

(1998) 04 AHC CK 0011

In the Allahabad High Court

Case No : Criminal M.W.P. No's. 814, 815, 1069 and 1135 of 1998

Sadhan Sahkari Samiti Ltd. and Another

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 13-04-1998

Acts Referred:

Constitution of India, 1950 — Article 19, 21
Criminal Procedure Code, 1973 (CrPC) — Section 103, 173, 482
Essential Commodities Act, 1955 — Section 10(7), 13(2), 17, 3, 7
Essential Commodities Regulations, 1955 — Regulation 19(1)
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 50
Prevention of Food Adulteration Rules, 1955 — Rule 7(3)

Citation : (1998) 2 ACR 1000

Hon'ble Judges : S.K. Phaujdar, J; J.C. Mishra, J

Bench : Division Bench

Advocate : A.P. Srivastava, for the Appellant; A.G.A., for the Respondent

Judgement

J.C. Mishra, J.—The aforesaid petitions have been filed for a writ of certiorari quashing the first information reports lodged u/s 3/7, Essential Commodities Act for violation of Fertiliser (Control) Order, 1995 (hereinafter called "Control Order" for convenience).

2. In Criminal Misc. Writ Petition No. 814 of 1998, first information report was lodged by Additional District Agriculture Officer, Gola Khazana, Sahjanwa, District Gorakhpur against the Secretary, Sadhan Sahkari Samiti Limited, Raja Vishanpura on the allegation that the sample of D. P. Fertiliser drawn on 10.8.97 was found to be non-standard due to deficiency of nitrogen and phosphorus. The first information report which was lodged on 7.10.97 has been sought to be quashed on the following grounds--(i) the result of the analysis was not communicated to the Petitioner. The Petitioner is not liable as the fertiliser was purchased from the manufacturer I.F.F.C.O. and was distributed by the Society. The U. P. Co-operative Federation, Lucknow initially got fertiliser from Central Government such as Indian Farmer Fertiliser Corporation conveniently referred

as I.F.F.C.O. which is manufacturer and the fertiliser and was distributed to various societies under the direction of U. P. Co-operative Federation, therefore, the Petitioner is not responsible for any deficiency ; thirdly it has been stated that on representation by the Petitioner, the Chief Development Officer (Co-operative) directed the District Agriculture Officer to get the fertiliser reanalysed and to take action only after the receipt of result of the second analysis by laboratory as there are chances of the fertiliser being adversely affected by moisture.

3. In Criminal Misc. Writ Petition No. 815 of 1998, the first information report was lodged by District Agriculture Officer, Respondent No. 1 on 17.1.1995 on the allegation that sample of D.A.P. spak and DAP Godawari taken on 30.8.1997 from the godown of the Petitioner were found to be non-standard on analysis. Firstly, it has been contended that the samples collected on 30.8.1997 were found to be standard on analysis and, therefore, no action was taken against the Petitioner nor the result was communicated. The samples were, however, again sent for Chemical analysis to Central Laboratory on 3.12.1997 and were found to be non-standard. On the basis of second analysis the impugned report was lodged. Secondly, it has been stated that before filing the report no opportunity was given to the Petitioner as required by Clause 23 (b) and (c) of the Control Order. Thirdly, it has been contended that the bags from which samples were taken, were machine stitched and, therefore, the employees of the firm cannot be solely held responsible and prosecuted u/s 3/7 of Essential Commodities Act ; fourthly, it has been contended that the report has been lodged mala fide against the reputed firm as the earlier attempts made by the Agriculture Department proved futile and the Petitioner No. 2 could not be arrested. Earlier a report was lodged on 7.10.1997 but in petition u/s 482, Cr. P.C. (Criminal Misc. Application No. 6508 of 1997) arrest was stayed till submission of charge-sheet ; fifthly, it has been stated that on the basis of another analysis of the sample drawn on 13.11.1997 a report was lodged on 21.12.1997 against the Petitioner in connection with which the Manager of the firm was arrested but later on released on bail. Then it has been contend that on the allegations, the Petitioners cannot be said to have committed violation of the Control Order. Lastly, it has been stated that regulation 19 (1) read with Section 17 of Essential Commodities Act is violative of Article 21 of the Constitution of India, as the accused has been denied opportunity of re-testing of sample given to the Petitioner at the time of inspection. Moreover, this provision has been declared ultra vires by Punjab and Haryana High Court in Tarsen v. Union of India (1997) 1 ERR 127.

