
(2014) 08 JH CK 0031

In the Jharkhand High Court

Case No : Writ Petition (Civil) No. 885 of 2014

Reliance Retail Limited

APPELLANT

Vs

The State of Jharkhand

RESPONDENT

Date of Decision : 29-08-2014

Acts Referred:

Constitution of India, 1950 — Article 226

Food Safety and Standards Act, 2006 — Section 3(1)(zg), 37, 37(2), 45, 52

Citation : (2015) 1 AJR 621

Hon'ble Judges : S. Chandrashekhar, J

Bench : Single Bench

Advocate : S.L. Agarwal, Advocate for the Appellant; Rajesh Kumar, G.P.-V, Advocate for the Respondent

Judgement

S. Chandrashekhar, J.—Aggrieved by order dated 18.11.2013 in FS & S Case No. 25/2013-14 under Section 52 of the Food Safety & Standards Act, 2006 passed by the Deputy Commissioner-cum-Adjudicating Officer and order dated 26.11.2013 issued by the Designated Officer-cum-1st Additional Chief Medical Officer, Ranchi directing the petitioners not to carry on any business during the period the licence remains suspended, the petitioners have approached this Court by filing the present writ petition. A further prayer for quashing the proceeding under the Bihar and Orissa Public Demand Recovery Act, 1914 in Certificate Case No. 9 (Penalty)/2013-14 for recovery of the penalty amount of Rs. 3,00,025/- from the petitioners, has also been made.

2. The writ petition has been filed by the Reliance Retail Limited and two of its employees. It is stated that the Reliance Retail Limited is carrying on business through 9 retail outlets in the Ranchi town. On 13.03.2013, one Smt. Gulab Lakra took sample of noodles of 1200 gms. from the retail outlet at Kanke and it was sent for analysis to the Public Analyst. The Public Analyst after analysing the sample found that the sample is mis-branded and does not conform to Regulation 2.2.2.10 of the FS & S (Packaging and Labelling) Regulation, 2011.

The report of the Food Analyst dated 21.03.2013 was made available to the petitioners and the Designated Officer referred the matter for adjudication under Section 68 of the Food Safety and Standards Act, 2006. A show-cause notice dated 27.04.2013 was issued to the petitioner Nos. 2 & 3 by initiating a proceeding being Food Safety and Standards Case No. 25/2013-14. Vide order dated 18.11.2013, the Deputy Commissioner-cum-Adjudicating Officer, Ranchi imposed a penalty of Rs. 3,00,000/- and further ordered that till the penalty amount is paid the licence of the petitioner No. 1 namely, Reliance Retail Limited would remain suspended.

3. A counter-affidavit on behalf of the DO-cum-ACMO, Ranchi, the respondent No. 5 has been filed stating that vide notification dated 25.01.2012 published in official gazette, the respondent No. 5 was appointed Food Safety officer, Jharkhand. By the same notification, the Principal Secretary, Department of Health, Medical Education and Family Welfare, Government of Jharkhand has been designated as Food Safety Commissioner and thus, there is no illegality in appointment of respondent No. 5 as Food Safety Officer by the respondent No. 2. Similarly, the appointment of Food Analyst, Jharkhand has also been notified in the official gazette under Section 45 of the Food Safety and Standards Act, 2006.

4. A supplementary affidavit has been filed by the authorised signatory of the petitioner No. 1-Company submitting that though a show-cause notice dated 27.04.2013 was issued, copy of the complaint was not attached along with the notice issued to the petitioners and accordingly, the letter dated 21.08.2014 was written to the Deputy Commissioner-cum-Adjudicating Officer, Ranchi for supplying copy of the complaint filed against the petitioners.

