
(2011) 02 AHC CK 0108

In the Allahabad High Court

Case No : Writ Petition No's. 4252 and 10044 (M/B) of 2010

Shyam Narain Pandey

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 18-02-2011

Acts Referred:

Food Safety and Standards Act, 2006 — Section 1(3), 97(1)
General Clauses Act, 1897 — Section 6
Prevention of Food Adulteration Act, 1954 — Section 10, 11, 13, 23, 24
Uttar Pradesh Prevention of Food Adulteration Rules, 1976 — Rule 2, 41, 4A, 4B, 59(2)
Food Safety and Standards Act, 2006 — Section 1(3), 97(1)
General Clauses Act, 1897 — Section 6
Prevention of Food Adulteration Act, 1954 — Section 10, 11, 13, 23, 24
Uttar Pradesh Prevention of Food Adulteration Rules, 1976 — Rule 2, 41, 4A, 4B, 59(2)
Food Safety and Standards Act, 2006 — Section 1(3), 97(1)
General Clauses Act, 1897 — Section 6
Prevention of Food Adulteration Act, 1954 — Section 10, 11, 13, 23, 24
Uttar Pradesh Prevention of Food Adulteration Rules, 1976 — Rule 2, 41, 4A, 4B, 59(2)

Citation : (2011) 4 Crimes 392

Hon'ble Judges : Ritu Raj Awasthi, J;Pradeep Kant, J

Bench : Division Bench

Judgement

1. These are two writ petitions which involve purely legal questions of law. The State has filed its response.
2. Counsel for both the parties have agreed to proceed with the hearing of the these petitions.
3. Heard the learned Counsel for the parties.
4. The issues raised in Writ Petition No. 4252 (M/B) of 2010 required the Court to consider whether the State Government could have issued the Government Orders dated 5.4.2010, 19.1.2010 and 7.5.2010, which, in substance provided

for appointment of administrative officers as local health authorities of the State, replacing the technical persons having knowledge of medical and health matters, namely, Chief Medical Officer, Deputy Chief Medical Officers, Health Officers, etc. The said Government Orders are under challenge in these petitions.

5. The decision to carve out a new Food and Drugs Administrative Department to shift the powers and responsibility from the persons having technical knowledge in the subject concerned i.e. Class I Medical Officers having knowledge of the impact of different chemicals and edible and non-edible items on human body, to the administrative machinery of district under the control of District Magistrate, having no knowledge about the technical and medical aspects of different items on the health of human-beings, has been assailed in the present writ petitions filed in the nature of public interest litigation.

6. It is also the case of the Petitioner that in the absence of any competent and effective machinery being in existence, the business of edible items by the restaurants, hotels and factories, which are running without licence after 30th March, 2010, is a great danger to the life and health of the public in general.

7. By means of the Government Order dated 5.4.2010, the powers to issue food licences were withdrawn from the Additional Chief Medical Officers and it was directed that no new food licence be issued nor existing licences be renewed. Since food licenses were valid only till 31st March of each year, therefore, owing to this Government Order, presently the entire food industry in the State of U.P. remains unchecked and is running without licence required under the Prevention of Food Adulteration Act, 1954, hereinafter referred to as the PFA Act and the U.P. Prevention of Food Adulteration Rules, 1976, hereinafter referred to as the Rules, 1976.

8. This Court made a query from the State Counsel as to who is the food licencing authority at present, in response to which another Government Order dated 7.5.2010 was pressed into service and it was said that by means of the said G.O. vide Placitum 3, the powers given to the Additional Chief Medical Officers under Rule 41(b) of the Rules, 1976 were cancelled and vide Placitum 4 of the same Government Order, City Magistrates in view of the Government Order dated 19.1.2010 were made Food Licensing Authority in urban areas and Chief Food Inspectors were made new licensing authorities of rural areas. By the Government Order dated 7.5.2010, Rule 4(1-A) and (1-B) were said to have been amended by the State Government.

