteration Act, 1954 on the ground, inter alia, that the Act contravenes the provisions of Articles 14, 19(1)(f) and 19(1)(g) of the Constitution of India and asks for a declaration of such invalidity of the Act and the rules made thereunder and also for an appropriate writ to restrain the respondents from enforcing the Act and the rules against the petitioner. The petition was filed on the 4th June 1964 and was subsequently amended to add paragraphs 11(a) and 11(b), which seek to explain the cause or action to support the petition.

2. The grounds of the alleged invalidity of the said Act are eventually confined to two only inasmuch as the ground under Article 19(1)(f) has not been pressed. Before I enter into the merits of the said allegations as to unconstitutionality, the preliminary objections in Bar raised by Mr. Nani Kumar Chakraborty on behalf of the respondent must be disposed of. The first preliminary objection raised by Mr. Chakraborty is that the petition should be dismissed in limine and the Rule discharged on the ground that the petitioner obtained the Rule after suppressing a material fact, namely, that there had been two convictions of the petitioner

under the Act on 16-1-62 and 17-6-64 and that from the second conviction as aforesaid the petitioner had preferred an appeal to this Court on 20-3-62 and such appeal was pending at the time when the petitioner moved the present petition for the Rule Nisi. It is also argued by Mr. Chakraborty that during the pendency of this Rule the appeal has been disposed of (on 4-12-69) and that since the petitioner has already availed of an alternative remedy he is not entitled to maintain a petition under Article 226 of the Constitution which is a discretionary remedy particularly because the question of unconstitutionality of the statute could have been raised in defence or as a plea in appeal in the criminal proceedings. It has, however, been laid down in various cases by the Supreme Court that the existence of an alternative remedy is not an absolute bar to relief under Article 226 where there has been a contravention of fundamental rights (*Himmatlal Harilal Mehta Vs. The State of Madhya Pradesh and Others*,); *The Bengal Immunity Company Limited Vs. The State of Bihar and Others*, *Zila Parishad Moradabad Vs. Nundan Sugar Mills, Amroha*, ; *Collector of Customs and Excise, Cochin and Others Vs. A.S. Bava*, ; *The State of Rajasthan and Another Vs. Karamchand Thappar and Bros.*, . It follows therefore that where there are allegations of infringement of a fundamental right in the petition which are not frivolous enough, a petition under Article 226 cannot be dismissed in limine on the ground of existence of an alternative remedy without going into the question of merits. It further follows, if the above proposition be correct, that the fact of suppression or omission to state in the petition anything about the existence of an alternative remedy or the petitioner having pursued an alternative course may not be taken to be such a suppression as would disentitle the petitioner to any consideration under Article 226 of the Constitution on the ground of fraudulent or reprehensible conduct as has been explained by the Court of Appeal in England in the case reported in (1917) 1 KB 486 (*The King v. General Commrs. for the Purposes of the Income Tax Acts for the District of Kensington*). The point which is to be determined by the Court where such an allegation is made is whether the Court which issued the Rule can be said to have been deceived. No question of deception arises if notwithstanding a disclosure of such facts the Court might have been inclined to issue the Rule.

3. As to the petitioner having already availed of an alternative remedy it might be pointed out that the judgment of the Court of Appeal in the criminal case (*Criminal Appeals Nos. 179 and 204 of 1964*) D/- 4-12-1969 (Cal.) shows that the appeal was disposed of on the simple question as to whether the ingredients of the offence were proved and no question of unconstitutionality was raised. If that is so, I don't think that this Court can avoid going into the question of unconstitutionality as has been raised by the petitioner in this case.