5. Heard the learned counsel appearing for the parties.

6. Challenging the appointment of the Food Analyst, the learned counsel for the petitioners has submitted that the Food Safety and Standards Act, 2006 provides a particular mode for appointment of Public Analyst and since such prescribed mode has not been followed, the appointment made thereunder would be vitiated. The learned counsel refers to provision under Section 3(1)(zg) and Section 45 of the Food Safety and Standards Act, 2006. The learned counsel for the petitioners has submitted that the notification with respect, to appointment of the Food Analyst has to be published in official gazette and in this case admittedly it was published only on 18.07.2014 therefore, the Food Analyst who has examined the samples taken from the shop of petitioner No. 1 was not competent to give a report. The learned counsel for the petitioners has relied on a decision of the Hon''ble Supreme Court in I.T.C. Bhadrachalam Paperboards and Another Vs. Mandal Revenue Officer, A.P. and Others, . The learned counsel for the petitioners has further submitted that this writ petition was filed on 14.02.2014 whereas, the Food Analyst has been appointed vide gazette notification dated 18.07.2014 and therefore, the appointment so made would not validate his report as at the time when he analysed the sample, his appointment was non-est.

7. A challenge to the appointment of Food Safety Officer has been made with reference to Section 37 of the Food Safety and Standards Act, 2006. It is contended that the appointment in the present case has been made by the State Government vide notification dated 25.01.2012 whereas, in terms of Section 37 of the Food Safety and Standards Act, 2006 only the Commissioner of Food Safety can make appointment of Food Safety Officer and thus Complainant was not validly appointed and he was not authorised to lodge prosecution against the petitioners. The learned counsel for the petitioners has relied on a decision of the Hon"ble Supreme Court in A.K. Roy and Another Vs. State of Punjab and Others, .

8. Mr. Rajesh Kumar, the learned counsel appearing for the respondent-State of Jharkhand has referred to Section 37 of the Food Safety and Standards Act, 2006 and submitted that Sub-Section 2 to Section 37 authorises the State Government to make appointment of Food Safety Officer. Drawing attention of the Court to gazette notification dated 25.01.2012, it is submitted that by the said notification the Principal Secretary, Health, Medical Education and Family Welfare, Government of Jharkhand has been made Commissioner of Food Safety also and in the said notification itself it is provided that the Public Analyst would continue to work as Food Analyst. The Food Safety and Standards Act, 2006 has replaced the earlier Act namely, Prevention of Food Adulteration Act, 1954, and as an ad hoc arrangement, for functioning as the officers under the new Act, the officers who were already posted as Public Analyst or Food Inspector were directed to continue.

9. I have carefully considered the submissions of the learned counsel appearing for the parties and perused the documents on record.

10. The relevant provisions of the Food Safety and Standards Act, 2006 are extracted below:

"Section 3(1)(zg) "notification" means a notification published in the Official Gazette;

36. Designated Officer.--(1) The Commissioner of Food Safety shall, by order, appoint the Designated Officer, who shall not be below the rank of a Sub-Divisional Officer, to be in-charge of food safety administration in such area as may be specified by regulations.

(2) There shall be a Designated Officer for each district.

(3) The functions to be performed by the Designated Officer shall be as follows, namely:--

(a) to issue or cancel licence of food business operators;

(b) to prohibit the sale of any article of food which is in contravention of the provisions of this Act and rules and regulations made thereunder;

(c) to receive report and samples of article of foods from Food Safety Officer under his jurisdiction and get them analysed;

- (d) to make recommendations to the Commissioner of Food Safety for sanction to launch prosecutions in case of contraventions punishable with imprisonment;
- (e) to sanction or launch prosecutions in cases of contraventions punishable with fine;
- (f) to maintain record of all inspections made by Food Safety Officers and action taken by them in performance of their duties;
- (g) to get investigated any complaint which may be made in writing in respect of any contravention of the provisions of this Act and the rules and regulations made thereunder;
- (h) to investigate any complaint which may be made in writing against the Food Safety Officer; and
- (i) to perform such other duties as may be entrusted by the Commissioner of Food Safety.

37. Food Safety Officer.--(1) The Commissioner of Food Safety shall, by notification, appoint such persons as he thinks fit, having the qualifications prescribed by the Central Government, as Food Safety Officers for such local areas as he may assign to them for the purpose of performing functions under this Act and the rules and regulations made thereunder.