9. Section 3 of the PFA Act provides that there shall be the Central Committee for Food Standards which will advise the Central Government and the State Governments on matters arising out of the administration of the Act and to carry out the other functions assigned to it under the Act. Section 24 provides that the State Government may, after consultation with the Committee, make rules for the purpose of giving effect to the provisions of the Act i.e. to define the powers and duties of the food (Health) Authority, prescribe the forms of licences, levy

fee, impose fines and provide for the delegation of the powers and functions conferred by the Act on the State Government or the Food (Health) Authority to subordinate authorities or to local authorities; meaning thereby that the State Government cannot make or change any rule made under the PFA Act without consultation of the Central Committee constituted u/s 3.

10. There is no denial by the Respondent State that no such exercise was undertaken, nor the aforesaid rules have been amended and thus, ignoring all these statutory rules, the State Government, without any consultation with the Central Committee, apparently took the Rules as amended, by issuing the impugned Government Order, which could not have been done. Even otherwise, by means of the Government Order, statutory provisions of the Act or the Rules cannot be said to have been amended nor could be amended, and admittedly no new rules have been framed.

11. The Special Secretary, Department of Food and Drugs Administration, Government of U.P appeared in person before this Court on 5.8.2010 and he said that the licensing authority had been appointed by the State Government under Rule 59 (2) of the Rules, 1976, hereinafter referred to as the Rules, 1976.

12. The Petitioner's counsel, however, did not dispute the aforesaid appointment, but said that the appointment of licensing authority could not be made under Sections 23 or 24 of the PFA Act, to which the Special Secretary, replied that the steps shall be taken for amending the Rules, but as already observed, the Rules have not yet been amended.

13. The posts of Chief Medical Officer and Nagar Swasthya Adhikari are interchangeable and inter-transferable which are governed by the same service Rules of Medical Health and Family Welfare Department and now although Nagar Swasthya Adhikari, as indicated in Rule 4 of the Rules, 1976 is retained but for reasons best known to the Respondents, by means of Government Order dated 5.4.2010, entire working of grant or renewal of food licences has been stopped.

14. By means of notification dated 20.12.2008, the Additional Chief Medical Officer was designated as Local Health Authority besides the Chief Medical Officer and now by means of Government Order dated 19.1.2010, the powers of Local Health Authorities have been withdrawn from the Chief Medical Officer/Additional Chief Medical Officer and have been given to City Magistrates, Additional Collectors or authorised Assistant Collectors, who have been made Local Health Authorities by means of the aforesaid G.O. dated 19.1.2010 while these persons to whom the powers of Local Health Authority have been delegated, have no experience or qualifications in relation to human health and the impact of different edible items including their clinical reaction on human body.

15. The Food Inspectors appointed u/s 9 of the PFA Act work as per the provisions of the PFA Act and the Rules, 1976 under the supervision of Local Health Authority. u/s 10, the approval of Local Health Authority is required for prohibition on sale of any edible items and u/s 10(4-A), satisfaction of Local

Health Authority is necessary for destroying the deteriorated food articles, harmful for human consumption. u/s 11(1)(c), the samples collected by Food Inspectors are sent for analysis under intimation to the Local (Health) Authority and u/s 13(1), the Local (Health) Authority can examine the report of analyst and under his authority, charges are framed under different Sections of PFA Act. All these provisions show that the Local (Health) Authority in the State is having discretionary powers to be exercised on the basis of the gravity of offence/matter evaluated on the basis of the impact of adulteration on the human body, which can only be done by a person having knowledge of human body and the impact of different chemicals and edible or non-edible items on the human body, which cannot be efficiently done by administrative authorities having no experience and knowledge in relation to impact of substances over human body.

16. In regard to shifting of powers of Local Health Authority from the Medical and Health Department to the District Administration headed by the District Magistrate, the State Government says that it is to reduce the burden of Medical and Health Department and therefore, the new Food and Drugs Administration Department is carved out.

17. The creation of a separate department in the name of Food and Drugs Administration Department vide Government Order dated 30.7.2009 has been challenged in Writ Petition No. 10044 (M/B) of 2010.