4. There is also another preliminary question to be disposed of, namely, whether the petitioner has got locus standi to maintain this petition to challenge the unconstitutionality of a statute. Curiously, in the original petition the petitioner did not specifically show as to how he was aggrieved but by the subsequent amendment it has been stated that samples are from time to time taken from

the petitioner's firm of the commodities in which he is dealing and they are being examined by Food Inspectors under the impugned statute and that if the statute remains on the statute book the petitioner is likely to be proceeded against for offences under the Act, which, according to the petitioner, is unconstitutional and void. It is true that prosecutions on two occasions have already been disposed of and at this stage there are no criminal proceedings pending against the petitioner, but, as has been laid down by the Supreme Court in the case of *Kavalappara Kottarathil Kochunni Moopil Nayar Vs. The State of Madras and Others*, , a petition under Article 226 of the Constitution may be maintained by a person if the Act be such that the mere coming into force of the Act itself is likely to abridge the fundamental rights of a person coming within its ambit and that in such a case the aggrieved person may at once come to the Court without waiting for the State to take some overt action threatening to infringe his fundamental rights. In the instant case, the penal provision is contained in Section 7 read with Section 16 of the Act. Once the food, which is defined in Section 2(v) of the Act in wide terms, is found to be adulterated as defined in Section 2(i), the vendor or a person who stores or distributes such adulterated food is liable to be punished u/s 16 with imprisonment or fine or both; and provision is made in Section 8 onwards of getting samples of such articles of food as come within the purview of the Act from dealers of such articles of food and to launch prosecution u/s 11 of the Act. The petitioner is therefore entitled to urge that the provisions of the Act contravene Articles 14 or 19(1)(g) of the Constitution because there is ground for immediate apprehension by the Act being applied against him at any moment if any sample taken from his shop is found to be adulterated, in the opinion of the authorities specified in the Act,

5. On the merits, however, the petitioner starts with an initial handicap inasmuch as the Supreme Court has already discussed the validity of this Act from various points of view in two cases -- the first one being *State of Uttar Pradesh Vs. Kartar Singh*, and the other one being an unreported decision -- *Andhra Pradesh Grains & Seeds Merchants Association v. Union of India*, Writ Petns. Nos. 468 to 469 and 489 to 490 of 1969, disposed of on 31-3-1970 (SC), a Blue Print of which was produced before this Court.

6. Taking up the question of Article 14, it was held in the earlier case of 1964 that the Act could not be struck down as contravening Article 14, in the absence of proper pleading which only could show that the standards which were to be adopted by the statutory authorities in the matter of analysing the food samples were arbitrary or discriminatory. It was contended by the learned Advocate on behalf of the petitioner before me that in the instant case there are such allegations in the petition. The challenge under Article 14 was also made in the second case of 1969. In this case, the Supreme Court held that there was nothing in the provisions of the Act from which it could be held that the standards prescribed were arbitrary or that arbitrary power had been vested in the authorities who were to administer the Act. The Court analysed the

provisions of the Act and held that the standards were to be formulated by a committee of experts and representatives of the Central Government and the State Governments, with the Director-General of Health Services as its Chairman and that the standards fixed in the rules by such an authority could not be held to be arbitrary, unless that was clearly demonstrated.

7. On behalf of the petitioner the allegation of discrimination as a ground of challenge under Article 14 has been directed against two points. It has been urged that while, u/s 12 of the Act, a purchaser was entitled to have an article of food analysed by the Public Analyst on payment of prescribed fees, a trader was not so entitled, so that while the purchaser might avoid distress by anticipatory examination of the article of food which he was going to purchase perhaps for re-sale, the vendor or the manufacturer at the first stage had no such opportunity of averting danger by voluntarily offering the sample of the goods produced, to learn from the Government experts if such articles could be held to be adulterated or not. As against such contention it has been urged by the learned Advocate on behalf of the respondent that though Section 12 speaks of the "purchaser" sending the article for analysis by the public analyst, the relevant rules made under the Act enable any person to do the same on payment of fees. In the instant case, we need not go to verify whether this interpretation of the Rule is correct and it would suffice to record this statement made on behalf of the respondents who are the only possible authorities to administer the Act, that it is open to persons other than the purchasers also to have such an analysis made by the public analyst on payment of fees, particularly, because it appears that though the petitioner, approached the various authorities by correspondence to have some samples examined he did not eventually turn to the public analyst when somebody pointed out to him that the public analyst was the competent authority. As I however already stated, the statements made on behalf of the respondent in Court that other persons are also entitled would give the petitioner and other traders similarly situated ample protection in future.