(2) The State Government may authorise any officer of the State Government having the qualifications prescribed under sub-section (1) to perform the functions of a Food Safety Officer within a specified jurisdiction.

45. Food Analysts.--The Commissioner of Food Safety may, by notification, appoint such persons as he thinks fit, having the qualifications prescribed by the Central Government, to be Food Analysts for such local areas as may be assigned to them by the Commissioner of Food Safety;

Provided that no person, who has any financial interest in the manufacture or sale of any article of food shall be appointed to be a Food Analyst under this section:

Provided further that different Food Analysts may be appointed for different articles of food.

52. Penalty for misbranded food.- (1) 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 misbranded, shall be liable to a penalty which may extend to three lakh rupees.

(2) The Adjudicating Officer may issue a direction to the person found guilty of an offence under this section, for taking corrective action to rectify the mistake or such article of food shall be destroyed.

66. Offences by companies.--(1) Where an offence under this Act which has been

committed by a company, every person who at the time the offence was committed was in charge of and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that where a company has different establishments or branches or different units in any establishment or branch, the concerned Head or the person in-charge of such establishment, branch, unit nominated by the company as responsible for food safety shall be liable for contravention in respect of such establishment, branch or unit:

Provided further that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.--For the purpose of this section,--

(a) "company" means any body corporate and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm."

11. The petitioners have challenged notice dated 27.04.2013 mainly on the ground that the appointment of Food Safety Officer as well as the Food Analyst are not in accordance with the provisions of the Food Safety and Standards Act, 2006. The learned counsel for the petitioners submitted that the appointment of Food Analyst was published vide gazette notification published on 18.07.2014 and since earlier notification dated 28.09.2012 was not published in official gazette, the appointment of Food Analyst was not valid. It is well settled that even in absence of notification in the official gazette an appointment can validly be made. The only requirement in law is to ascertain whether there was a clear intention on the part of the authorities to enact the law or not. In Vimal Kumari Vs. The State of Haryana and Others, , the Hon''ble Supreme Court has held that if the Draft Rules are intended to be notified in the near future, it can be followed in the interregnum to meet emergent situations.

12. Before commencement of the Food Safety and Standards Act, 2006, the food analysis report was prepared by the Public Analyst. On 25.01.2012 Government of Jharkhand issued notification notifying that the Public Analyst shall be the

Food Analyst from the date of notification. Vide notification dated 28.09.2012 one Jitendra Kumar Singh was appointed Food Analyst. The said appointment has been published in official gazette on 18.07.2014. The subsequent gazette notification is in continuation to the earlier notifications dated 25.01.2012 and 28.09.2012. The appointment of Food Analyst and the report prepared by him cannot be said to be invalid because the appointment was notified subsequently in the official gazette.

13. In *High Court of Gujarat and Another Vs. Gujarat Kishan Mazdoor Panchayat and Others*, , the eligibility for appointment to the post of "President of Industrial Court" was in issue. It was held by the Hon"ble Supreme Court that a Joint District Judge completing ten years" service in judiciary including the period of practice at Bar was eligible for the said post under Rs. 2 and 3 of the Draft Recruitment Rules framed by the High Court though, it was pending approval by the Government. It was held that, rules even in their draft stage can be acted upon provided there is a clear intention on the part of the Government to enforce those rules in the near future.

14. In *Chandigarh Administration through the Director Public Instructions (Colleges), Chandigarh Vs. Usha Kheterpal Waie and Others*, , the post of Principal was advertised in terms of Draft Rules prescribing eligibility conditions. It was held that the Draft Rules framed by the UT Administration though was pending notification by the Central Government, service conditions of employees can be regulated in terms of Draft Rules provided there is clear intention to enforce those rules in near future.

15. In support of his contention that when the Act provides publication in official gazette, such requirement is mandatory, the learned counsel for the petitioners has relied in *I.T.C. Bhadrachalam Paperboards and Another Vs. Mandal Revenue Officer, A.P. and Others*, . I find that in the said case Section 11(A) of the A.P. Non-Agricultural Lands Assessment Act, 1963 was considered by the Hon"ble Supreme Court and it was held that when the other requirements of Section 11(A) has been held to be mandatory, the requirement with respect to mode of publication also cannot be said to be directory. The other judgments relied upon by the counsel for the petitioners are also not relevant.