4. In Criminal Misc. Writ Petition No. 1069 of 1998, the first information report sought to be quashed was lodged by District Agriculture Officer, Farrukhabad on 25.1.98 stating that the samples of Nitrogen Phosphate Mahadhan and D.A.P. Ratna taken on 13.11.1997 from the Petitioner's godown were found to be non-standard and the Petitioner committed offence punishable u/s 3/7, Essential Commodities Act for violation of said Control Order. It has been stated that the fertiliser bags from which samples were taken were machine stitched and,

therefore, the Petitioner cannot be said to have committed any offence. The samples were not taken in accordance with the procedure laid down in Part "A" of Schedule II and clause D of the Control Order ; as there were 28 bags of fertiliser stored in the godown samples should have been taken at least from two bags.

5. In Criminal Misc. Writ Petition No. 1135 of 1998, first information report was lodged on 13.2.1998 by Deputy Director, it was alleged that Prasad Urvarak Nigam on analysis was found to be non-standard and thereby the Petitioner committed the offence complained. The learned Counsel contended that the Petitioner had purchased 80 bags of Nitrogen Phosphate manufactured by Rashtriya Chemicals and Fertilisers Limited, Bombay through wholesale dealer M/s. Shyam Sundar Madan Mohan and, therefore, only manufacturer and dealer may be held responsible for deficiency if any. Secondly, it has been stated that the fertiliser bags were machine stitched and, therefore, the Petitioner is not liable for the offence. Thirdly, it has been stated that the Petitioner was not given any opportunity to get the sample given to him analysed which is violative of Article 21 of the Constitution. Fourthly, it has been stated that the manufacturer who may be liable for the deficiency in the fertiliser has not been implicated in this case.

6. In view of the grounds taken in the petitions and submissions, the following questions arise for consideration :

(1) Whether the dealers can be said to have committed violation of the Control Order by selling fertiliser in machine stitched bags and directly received from the manufacturer?

(2) Whether only manufacturers are responsible if the fertiliser is found to be non-standard?

(3) Whether the first information report is liable to be quashed on account of non-communication of the result?

(4) Whether the first information report is liable to be quashed on account of direction given by Senior Officers of the Agriculture Department for reanalysis of the sample?

(5) Whether Clause 19 is violative of Article 19 as it gives no opportunity to the accused to get the sample given to him at the time of drawal of sample to be analysed?

(6) Whether before launching the prosecution, an opportunity should be given to the dealer to file an application for permission to sell non-standard fertiliser?

7. Point No. 1--It has been stated that since the fertiliser bags from which samples were taken were machine stitched, the Petitioners cannot be held responsible for selling the fertiliser which may have been found to be non-standard on chemical analysis. The Petitioners have filed copies of form "J" which

indicates that the bags were only stitched. From the Form "J", it cannot be said the fertiliser bags were machine stitched or sealed. Clause 19 prohibits the dealers to sell, offer for sale stock or exhibit for sale or distribute any fertiliser the container whereof is not packed and marked in the manner laid down in this order. Clause 21 provides that fertiliser manufactured in India are packed in bags, stitched by hand such bags shall bear lead seals, so that the contents thereof cannot be tampered with without breaking the seals. Proviso permits the bags to be sold without lead sealing if the bags are machine stitched in such manner that the contents thereof cannot be tampered with without a visible break in stitching.