8. The second ground on which discrimination is alleged on behalf of the petitioner is with reference to Sub-section (1) of Section 19 which says that "it shall be no defence in a prosecution for an offence pertaining to the sale of any adulterated or misbranded article of food to allege merely that the vendor was ignorant of the nature, substance or quality of the food sold by him or that the purchaser having purchased any article for analysis was not prejudiced by the sale". This sub-section expresses in a negative form the general proposition that in a charge for sale of adulterated articles of food, ignorance of the vendor that the article was so adulterated would be no defence. But there is an exception to this general proposition with which we are concerned in this case, viz., proviso (1) which says:--

"Provided that such a defence shall be open to the vendor only if he had submitted to the food inspector or the local authority a copy of the warranty with a written notice stating that he intends to rely on it and specifying the name and

address of the person from whom he received it, and has also sent a like notice of his intention to that person."

Speaking in brief, a vendor of an article of food may, notwithstanding the general proposition stated earlier, plead in defence that he was ignorant of the adulterated nature of the article of food if he can produce a copy of a written warranty given by the person from whom he had received the article. It is argued on behalf of the petitioner that this defence in the first proviso is available only to a vendor but not to a commission agent or any person other than the vendor who may be storing or distributing an article of food inasmuch as Section 7 of the Act is levelled not merely against the vendor of an adulterated article but also against a person who stores or distributes any such article. The vendor in the usual sense of the term would not, of course, include a commission agent because after all what he does is not on his own behalf but only as agent of the principal. But it has been pointed out on behalf of the respondent that the definition of "sale" in Section 2(xiii) is an artificial definition which is wider than the ordinary concept of the word "sale" as it is understood under the Sale of Goods Act or otherwise, because it includes the act of "exposing for sale or having in his possession for sale of any such article and even includes also an attempt to sell of such article". Prima facie, if this be the definition of the word "sale", the term "vendor" in Section 19 may also be given a wider connotation because it is relative to the concept of sale. If that be so the defence in the proviso to Section 19(2) would also be available to a person who may have in his possession as a commission agent, goods which may be offered for sale even by any other person, namely, his principal. Here also, the stand taken by the respondent in this Court might be of aid to the petitioner and like traders inasmuch as the defence in question would be open in view of this concession on behalf of the State to commission agents and like persons who might be hauled up in future. As to the standards being arbitrary, I would propose to deal with that under Article 19(1)(g).

9. As to Article 19(1)(g); this again has been dealt with by both the decisions of the Supreme Court referred to earlier. In the earlier case of 1964, of course, the question was not dealt with elaborately but only a passing observation was made that "the respondent cannot assert any fundamental rights under Article 19(1) to carry on business in adulterated food stuffs". Curiously, however, notwithstanding such broad proposition having been asserted in the earlier case, in the subsequent decision in 1969 the question of unreasonableness of the restrictions imposed by the Act on the fundamental rights under Article 19(1)(g) was gone into in details. It had been asserted in some decisions of the Supreme Court since the case of *The State of Bombay Vs. R.M.D. Chamarbaugwala*, that there were certain articles of trade which were *res extra commercium*. In other words, they involved activities which were so inherently pernicious or dangerous to the community that nobody could claim any right to trade in such commodities or activities. It is not possible to say whether this stand of the Supreme Court has been maintained subsequently in relation to Article 19, but Article 19(1)(g) does

not exclude prima facie any trade or business. It says -- "all citizens shall have the right to practise any profession or to carry on any occupation, trade or business assuming that all trades or businesses might come under Article 19(1)(g)". Clause (6) of that Article empowers the State for imposing reasonable restrictions on the exercise of the right conferred in the interest of the general public. The power, thus, is reserved in the State to impose reasonable restrictions on the exercise of the right to carry on any trade or business in the public and certainly it would be in the public interest to suppress a dangerous trade or business and it has, in fact, been held that the expression "reasonable restrictions" also includes total prohibition in the case of business or trade which is inherently dangerous (Cooverjee B. Bharucha Vs. The Excise Commissioner and the Chief Commissioner, Ajmer and Others,) Narendra Kumar and Others Vs. The Union of India (UOI) and Others, ; Kishan Chander Vs. State of Madhya Pradesh, . If that is so, it is not necessary to resort to any doctrine of res extra commercium for the conclusion of any particular trade or business from the ambit of Article 19(1)(g) inasmuch as the legislature can impose an absolute prohibition upon carrying on any particular trade or business as soon as it comes to hold that such trade or business is altogether pernicious or inherently dangerous to the community.

