

(1979) 02 KAR CK 0029
In the Karnataka High Court
Case No : Cr.R.P. 458, 459 & 460/78

State of Karnataka

APPELLANT

Vs

Ruqario Menezes

RESPONDENT

Date of Decision : 23-02-1979

Acts Referred:

Prevention of Food Adulteration Rules, 1955 — Rule 9(J)

Citation : (1979) 2 KarLJ 41

Hon'ble Judges : Nagappa, J

Judgement

These three revision petitions arise out of three different orders passed by the Addl. Munsiff and Judicial Magistrate First Class Puttur, Dakshina Kannada, on complaints under the Prevention of Food Adulteration Act, 1954 (hereinafter to be referred to as "the Act").

As common questions of fact and law arise in all these three petitions they could conveniently be disposed of by a common order.

Cr.R.P. No. 458 of 1978 is directed against the order dated 12-7-1978 passed by the, Addl. Magistrate and Judicial Magistrate First Class, Puttur, Dakshina Kannada, in C.C. No. 1601 of 1976 on his file discharging the petitioner (who will hereinafter be referred to as "the accused") for offences punishable under Ss. 2(1) (a) and 16(1) read with S. 7 of the Act.

The facts of the case are, that on 25-12-1975 at about 4-30 p.m. the accused was found selling buffalo's milk to the hotel bearing No. 24-52 of Puttur town municipality. A. Krishna Rao (P.W. 1), the Food Inspector, town municipal council, Puttur, suspected the purity of the milk, purchased 660 ml. of milk from the accused for the purpose of analysis by the Public Analyst, Bangalore. He also intimated the accused in writing that the said milk would be sent to the Public Analyst, Bangalore. As enjoined under the Rules, Form No. 6 was also given to the accused. Further, P.W. 1 also paid the costs of the milk purchased, namely, Re. 1, out the accused refused to receive the same. P.W. 1 thereafter divided the milk into 3 equal parts and filled the same into 3 dry clean bottles and added 16

drops of formalin to, each of the bottles as a preservative. After observing the necessary formalities of corking and sealing of the three bottles in the presence of witnesses as also the accused, he affixed label No. 276 over the said bottles. As enjoined under S. 11(1) (c) (i) of the Act he handed over one such sample bottle to the accused but he refused to receive the same. One bottle was sent to the Public Analyst, Bangalore, for chemical analysis. The Public Analyst, Bangalore, after analysing the said milk sent his report as per Report No. PFA/M/1415 dated 3-1-1976 opining that the sample so sent is adulterated for the reasons stated therein. P.W. 1 after obtaining necessary sanction from the President, Puttur Town Municipality, lodged the complaint in question against the accused for the aforesaid offences.

The learned Magistrate thought fit to make an enquiry for ascertaining whether there was a *prima facie* case against the accused or not. On behalf of the prosecution, only one witness, namely, P.W. 1, the Food inspector has got himself examined and also got marked 9 exts. including Ex. P.2 receipt for the purchase of the milk, Ex. P. 5 report of P.W. 1. Ex. P.6 chemical report, Ex. P.7 report by the Public Analyst and Ex. P.8 the sanction accorded by the President of the Town Municipality, Puttur for launching the prosecution against the accused. After examining P.W. 1 the accused was questioned under S. 313 Cr.P.C. to explain the circumstances appearing against him. The accused has denied the circumstances appearing against him. Arguments were heard before charge and the learned Magistrate after considering the legal point raised on behalf of the accused came to the conclusion that the complaint is not in conformity with Rule 9(j) of the Prevention of Food Adulteration Rules, 1955 as amended by the Prevention of Food Adulteration (Amendment) Rules, 1974 and as such the said mandatory provision is violated and the accused is liable to be discharged. Accordingly he discharged the accused. Aggrieved by the said order of discharge, the State has challenged the legality and propriety of the said order in the above revision petition.

Cr. R.P.No. 459 of 1978 is directed against the order dated 25-7-1978 passed by the, Additional Munsiff and Judicial Magistrate First Class, Puttur, Dakshina Kannada, in C.C.No. 1148 of 1976 on his file discharging the petitioner (who will hereinafter be referred to as "the accused") for offences punishable, under S. 2(1) (a) and 16(1) read with S. 7 of the Act.