8. In none of the cases, the bags according to Form "J" were found to be machine stitched or lead sealed. The allegation contained in the petitions that the bags were machine stitched is not supported by any document on record. However, the investigation may consider the plea of the Petitioners in this regard and on the material on record, to find whether the bags were machine stitched or not.

9. Clause 23 permits sale of non-standard fertiliser subject to the following conditions :

(a) the container of such non-standard fertiliser is conspicuously super-scribed in red colour with the words non-standard and also with the sign "X" ; and

(b) an application for disposal of non-standard fertilisers in Form H is submitted to the registering authority to grant a certificate of authorisation of sale of such fertilisers and a certificate of authorisation with regard to their disposal and price is obtained in Form I ;

(c) such non-standard fertiliser shall be sold only to the manufacturers of mixtures of fertilisers or special mixtures of fertilisers or research farms of Government or Universities or such bodies.

In none of these cases, these conditions are satisfied. Therefore, the Petitioners had no right to stock or sell or offer for sale non-standard fertilisers.

10. Moreover, Clause 19 of the Fertiliser Control Order specifically prohibits sale of non-standard fertiliser. Neither the manufacturer and the dealer can stock or offer for sale or exhibit for sale or distribute any fertiliser or any mixture of fertilisers which is not of prescribed standard. The dealer cannot escape the liability of violation of the Control Order punishable u/s 3/7, Essential Commodities Act on the plea that the fertiliser bags were received from the manufacturer since sale or offer for sale or stock of non-standard fertiliser is prohibited. A duty is cast on the dealers to purchase fertilisers from manufacturers of repute. It is for them to be ensured by either getting the fertiliser tested or through some other mode that they get fertiliser of prescribed standard for sale. We are of the view that the dealers commit violation of Fertiliser Control Order by stocking selling or offering for sale of non-standard

fertiliser.

11. Coming to the second point, it may be noticed that Clause 19 of the Control Order prohibits manufacture for sale or offer for sale of non-standard fertiliser. Therefore, the manufacturer commits violation of the Fertiliser Control Order, the moment he manufactures non-standard fertiliser for sale or stock or exhibit for sale or distribute. The only plea that can be taken by the manufacturer is that the fertiliser was not found in a machine stitched or hand stitched lead sealed container and thereby tampering was done in contents either by the carrier or the dealer.

12. Coming to the third point, it may be noted that Clause 30 of the Control Order requires the authority to whom the analysis result is sent under Sub-clause (2) to communicate the result of analysis to the dealer/manufacturer from whom the sample was drawn within 30 days from the date of receipt of the analysis report of the laboratory. If the result is not communicated within 30 days, there is violation of Sub-clause (3) of Clause 30. The question arises whether the time-limit given in Clause 30 is mandatory and on its basis the first information report is liable to be quashed.

13. Learned Counsel referred to the observation made by this Bench in *Vinod Sarraf and Anr. v. Union of India*, Criminal Misc. Writ Petition No. 513 of 1998 connected with Criminal Misc. Writ Petition No. 514 of 1998, decided on 4.3.98. In the aforesaid petitions, the question arose whether the period of seven days indicated in Clause 30 was mandatory or directory. In view of the pronouncement in *M/s. Mukund Chand v. District Agriculture Officer and Fertiliser Registering Authority, Azamgarh and Anr.* 1988 AWC 569 and *Ved Prakash Shahi v. State of U. P. and others*, Criminal Misc. Writ Petition No. 6912 of 1997, wherein interim relief was granted to the accused, it was held that the time-limit in Clause 30 was mandatory. Reference was made to side note of Clause 30 which is worded as follows "time limit for analysis and communication of result".

14. The learned A.G.A. contended that the view taken in the aforesaid decisions is not correct nor it causes any prejudice to the accused persons, on account of delay in despatch of sample. He contended that even if the said view is assumed to be correct, the first information report cannot be quashed on account of delay in despatch of the sample or its analysis or communication of the result to the accused.