16. The learned counsel for the petitioners contended that the State Government is not authorised to make appointment on the post of Food Safety Officer and Designated Officer because the Act specifically provides the authority who can make appointment of Designated Officer and Food Safety Officer. A perusal of notification dated 25.01.2012 clearly indicates that by the said notification the persons earlier working as Food Inspectors were appointed as Food Safety Officer. The notification dated 25.01.2012 has been issued by the Principal Secretary, Health, Medical Education and Family Welfare Department, Government of Jharkhand and by the same notification the Principal Secretary, Health, Medical Education and Family Welfare Department has been designated as Commissioner of Food Safety. The contention of the counsel appearing for the

petitioners that the appointment made vide notification dated 25.01.2012 cannot be sanctioned in law because the said notification has been issued by the order of the Governor and thus the appointment has been made by the State Government, does not merit acceptance. Section 37(2) of the Act specifically provides that the State Government can authorise any person to work as Food Safety Officer. The Commissioner of the Food Safety works under the State Government and he is not a superior authority to the State Government. It is well settled that if a power has been delegated to an authority, the power exercised by the delegatee can also be exercised by the authority which has delegated the power. In *Godawari S. Parulekar and Others Vs. State of Maharashtra*, , the appellant was detained by the order passed by the State Government under Rule 30 of the Defence of India Rules. It was contended by the appellant that the State Government had earlier issued a notification delegating its power under Rule 30 to the District Magistrate and therefore, the State Government was not competent to make the order of detention in question. The Hon''ble Supreme Court held that by issuing the notification in question, the State Government had not denuded itself by the power to act under Rule 30. In the present case though it cannot be said that the State Government delegated its power to the Commissioner of Food Safety, in view of Section 37(2) of the Act, it cannot be said that the State Government has no power to make appointment on the post of Food Safety Officer.

17. The learned counsel appearing for the petitioners challenged the order dated 18.11.2013 passed by the Deputy" Commissioner on the ground that the order has been passed without affording an opportunity of hearing to the petitioner No. 1.

18. From the facts disclosed in the present petition, it appears that a proceeding was initiated vide letter dated 05.04.2013 of DFSO cum DO cum ACOMO-1, Ranchi against the petitioner Nos. 2 and 3. The notices were issued to the petitioner Nos. 2 and 3, is not in dispute. The petitioner Nos. 2 and 3 are employees of petitioner No. 1 is also an admitted fact. Only when the matter was posted for final hearing, one Sirshendu Das, Authorised Signatory of Reliance Fresh Ltd., Ranchi appeared and sought time. Vide order dated 18.11.2013, the Court found the petitioner Nos. 2 and 3 guilty of offence under Section 52 of FSS Act, 2006 and imposed a penalty of Rs. 3 Lacs. A further direction was issued that till the time the penalty is recovered, the licence of the defaulter, i.e., Reliance Retail Limited shall remain suspended.

19. A bare perusal of Section 52 of FS & S Act, 2006 indicates that if a person 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 misbranded, he shall be liable to a penalty which may extend to Rs. 3 Lacs. It is not denied that the petitioner Nos. 2 and 3 were in-charge of the store belonging to petitioner No. 1 from where the article in question was purchased. Thus, the petitioner No. 1 through its representatives

was selling from its store the article which has been found misbranded. When notices were issued to the petitioner Nos. 2 and 3, the petitioner No. 1 did not appear in the proceeding. In fact, the petitioner Nos. 2 and 3 also did not appear and at the final stage, the authorised signatory of petitioner No. 1 appeared in the Court and sought time. It is not the case of the petitioner No. 1 that the petitioner Nos. 2 and 3 were no longer its employee. The ex-parte order dated 18.11.2013 has been challenged on the ground that no notice was issued to the petitioner No. 1. It is well settled that the application of principles of natural justice cannot be confined in a straight jacket formula. It has been held by the Hon"ble Supreme Court that, "it is not only difficult but also not advisable to spell out any straight jacket formula which can be applied universally to all cases without variation." In *K.L. Tripathi Vs. State Bank of India and Others*, , the delinquent employee challenged the order of dismissal on the ground of violation of principles of natural justice, as the delinquent employee was not afforded opportunity to cross-examine the witnesses. Holding that non-compliance to the principles of natural justice must cause some real prejudice to the delinquent officer, the Hon"ble Supreme Court has held thus;