10. It is thus evident that though a person may not claim a fundamental right to carry on trade in an inherently dangerous commodity or activity when it is so prohibited by the Legislature it would not prevent him from challenging the constitutionality of the statute itself on the ground that it offends against the fundamental right guaranteed by Article 19(1)(g) by showing that the restrictions imposed by the statute are unreasonable, either because the restrictions go in excess of the object or because activities which are not pernicious are included within the sweep of the statute or because the procedure laid down in the statute for curbing such activities is unreasonable or unjust or arbitrary. We have, therefore, to enter into the core of the statute crossing the preliminary objections in Bar.

11. In the decision of 1969 (the Andhra Pradesh case) the Supreme Court has discussed the question of reasonableness of the impugned statute from various standpoints and so far as the question of absence of mens rea is concerned it has been dealt with fully so that this point may be said to be concluded. There are also some other observations which dispose of other points taken in the present petition. I would, therefore, confine myself only to those points on which there is no direct decision in the Supreme Court case of 1969. The first point which I might mention is the contention advanced on behalf of the petitioner that the definition of adulteration in Section 2(i) is vague and uncertain. There is no doubt that a penal statute may be held to be unconstitutional if it is so uncertain and vague that it gives no guidance either to the public or to the Court or to the persons who are to administer the statute, as has been held both in England and in India. Of course in England, the conviction is quashed but the Courts have got no power to strike down the statute itself: but in India, in such a contingency the

Court may not only quash the conviction but annul the statute itself as was done by the Supreme Court in the case of *The State of Madhya Pradesh and Another Vs. Baldeo Prasad*, . But in determining whether a statute should be condemned on the ground of vagueness it should be read as a whole and if upon such reading a reasonably certain meaning can be imputed to a provision no complaint of vagueness can be imputed to the statute. The only provision to which my attention was drawn on behalf of the petitioner in this behalf is Sub-clause (f) of Section 2(i) of the Act which says "An article of food shall be deemed to be adulterated if the article consists wholly or in part of any filthy, putrid, disgusting, rotten, decomposed or diseased animal or vegetable substance or is insect-infested or is otherwise unfit for human consumption". It was argued that it is difficult, if not impossible, to avoid the mischief of this definition because there may hardly be found any sample of certain food articles like cereals or other crops which is absolutely free from insects. The conditions of such products also vary under different climates or different parts of the country. The expression "filthy, putrid, disgusting, rotten etc." also does not give any definite standard for adjudging the quality of the thing. There are, however, two answers to such a contention, namely, that the vice of the particular article will be governed not only by the definition but by the standards of purity which have been prescribed by the rules made under the Act, u/s 23. So the definition must be read together with the rules. Secondly, the adjectives which precede in the said definition must be read with the concluding words "or is otherwise unfit for human consumption". The word "otherwise" suggests that all the adjectives refer to the quality of the article being unfit for human consumption, which condition may be due either because the article is filthy or infested or rotten and the like. If that is so, the vagueness of the adjectives standing by themselves is eliminated. On these grounds, therefore, I do not think that the statute or the definition in particular is liable to be condemned as constituting an unreasonable restriction upon the fundamental right guaranteed by Article 19(1)(g). Whether the standards as laid down are vague is another question to which I shall advert presently.