15. Learned A.G.A. Sri Arvind Tripathi referred to a pronouncement of the Supreme Court in *T.V. Usman v. Food Inspector, Tellicherry Municipality, Tellicherry* (XXXI)1994 ACC 226.

In the aforesaid pronouncement, the question arose whether Rule 7 (3) of the Food Adulteration Rules providing forty days time for delivery of report of Public Analyst to Local (Health) Authority. The Supreme Court held that the period of forty days is not mandatory but only directory and violation of time limit given in Sub-rule (3) of Rule 7 cannot, by itself, be a ground to throw out the prosecution

case. The reason assigned by the Supreme Court is reproduced below :

It must be noted that Rule 7 (3) is only a procedural provision meant to speed up the process of investigation on the basis of which the prosecution has to be launched. No doubt, Sub-section (2) of Section 13 of the Act confers valuable right on the accused under which provision the accused can make an application to the Court within a period of 10 days from the receipt of copy of the report of Public Analyst to get the samples of food analysed in the Central Food Laboratory and in case the sample is found by the said Central Food Laboratory unfit for analysis due to decomposition by passage of time or for any other reason attributable to the lapses on the side of prosecution, that valuable right would stand denied. This would constitute prejudice to the accused entitling him to acquittal but mere delay as such will not per se be fatal to the prosecution case even in cases where the sample continues to remain fit for analysis inspite of the delay because the accused is in no way prejudiced on the merits of the case in respect of such delay. Therefore, it must be shown that the delay. Therefore, it must be shown that the delay has led to the denial of right conferred u/s 13(2) and that depends on the facts of each case and violation of the time limit given in Sub-rule (3) of Rule 7 by itself cannot be a ground for the prosecution case being thrown out.

The Supreme Court observed that in Rule 7 (3) no doubt the expression "shall" is used but it may be borne in mind that the rule deals with stages prior to launching the prosecution and it is also clear that if by the date of receipt of the report of public analyst the case is not yet instituted in the Court and it is only on the basis of this report of the Public Analyst that the concerned authority has to take decision whether to institute a prosecution or not. There is no time-limit prescribed within which the prosecution has to be instituted and when there is no such time-limit prescribed then there is no valid reason for holding the period of forty days as mandatory.

16. The time limit given by the Control Order on the reasoning given by the Supreme Court cannot be said to be mandatory, furthermore even if the said provision is mandatory, no interference can be made with the prosecution at this stage.

17. Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 was held to be mandatory. In State of Himachal Pradesh Vs. Shri Pirthi Chand and another, , the State of H. P. had filed appeal for setting aside the order passed by the High Court u/s 482, Cr. P.C. affirming the order passed by the Sessions Judge discharging the accused on account of non-compliance of Section 50 of N.D.P.S. Act. The Supreme Court held that the Sessions Judge was not justified in discharging the accused after filing of charge-sheet holding that the mandatory requirement of Section 50 had not been complied with. However, the Supreme Court declined to interfere, with the order on account of delay. The reasoning given by the Supreme Court is contained in para 14 of the judgment given below :

The evidence collected in a search in violation of law does not become inadmissible in evidence under the Evidence Act. The consequence would be that evidence discovered would be to prove unlawful possession of the contraband under the Act. It is founded in Panchnama to seize the contraband from the possession of the suspect/accused. Though the search may be illegal but the evidence collected, i.e., Panchnama etc., nonetheless would be admissible at the trial. At the stage of filing charge-sheet it cannot be said that there is no evidence and the Magistrate or the Sessions Judge would be committing illegality to discharge the accused on the ground that Section 50 or other provisions have not been complied with. At the trial an opportunity would be available to the prosecution to prove that the search was conducted in accordance with law. Even if search is found to be in violation of law, what weight should be given to the evidence collected is yet another question to be gone into.