18. In Writ Petition No. 4252 (M/B) of 2010, the prayer made is that the aforesaid Government Orders dated 5.4.2010, 19.1.2010 and 7.5.2010 be quashed and the existing Local Health Authority of the State vested in Chief Medical Officer and Additional Chief Medical Officer be restored with powers of food licensing authority.

19. So far as Writ Petition No. 10044 (M/B) of 2010 is concerned, the Petitioner has alleged that the creation of new Food and Drugs Administrative Department by the State Government is without jurisdiction and is not in public interest, which also loses control over the Local Health Authority and other licensing authority, and thereby gives absolute liberty to this new department to violate the law at the risk of public health. This writ petition actually proceeds with the assumption that the Food Safety and Standards Act, 2006 having come into force and it being the stand of the State Government before the High Court that in view of Section 97 of the said Act, the Prevention of Food Adulteration Act, seven other Acts and Orders were repealed by virtue of notification dated 29.7.2010, therefore, a direction be issued to the Respondents to implement the entire Food Safety and Standards Act, 2006 in the State of U.P. at the earliest and to constitute the Food and Drug (Administration) under the administrative control of department of Health and Family Welfare of State of Uttar Pradesh as required under the various notifications of Central Government and accordingly quash the Office Memorandum dated 30.7.2009, by means of which the new department was created.

20. The prayer for implementation of Food Safety and Standards Act, 2006 appears to have been made for the reason that the State Government in *In re: M/s Pepsico India Holdings (Pvt) Limited and Anr. v. State of U.P. and Ors.* Writ Petitions No. 8254, 8255 and 8256 of 2010 (M/B), has taken the stand that on the enforcement of the aforesaid Act, the PFA Act and the Rules, 1976 stand repealed. We will discuss the aforesaid issue at latter stage of this order.

21. So far as the appointment of officers of the district officers as licensing authorities and local health authorities is concerned, the learned State Counsel could not satisfy us nor could show any provision under the Act or the Rules which permits such an appointment by the State Government, that too by issuance of a Government Order, without amending the Rules made under the PFA Act. The officers of the district administration, who are supposed to have no knowledge of public health and the ingredients used in various types of food products, the process under which such food items are cooked or prepared and the effect of such materials, namely, oils and chemicals used, on human body, cannot be entrusted with this work. Such persons cannot check adulteration as they neither can find out the degree of adulteration nor can work out the impact thereof on human and living beings. Chief Medical Officers and Additional Chief Medical Officers, who are experts in the medical field, they being degree-holders in medical sciences, cannot be replaced even in public interest with those who are non-experts in the field, or in other words quacks. That apart, the rules having not been amended, as is admitted to the State Counsel, no Government Order or Office Order could be issued contrary to the statutory rules. Since the Rules themselves prescribe and designate the Chief Medical Officer/Additional Chief Medical Officer as the licensing authority, this statutory prescription cannot be withdrawn by executive order or by issuing a Government Order.

22. Sri D.K. Upadhyay, learned Chief Standing Counsel appearing for the State could not satisfy the Court as to under what authority or law, such a change has been effected. The Government Orders impugned are per se illegal in so far as they make a change against the statutory prescription and designate the officers of district administration as local health authorities in place of Chief Medical Officer/Additional Chief Medical Officer.

23. In view of the legal position as discussed above, the appointment of City Magistrates or in their absence Deputy Collectors, nominated by the District Magistrates under the PFA Act, 1954 as local health authorities for the districts, cannot be sustained, which authority has to be in consonance with the provisions of Rules 2, 4 and 8 of the Rules of 1976.

24. So far as the licensing authorities are concerned, they are also to be appointed as per Rule 4(1)(b) of the Rules of 1976 and any appointment made contrary to the aforesaid Rules, can neither be allowed to continue nor can be said to be valid. The rules have not been changed/amended by following the provisions of Section 24 of the Act till date.

25. Rule 2(b) of the Rules of 1976 defines "Food (Health) Authority", which means the Director of Medical and Health Services, Uttar Pradesh, whereas Commissioner has been made the Food (Health) Authority, which cannot be done in pursuance of the aforesaid Rules.

