

(2014) 08 JH CK 0007

In the Jharkhand High Court

Case No : Writ Petition (Civil) No. 146 of 2014

Sanjiv Kapila

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, 51
Negotiable Instruments Act, 1881 (NI) — Section 141

Citation : (2015) 1 AJR 50

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 the issuance of notice dated 28.11.2013, the petitioners have approached this Court. The petitioners have challenged the appointment of Food Analyst on the ground that the appointment was not published in the official gazette prior to the date of occurrence and therefore, the Food Analyst could not have analysed the food samples. A challenge to the appointment of Food Safety Officer has been made on the ground that the State Government is not competent to make such appointment and the appointment of Food Safety Officer was also not notified in the official gazette prior to the date of alleged occurrence.

2. The brief facts of the case as disclosed in the application for adjudication dated 04.04.2013, a copy of which has been annexed as Annexure- 4 to the writ petition are that, on 18.03.2013 the Food Safety Officer along with one Naresh Kumar Prasad visited the shop of the accused persons and they informed the accused No. 2 (petitioner No. 2) that they intended to take sample of "paneer" for the purpose of analysis and consequently, a notice in form V-A was issued to the accused Nos. 1 and 2 (petitioners). The Complainant, Food Safety Officer purchased (200x4) gms of "paneer" for the purpose of analysis on payment of

Rs. 192/- and it was sealed in sample packets which were sent for food analysis. After the report of the Food Analyst was received wherein, it was found that the "paneer" procured by the Complainant was of sub-standard grade, prosecution for an offence punishable under Section 51 of the Food Safety and Standards Act, 2006 was lodged and accordingly, notice dated 28.11.2013 was issued to the petitioners.

3. A counter-affidavit has been filed denying the allegations made in the writ petition. It has specifically been averred that the appointments of Food Safety Officer and the Food Analyst have been made in accordance with law.

4. Heard the learned counsel appearing for the parties.

5. 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 so made 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 10.01.2014 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 the alleged offence was committed his appointment was non-est.

6. 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, .

7. 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.

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

9. 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."

10. Referring to Section 66 of the Food Safety and Standards Act, 2006, Mr. S.L. Agarwal, the learned counsel appearing for the petitioners has submitted that a bare perusal of application for adjudication would indicate that the prosecution against the petitioner No. 1 is liable to be quashed as, no averment as required under Section 66 of the Act stating that the petitioner No. 1 was in-charge of the conduct of business has been made in the application for adjudication and therefore, the present proceeding initiated against the petitioner No. 1 is liable to be quashed on this ground alone. The learned counsel has relied on a decision of Hon"ble Supreme Court in Aneeta Hada Vs. Godfather Travels and Tours Pvt. Ltd., . From the application for adjudication dated 04.04.2013, I find that the petitioner No. 1 has been described as owner. Being the owner of the shop, he cannot deny that he was not in-charge of the conduct of his own business. In Aneeta Hada case, the issue before the Hon"ble Supreme Court was, whether in view of Section 141 of N.I. Act, the Director etc. can be proceeded against without arraying the company as an accused. Moreover, Section 66 of the Food Safety and Standards Act, 2006 is not attracted in the present case.

11. The petitioners have challenged notice dated 28.11.2013 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 notification was published 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 Rules 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 designated 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 make appointment of Food Safety Officers. The Commissioner of the Food Safety works under the State Government and he is not a superior authority to the State Government. The qualification for appointment on the post of Food Safety Officer and Designated Officer has to be provided by the Central 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.

17. In view of the aforesaid discussion, I do not find substance in the contention of the counsel appearing for the petitioners that the State Government is not authorised to make appointments on the post of Designated Officer, Food Safety Officer and Food Analyst. Moreover, it is not the case of the petitioners that the person notified as the Public Analyst and Food Safety Officer are not eligible for being appointed on the said posts. Finally, it is seen that after the proceeding was initiated only a notice dated 28.11.2013 was issued to the petitioners. The petitioners rushed to the Court by filing a writ petition under Article 226 of the Constitution of India.

18. In *Union of India (UOI) and Another Vs. Kunisetty Satyanarayana*, , the Hon''ble Supreme Court has observed that, "a mere charge-sheet or show-cause notice does not give rise to any cause of action, because it does not amount to an adverse order which affects the rights of any party unless the same has been issued by the person having no jurisdiction to do so. It is well settled that a writ petition lies when some right of any person is infringed. A mere show-cause

notice or charge-sheet does not infringe the right of anyone."

19. In the present case, it is seen that vide notice dated 28.11.2013, the petitioners were directed to appear in the case pending in the court of Deputy Commissioner-cum-Adjudicating Officer, Ranchi. A notice to appear in the court in a pending proceeding cannot be said to infringe the statutory or constitutional right of the petitioner. The objection which the petitioners have taken in the present proceeding can very well be urged in the pending proceeding in the Court of Deputy Commissioner-cum-Adjudicating Officer, Ranchi.

20. I find no merit in this writ petition and accordingly, this writ petition is dismissed.