12. But before disposing of the question relating to the definition I would observe that I am not very happy with the use of the word "disgusting" because that word refers to a subjective condition and what is disgusting to one person who may perhaps be called "neurotic" by medical people may not be disgusting to many others. In fact, the objectivity of the test of "being unfit for human consumption" is apparently incompatible with the subjective condition of being "disgusting". Even without the word "disgusting" the object of the legislator would be served by the residuary clause "or is otherwise unfit for human consumption." I would, therefore, draw the attention of the authorities in charge of the administration of this Act to consider the question of deleting the word "disgusting" on the occasion of any future amendment that might be undertaken in respect of the statute, specially as it has been pointed out to me that various amendments have already been made in various provisions of this Act and that

some of them have taken place during the pendency of the instant Rule.

13. Coming now to the reasonableness of the standard laid down in the rules, various complaints have been made in the petition a reference to which may be nearly impossible within the course of this judgment inasmuch as this Court should not pose as an expert in the matter of judging the propriety or reasonableness of the standard relating to chemical analysis of different food articles. But, subject to certain observations which I am going to make at once it is enough to point out that though the standards might be improved by furnishing further details it has not been established that while using the standards the Public Analyst or the Central Food Laboratory uses different processes or methods or holds the tests under different conditions in different cases. Whatever be the method used by them, it must be presumed unless the contrary is shown that the same standard and the same process is being followed by them in the case of every person who is brought before them. It was argued that different standards than those which have been prescribed under the instant impugned Act are to be found in other statutes, such as Agricultural Produce (Grading and Marking) Act, 1937. But this contention cannot be accepted inasmuch as the object of these other statutes is not identical. The object of the Agricultural Produce Act 1937, for instance, is to classify and properly describe different articles having regard to their nature and quality, from the standpoint of marketing and not from the standpoint of assuring the purity of such articles. The object of grading according to quality under the Agricultural Produce Act 1937 is to make it clear to the purchaser what was the quality or standard of the article he was going to purchase and at what price. It would also facilitate the trade from the standpoint of traders because things of different quality would not fetch the same price. A more stringent standard must, on the other hand, be adopted in the legislation where the object is to prevent adulteration of food articles in order to protect the health and safety of the citizens, particularly in a democratic country and it is with that object in view that very drastic measures and stringent standards have been provided for in the instant legislation as well as in comparable legislation in all civilized countries, including the United Kingdom. It is in this connection fit and proper to refer that even an absolute liability, negating the plea of absence of mens rea, has been imposed by such statutes both in the U. K. and in India and this aspect has been fully discussed by the Supreme Court in the 1969 decision. It is therefore of no avail to say that a more relaxed standard has been prescribed under other statutes which have been referred to on behalf of the petitioner at the hearing. But even though I don't accept the contention raised in this behalf on the present point, I would point out to the respondents two features which have struck me as remediable by further amendments either in the Act or in the rules, for a better administration of the statute. While it is absolutely justifiable in a democratic country that pernicious activities should be suppressed with the maximum of strength at the command of the State, at the same time it is also essential that an innocent citizen of a country which professes equality before the law should