26. The next plea of the Petitioner, that in view of Section 97(1) of the Food Safety and Standards Act, 2006, the Prevention of Food Adulteration Act, seven other Acts and the Rules, 1976 stand repealed and, therefore, a direction be issued to implement the entire Food Safety and Standards Act, 2006 in the State of U.P. effectively, is to be considered by appreciating the fact as to whether any notification u/s 97(1) of the said Act repealing the aforesaid Acts has been issued or not by the Central Government. True, the stand of the State Government is itself contrary as on the one hand in the writ petitions of Pepsico (supra), they have taken the stand that the PFA Act and the Rules stand repealed in view of the notification issued u/s 97(1) of the said Act and on the other hand, in the present case, they stated that the process for amending the aforesaid Rules is in progress. If the PFA Act and the Rules, as per the own assertion of the State Government, stood repealed, then there is no occasion or question for amending the said Rules which are no more in force.

27. Dr. Ashok Nigam, learned Senior Advocate assisted by Sri Neerav Chitranshi, appearing for the Central Government, has submitted that Section 1, Sub-section (3) of the Act of 2006 provides that the Act of 2006 shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint, and different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision, meaning thereby that different Sections of the Act can come in force at different times and, therefore, in exercise of this power, the Central Government has issued the aforesaid notification making Section 97 enforceable with effect from 29.7.2010. This notification does not mean the notification which is required to be issued u/s 97, Sub-section (1). He categorically states that Section 97 on its commencement, enables the Central Government to issue a notification for repeal but the said notification has not yet been issued.

28. Dr. Ashok Nigam further submitted that the aforesaid judgment in Pepsico case is per incurium, as it does not take into consideration Section 97(1) of the Act, 2006 and raises a presumption that on the issuance of the notification by the Central Government on 29.7.2010, the old Act has been repealed, whereas the said notification has not been issued u/s 97(1) of the Act, but has been issued u/s 1(3) of the Act.

29. During the course of arguments, Sri Umesh Chandra, learned Senior Advocate moved an application for impleadment on behalf of "Pepsico", saying that the matter be deferred as a SLP has been filed against the judgment and order dated 8.9.2010 passed in writ petitions bearing Nos. 8254, 8255 and 8256 of 2010 (M/B) filed by Pepsico, and later on informed that notices have been

issued to the Respondents by the Supreme Court in the aforesaid case. We do not find it expedient to implead "Pepsico" in the present petitions as we are not to adjudge the merits of the case, in which judgment has been delivered by a Division Bench of this Court and moreso when it is in appeal before the Supreme Court. We have, however, heard Sri Umesh Chandra. His submission is that this Court cannot take a different view, contrary to the view taken in the case of Pepsico.

30. We have gone through the judgment in the case of Pepsico, which has been placed before us and we find that the Court has presumed that the repealing notification has been issued u/s 97(1) of the Act, 2006 and, therefore, PFA Act and the Rules of 1976 stand repealed. We are not on the merits of the issue which has been considered and decided in the case of Pepsico (supra), nor we make any attempt to scrutinize the findings recorded on merits of that case in the said judgment, but we have been persuaded by Sri Anurag Narain, learned Counsel for the Petitioner to delve upon the issue whether the PFA Act and the Rules, 1976 actually stood repealed by operation of law on issuance of notification dated 29.7.2010.

31. We are, therefore, of the view that the PFA Act and the Rules are in operation and in the absence of a notification u/s 97(1), the provisions of the said Act and the rules would continue to be operative unless the aforesaid Act and the rules are repealed.

32. The notification said to have been issued by the Central Government on 29.7.2010 is in fact a notification issued under Sub-section (3) of Section 1 of the Act, 2006. This means that Section 97, which was hitherto not in force, has been enforced with effect from the said date. Section 1, Sub-section (3) and Section 97 of the Act read as under:

1. Short title, extent and commencement.-(1)

(2)

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint, and different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision.