Brief facts of the case are, that on 31-7-1975 at about 8 a.m. the accused was found selling cow's milk to the Hotel Shiva Shankara, bearing No. 5-129 situate in the Main Road at Puttur. A Krishna Rao (P.W. 1), the Food Inspector having suspected the purity of the said milk purchased 660 ml. of milk from the accused for the purpose of analysis by the Public Analyst, Bangalore, and Form No. 6 was given to him as required by the Rules. He also paid the costs of the milk to the accused and obtained a receipt from him. Thereafter, P.W. 1 divided the said milk into 3 proportions and filled them in 3 empty clean dry bottles and added 16 drops of formalin to each of the bottles as preservative. P.W.1 thereafter

observed the necessary formalities of corking and sealing of all the three bottles in the presence of the panch witnesses as also the accused and affixed lable No. 266 over the said bottles. As enjoined under the Act, P.W. 1 handed over one bottle to the accused and sent another bottle to the Public Analyst, Bangalore and retained the third one with him. The public analyst after analysing the milk so sent, sent his reports as per No. PFA/M/570 dated 28-8-1975 opening that the sample is adulterated for the reasons stated therein. P.W. 1 thereafter obtained sanction to launch the prosecution against the accused from the President, Town Municipal Council, Puttur and thereafter filed complaint against the accused for the aforesaid offences. The learned Magistrate for satisfying himself whether there was a prima facie case against the accused for proceeding against him for those offences held an enquiry. P.W. 1 got himself examined and also got marked 9 documents including Ex. P. 1 copy of the notification Ex. P. 4 yadast, Ex. P. 5 memo form No. 7, Ex. P. 7 report of the Public Analyst and Ex. P. 8 sanction order. The learned Magistrate, after recording the evidence, examined the accused under Section 313 of the Code of Criminal Procedure to enable him to explain the circumstances appearing against him. The accused having admitted that on, the date and time he was selling the milk in question to the hotel denied that the same was adulterated and contended that he has not committed any offence. The learned Magistrate after hearing both the parties on the question of law raised on behalf of the accused came to the conclusion that the complainant has not complied with the mandatory provisions of Rule, 9 (j) of the Prevention of Food Adulteration Rules 1955 as amended by the Prevention of Food Adulteration (Amendment) Rules 1974 and as such held that the accused is entitled to be discharged and accordingly discharged him. Aggrieved by the said order Of discharge, the State has preferred the above revision petition questioning the legality and propriety of the said order.

Cr.R.P.No. 460 of 1978 is directed against the order dated 12-7-1978 passed by the Additional Munsiff and Judicial Magistrate First Class, Puttur, Dakshina, Kannada, in C.C. No. 1150 of 1976 on his file discharging the accused of the offences punishable under S. 2(1) (a) and 16(1) read with S. 7 of the Act.

The facts of the case are, that on 11-11-1975 at about 8.30 a.m. A. Krishna Rao (P.W. 1) found the accused selling Buffalo's milk to the hotel Shivashankar, Puttur. P. W. 1 suspected the purity of the said milk and as such purchased 660 ml. from the accused for the purpose of sending the same for analysis to the Public Analyst, Bangalore. The accused was intimated in writing about the same and Form No. 6 was also given to him. P.W. 1 also paid the costs of the milk and obtained a receipt from the accused. Thereafter P.W. 1 divided the milk into 3 equal parts and filled them into 3 clean dry bottles and added 16 drops of formalin to each of the bottles as preservative. Thereafter he observed necessary formalities of corking and sealing the said three bottles in the presence of panch witnesses as also the accused and affixed the lable No. 271 over the said, three bottles. Out of them one sample bottle was handed over to the accused, another was sent to the Public Analyst, Bangalore and the other one was regained in his

office. The Public Analyst after analysing the contents of the bottle so sent to him sent his report as per No. PFA/M/1077 dated 29-11-1975 opining that the sample is adulterated for the reasons stated therein. P.W. 1 after obtaining the necessary sanction from the President of the Town Municipal Council, Puttur, launched the prosecution against the accused for the aforesaid offences.