The Supreme Court further observed that illegality committed in investigation does not render the evidence obtained during that investigation in-admissible. In spite of illegal search property seized on the basis of said search it still would form basis for further investigation and prosecution against the accused. The manner in which contraband is discovered may affect the factum of discovery but if the factum of discovery is otherwise proved then the manner becomes immaterial.

The Supreme Court also referred to earlier decision in Radhakishan Vs. State of U.P., , wherein it was held that the evidence obtained by illegal search and seizure would not be rejected but requires to be examined carefully. In State of Maharashtra Vs. Natwarlal Damodardas Soni, it was held that even if the search was illegal it will not affect the validity of seizure and further investigation of the authorities or validity of trial.

18. In Sunder Singh Vs. State of Uttar Pradesh, , the search was not invalidated for non-compliance of Section 103 of Cr. P.C. 1898, on the ground that respectable inhabitants of the locality were not associated with the search.

19. In State of Bihar and Another Vs. P.P. Sharma, IAS and Another, , the High Court had quashed the prosecution on the ground that the samples were tested by Rajendra Agriculture University and found to be of standard quality on analysis. The Supreme Court reversed the order as it found that the result of the samples of the fertiliser supplied by the firm sent to the Central Laboratory were found to be substandard. The Supreme Court held that the High Court had no power to quash the prosecution by treating annexures and affidavits filed by the Petitioners as evidence and converting itself into a trial court. The annexures relied on by the Petitioners were neither part of the police reports nor were relied upon by the Investigating Officer.

20. In view of the aforesaid pronouncement, we find that the delay in despatch of the samples for analysis in the laboratory or delayed analysis or delayed communication of the result cannot be a ground for quashing the F.I.R., nor any

infirmity in drawal of samples as indicated in the petition can be ground for quashing the first information report.

21. Coming to the fourth point, it may be pointed out that there is no provision in the Control Order permitting the Senior Officers to order re-analysis of the samples. If a sample is found to be non-standard on analysis, a report may be lodged. The Investigating Agency may not stop the investigation merely on account of order of reanalysis. However, on receipt of the result, the same may be considered whether charge-sheet should or should not be submitted.

22. It is true that unlike Prevention of Food Adulteration Act there is no specific provision in this Control Order providing opportunity to the accused to get the sample reanalysed after the filing of complaint but whether the prosecution is liable to be quashed on account of this departure in the Control Order. In our opinion, despite absence of specific provision in this regard on a representation made by the accused, the investigating agency can rather should send sample for analysis and the result should be considered and if report is submitted u/s 173, the same powers should be exercised by the Court, as the refusal to do so may be violative of natural justice. However, the question arises whether absence of any such provision in the Control Order is violative of Article 21. We do not find any force in the contention of the learned Counsel in this regard. It may be noticed that the samples are sent for analysis only to the laboratories which are notified for this purpose by the State Government, and the laboratories mentioned in Clause 29, viz., Central Fertiliser Quality Control and Training Institute, Faridabad, Regional Fertiliser Control Laboratories at Bombay, Madras or Kalyani (Calcutta). The analysis is made by fertiliser analyst who possesses minimum qualification contained in Clause 29A. In view of these protections, the accused may not feel aggrieved by absence of any specific provision providing opportunity to get the sample reanalysed.

23. It is true that Punjab and Haryana High Court has held Clause 19 of the Control Order to be ultra vires as it was found violative of Articles 19(1) and 21 of the Constitution and also unjust and unfair in *Tarsen Singh v. Union of India and others* 1997 (1) EFR 126. This pronouncement may, however, be not binding as it does not appear that the Solicitor General of India was given opportunity of hearing.