97. Repeal and savings.-(1) With effect from such date as the Central Government may appoint in this behalf, the enactment and orders specified in the Second Schedule shall stand repealed:

Provided that such repeal shall not affect:

(I) the previous operations of the enactment and orders under repeal or anything duly done or suffered thereunder; or

(II) any right, privilege, obligation or liability acquired, accrued or incurred under

any of the enactment or Orders under repeal; or

(III) any penalty, forfeiture or punishment incurred in respect of any offences committed against the enactment and Orders under repeal; or

(IV) any investigation or remedy in respect of any such penalty, forfeiture or punishment, and any such investigation, legal proceedings or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed, as if this Act had not been passed:

(2) If there is any other law for the time being in force in any State, corresponding to this Act, the same shall upon the commencement of this Act, stand repealed and in such case, the provisions of Section 6 of the General Clauses Act, 1897 (10 of 1897) shall apply as if such provisions of the State law had been repealed.

(3) Notwithstanding the repeal of the aforesaid enactment and Orders, the licences issued under any such enactment or Order, which are in force on the date of commencement of this Act, shall continue to be in force till the date of their expiry for all purposes, as if they had been issued under the provisions of this Act or the rules or regulations made thereunder.

(4) Notwithstanding anything contained in any other law for the time being in force, no court shall take cognizance of an offence under the repealed Act or Orders after the expiry of a period of three years from the date of the commencement of this Act.

33. After the enforcement of the aforesaid Section, it is necessary that the Central Government issues a notification under Sub-section (1) of Section 97 and on issuance of such notification, the Act aforesaid would stand repealed with effect from the date the Central Government may appoint, but the Respondent State has not been able to produce before us any notification issued u/s 97(1) by the Central Government. The issuance of notification dated 29.7.2010 can neither be treated as notification issued u/s 97(1) nor it can be substituted in place of the required notification. The effect of the notification issued on 29.7.2010 by the Central Government is that with effect from the said date, the aforesaid Section has come into force and now notification as required u/s 97(1) can be issued by the Central Government. No such notification having been issued, it hardly can be presumed that by operation of law, the pre-existing Acts and the Rules stand repealed.

34. After considering the arguments from both the sides, we are of the view that the question whether notification issued on 29.7.2010 u/s 1, Sub-section (3) of the Act, 2006 means a notification u/s 97, Sub-section (1) of the said Act and has the effect of repealing the PFA Act and the Rules or the aforesaid notification is only a notification regarding commencement of the said provision of the Act, i.e. the date of its enforceability, which cannot be treated to be a notification u/s 97(1) of the Act, 2006 issued by the Central Government, need be considered by

a larger Bench, there being a conflict of opinion, as we, with deep regard, are not able to subscribe to the view expressed by the Division Bench in the case of Pepsico (supra) on this issue.

35. The issue whether the Food and Drugs Department can be separated or not, has not been addressed by us, as reference is being made to a larger Bench.

36. We, therefore, for the reasons given above, direct that the Government Orders dated 5.4.2010, 19.1.2010 and 7.5.2010 shall remain in abeyance till the final disposal of these writ petition. The State Government is directed to forthwith issue necessary orders/instructions restoring the local health authorities as well as licensing authorities as per the statutory provisions of PFA Act and Rules, 1976. The orders/instructions so issued shall be subject to further orders of the Court.

37. Further, on the plea of repeal of PFA Act and the Rules, 1976, we refer the following question for determination by a larger Bench:

Whether the notification issued on 29.7.2010 u/s 1, Sub-section (3) of the Act, 2006 has the effect of repealing the Prevention of Food Adulteration Act, 1954 and the U.P. Prevention of Food Adulteration Rules, 1976 or the aforesaid notification is only a notification regarding commencement of the said provision of the Act i.e. the date of its enforceability, which cannot be treated to be a notification u/s 97(1) of the Act, 2006 issued by the Central Government?

38. Let the papers be placed before the Hon''ble Chief Justice for passing appropriate orders for referring the matter to the larger Bench.