not be punished unless the law is not only certain but is also precise and exhaustive so as to prevent miscarriage of justice in so far as that can be humanly eliminated. Oftentimes it is complained on behalf of the public that laws are amended too frequently. No doubt, if the amendment simply adds to confusion and bewilderment it is unwelcome, but if the amendment seeks to improve the law and is conducive to the interest of the members of the public hardly any complaint can reasonably be raised. With this end in view I should point out to the respondents the statement in para 6 (g) of the counter-affidavit filed by Dr. A. P. Roy, Deputy Director-General of Health Services, who must be vitally concerned with the administration of this Act because it has been stated that it is the Director-General of Health Services who is the Chairman of the Central Committee for Food Standards as referred to in Section 3 of the Act. This gentleman in his affidavit has stated that "the incorporation of method of analysis for various articles of food for the Prevention of Food Adulteration Rules 1955 is in contemplation" and one of the grievances made on behalf of the petitioner is that precise method of analysis not being mentioned in the rules different results as to the quality of the sample might be arrived at by different experts. If the precise method, for example, whether it is to be the "dry process method" or "wet method", were prescribed in the rules the chances of coming to different conclusions would be obviated. The absence of laying down the precise method, as I have already said, may not be itself a ground for striking down the statute as unreasonable because the fact that a statute is capable of improvement and that the legislator has not been able to make it fool-proof is no ground for invalidating it. On the other hand the presumption is in favour of constitutionality, and all circumstances which might uphold the validity of the statute are to be presumed by the court and must be shown as non-existent by the person who wants to challenge it [Chiranjit Lal Chowdhuri Vs. The Union of India (UOI) and Others,]; Rao Shiv Bahadur Singh and Another Vs. The State of Vindhya Pradesh, But at the same time, as I have stated earlier, it must be an object of the persons empowered to amend the statute or rules to improve it by supplementing it by proper materials or by deleting faulty expressions if possible. Since the Deputy Director-General in his affidavit has stated that an attempt is already afoot to incorporate in the rules the precise method of analysis for the various articles I think it proper on my part to draw the attention of the respondent, namely, the Government of India, in the Ministries of Commerce and Industries, Food and Agriculture and the Ministry of Health, that the process of "consideration" of this question should be expedited so that it can be completed before many more persons are not hauled up as accused under the Act.

14. The other matter to which I would like to draw the attention of the respondents is that stated in paragraph 9 of the affidavit sworn by Dr. Sudhir Chandra Ncogy who is specialist in this branch of Applied Chemistry and has got sufficiently advanced academic proficiency in the subject. He has said that the conditions of test should be made more precise under the different heads relating to various articles inasmuch as the result of analysis might not be the same if the

analysis is held under different conditions. He has referred to the case of Fenugreek (Methi) which is item No. A.05.13 of the Rules. Clause (a) of this item says that this article must not contain more than 10 per cent of moisture. The Doctor of Science has rightly observed that the question of the quantum of moisture will vary with the condition of temperature under which the analysis is held. There is no doubt that if the trader or vendor himself wants to have his article tested he cannot have it done unless the temperature under which the test is to be held is specified in the Rule. It may be that the public analyst or the Central Laboratory hold their examination in a particular condition in the laboratory pertaining to their establishment so that the chances of variation may be reduced but for the members of the public who want to avoid the mischief of the Act, better guide should be offered by the laboratory test or the conditions of analysis as are applied under the different items of the Act.

15. The other ground which was taken on behalf of the petitioner was in relation to the collusiveness of the certificate of the public analyst contained in the proviso to Section 13(5) of the Act which says "provided that any document purporting to be a certificate signed by the Director of the Central Food Laboratory shall be final and conclusive evidence of the facts stated therein". This aspect of the matter has, as a matter of fact, been dealt with by the Supreme Court in another case -- Corporation of Calcutta Vs. Calcutta Tramways Co. Ltd., , where it was held that the provision in Section 437 (1) (6) of the Calcutta Municipal Act, 1951 constitutes unreasonable restriction upon the citizens' right guaranteed by Article 19(1)(g) inasmuch as it makes the opinion of the Municipal authorities as conclusive and non-justiciable that the premises in question were being used for a purpose which was dangerous to life, health or property and was likely to create a nuisance. It was held by the Supreme Court that the subjective opinion of a municipal body which has the effect of imposing restrictions on carrying on trade cannot be said to be a reasonable restriction within the meaning of Article 19(6) because it would put the citizen residing within the limits of the municipal Corporation entirely "at its mercy, if it chooses to exercise that power capriciously, arbitrarily or unreasonably, though not mala fide". The circumstances under the instant Act however are not of the same nature. The opinion u/s 13(5) is not that of a municipal authority but that of experts who have the business of analysing the sample of food taken under the Act. This drastic provision has been adopted in this Act because of the nature of the mischief which the Act arrived at and this feature has been elaborately dealt with by the Supreme Court in the second case.

16. Having given my anxious consideration on all the points raised by the petitioner, I am of the opinion that this Rule must fail and it is accordingly discharged subject, however, to the observations which I have made in the judgment to draw the attention of the respondent.

17. I make no order as to costs.