24. Coming to the sixth point, it may be mentioned that the prosecution need not give any opportunity to the dealer to file an application for permission to sell non-standard fertiliser prior to lodging of report as there is no such requirement in the Fertiliser Control Order. Clause 23 has been introduced in the Control Order to deal with the situation as what should be done to the stock of fertiliser which on analysis was found to be non-standard. In view of this provision, the registering authority is empowered to grant a certificate of authorisation of sale of non-standard fertiliser after fixing its price, such fertiliser can be sold only to the Government farms or to manufacturers of mixtures of fertilisers or special mixtures of fertilisers, etc., or the University or such bodies and farms of

Government. The formalities required by Clause 23 (a) shall also be observed.

25. The next question arises whether any protection should be given to the accused person during the investigation. The learned A. G. A. referred to Section 10(7) of the Essential Commodities Act which provides that in any prosecution for any offence under this Act which requires inculpable mental state on the part of the accused, the Court shall presume the existence of such mental state but it shall be defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation provides that "culpable mental state includes intention, motive, knowledge of fact and the belief in origin to believe a fact. It is true the culpable mental state is presumed if the accused is found to have committed violation of any control order punishable u/s 3/7 of the Essential Commodities Act, 1995. The presumption is, however, rebuttable. The accused can prove that by reliable evidence that while selling fertiliser received from the manufacturer, he had no knowledge or reason to believe that the fertiliser was not of prescribed standard. If the accused are able to establish this fact beyond reasonable doubt, they may be exonerated of the offence.

26. The effect of moisture, etc., and the conflicting results of analysis, if any, on account of reanalysis can be considered by the trial court after giving opportunities to the parties to adduce expert opinion. Unless otherwise shown, it may be presumed that the analysis which was done by competent persons having minimum prescribed qualification were correct. On ground of these alleged infirmities the F.I.R. may not be liable to be quashed.

27. In view of the defence available, we think proper to give some protection to the accused if the fertiliser bags which were found in the premises, shop or godown of the accused were either machine stitched or if hand stitched were lead sealed and it was not possible to tamper with the contents. The protection may not be available to the accused if the fertiliser bags were hand stitched and they were not lead sealed or otherwise it is found that the fertiliser kept in the bags would be tampered with.

28. We are of the view that the first information report lodged in the petitions before us are not liable to be quashed. It is after investigation, it can be found whether the containers were packed in accordance with the requirements of Clause 21 of the Control Order. If it is found that in accordance with the requirements of Clause 21, the containers were properly packed, the manufacturers may be held guilty of violation of the Control Order and, therefore, charge-sheet may be submitted against them.

29. In Criminal Misc. Writ Petition No. 814 of 1998, it has been stated that the U. P. Co-operative Federation, Lucknow had directly placed order to Indian Farmer Fertiliser Corporation, a manufacturer for supply of the fertiliser and the fertiliser bags were sent to the Sadhan Sahkari Samiti directly from the higher authorities and, therefore, the Officer Incharge of Sadhan Sahkari Samiti may not be

responsible for stock or sale of non-standard fertiliser. The liability of the accused can be determined after investigation. A mere salesman of a proprietor may not commit violation of the Control Order since he does not in fact sell or offers to sell non-standard fertiliser. He merely assists his proprietor in sale of such fertiliser. The same protection may not be available to incharge of the organisation. However, the liability of the accused can be fixed only after investigation.

30. In Criminal Misc. Writ Petition No. 815 of 1998, the F.I.R. has been sought to be quashed as mala fide. It is true that two F.I. Rs. were lodged against the Petitioner and the proprietor was provided protection from arrest in a petition u/s 482, Cr. P.C. or was granted bail but on its basis, prosecution cannot be said to be mala fide. The sample of the fertiliser on analysis has been found to be non-standard, and the report was lodged on its basis. If there is truth in the F.I.R. allegation, it cannot be quashed as mala fide.

31. The petitions are disposed of with the direction that till the submission of report u/s 173(2) Cr. P.C., the office-bearers of Petitioners of Writ Petition Nos. 814 and 815 of 1998 and the Petitioners of Writ Petition Nos. 1069 and 1135 of 1998 shall not be arrested.

32. The petitions are disposed of accordingly.