31. "Wade in his *Administrative Law*, Fifth Edition at pages 472-475 has observed that it is not possible to lay down rigid rules as to when the principles of natural justice are to apply: nor as to their scope and extent. Everything depends on the subject-matter, the application of principles of natural justice, resting as it does upon statutory implication, must always be in conformity with the scheme of the Act and with the subject-matter of the case. In the application of the concept of fair play there must be real flexibility. There must also have been some real prejudice to the complainant; there is no such thing as a merely technical infringement of natural justice. The requirements of natural justice must depend on the facts and the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter to be dealt with, and so forth."

20. The Hon"ble Supreme Court further held that,

34. ".....Therefore, in our opinion, in the manner in which the investigation was carried out as a result of which action has been taken against him cannot be condemned as bad being in violation of the principles of natural justice. Had he, however, denied any of the facts or had questioned the credibility of the persons who had given information against him, then different considerations would have applied and in those circumstances, refusal to give an opportunity to cross-examine the persons giving information against him or to lead evidence on his own part to rebut the facts would have been necessary and denial of such opportunity would have been fatal. But such is not the case here as we have mentioned hereinbefore."

21. In *Aligarh Muslim University and Others Vs. Mansoor Ali Khan*, , the Hon"ble Supreme Court after taking note of *K.L. Tripathi* case observed that, "since then, this Court has consistently applied the principle of prejudice in several cases." It

was further observed that, "there can be certain situations in which an order passed in violation of natural justice need not be set aside under Article 226 of the Constitution of India. For example, where no prejudice is caused to the person concerned, interference under Article 226 is not necessary."

22. The person aggrieved has to show prejudice caused to him. In the present case the petitioner No. 1 admittedly had noticed of the proceeding against the petitioner Nos. 2 and 3, who are its employees, still the petitioner No. 1 did not appear in the proceeding of Food Safety and Standards Case No. 25/2013-14. I do not find any merit in the contention raised on behalf of the petitioner No. 1 that without hearing petitioner No. 1 an adverse order has been passed against it which has caused serious prejudice to it. The petitioner No. 1 knowingly decided to take the risk of not appearing in the Court and in such event, it is bound to suffer the consequences.

23. In Board of Directors, H.P.T.C. and Another Vs. K.C. Rahi, , the delinquent employee himself abstained from departmental enquiry though he had knowledge about it, the Hon"ble Supreme Court held that plea of natural justice deemed to have been waived and the delinquent employee is estopped from raising such plea. In the writ petition, the entire proceeding in the Food Safety and Standards Case No. 25/2013-14 has been challenged on the ground that the appointment of the Food Safety Officer, the Public Analyst and the Authorised Officer is contrary to provisions of the Food Safety and Standards Act, 2006 and thus, without jurisdiction. However, the factum of samples taken, report of the Public Analyst, issuance of notice to petitioner Nos. 2 and 3 and knowledge of petitioner No. 1 of the pending proceeding have not been challenged.

24. In S.L. Kapoor Vs. Jagmohan and Others, , the Hon"ble Supreme Court has held that,

24. "..... where on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the court may not issue its writ to compel the observance of natural justice, not because it is not necessary to observe natural justice but because courts do not issue futile writs."

25. From the record of the case, it appears that a certificate case has also been initiated under the provisions of Bihar & Orissa Public Demand Recovery Act, 1914 and a certificate has been issued under the name of Sri Partho Chatopadhyay. The learned counsel appearing for the State of Jharkhand submits that the petitioners have already paid the amount of penalty.

26. I find no merit in this writ petition and accordingly.