The learned Magistrate for satisfying himself before framing a charge whether there was a prima facie case against the accused to frame a charge against him for the aforesaid offence held an enquiry in which the Food Inspector got examined himself as P.W. 1 and also got marked 8 exhibits including Ex.P. 1 copy of the notification, Ex.P. 3 receipt for the purchase of milk, Ex.P.7 report of the Public analyst and Ex.P. 8 sanction order. The accused was questioned by the learned Magistrate under Section 313 of the Code of Criminal Procedure to explain the circumstances appearing against him. The accused while admitting that he was selling the milk in question on that date and time alleged, denied that he has committed any offence on that he was selling adulterated milk as alleged by the complainant. The learned Magistrate after hearing both the parties on the question of law raised on behalf of the accused came to the conclusion that the complainant has not complied with the mandatory provisions of Rule 9 (j) of the Prevention of Food Adulteration Rules 1955 as amended by the Prevention of Food Adulteration (Amendment) Rules 1974 and held that the accused is entitled to be discharged and accordingly discharged him. The State aggrieved by the said order of discharge has challenged the legality and propriety of the said order in the above revision petition.

Sri Kuranga, the learned High Court Government Pleader, appearing on behalf of the State raised two main points for my determination, apart from other contentions. They are, firstly, the Food Inspector has personally handed over the copy of the report of the Public Analyst to each of the accused which would be in conformity with Rule 9(j) of the Rules and secondly that even assuming for the sake of argument that the copy of the report as enjoined under Rule 9(j) is not delivered to the accused by registered post it would not entitle the accused for an order of discharge as the said provision is not mandatory but only a directory.

I find no force, in the above contentions of the learned High Court Government Pleader. Now, as far as the first contention is concerned such fact entirely rests upon the evidence of A. Krishna Rao (P.W. 1), the Food Inspector. He is the complainant and a perusal of the complaint clearly indicates that nowhere he has stated that he handed over a copy of the report of the Public Analyst in conformity with the Rules. Apart from it, when he examined himself as P.W. 1 there is not even a whisper with regard to his handing over a report either by hand or sending the same by registered post as enjoined by Rule 9 (j) of the Rules. I have been taken through the evidence of P.W. 1 by the learned High Court Government Pleader and as observed above, there is no indication whatsoever in his entire evidence that after receipt of the report from the Public, Analyst he sent a copy of the same to each of the accused by registered post. I

am, therefore, inclined to hold that there is no force in the submission made by Sri Kuranga and the same has to fail.

Adverting now to the next contention, which is in the, nature of a, legal contention, what the learned High Court Government Pleader submitted was that the non-compliance of R. 9(j) of the Rules would not entitle to the accused for an order of discharge. Elaborating the said contention what he submitted was that R. 9(j) of the Rules could at best be construed only as a directive, in other words, a procedure to be followed but it has not got the mandatory force and as such the non-compliance would not and should not have weighed much with the learned Magistrate, in discharging the accused.

Now, for a proper appreciation of the said contention it would be necessary to find out the intention of the legislature in framing the said Rules. Rule 9 was amended on 13-2-1974 under the rules called The Prevention of Food Adulteration (Amendment) Rules, 1974, which reads thus:

"9. It shall be the duty of the Food Inspector:

(j) to send by registered post, a copy of the report received in Form III from the public analyst to the person from whom the sample was taken within ten days of the receipt of the said report. However, in case the sample conforms to the provision of the Act or Rules made thereunder, then the person may be informed of the same and report need not be sent."

It will be convenient to refer to the said rule as it existed prior to the amendment which reads as under:

"9. It shall be the duty of the food inspector to send by handor registered post a copy of the, report received in Form-III from the Public Analyst to the person from whom the sample was taken, in case it was found to be not conforming to the Act or Rules made thereunder as soon as the case was filed in the Court". (underlining is mine).

The learned High Court Government Pleader in order to substantiate his contention relied upon the Bench decision of the Gujarat High Court in Martand Balvant Risaldar v. Chhaganlal Ambalal Gandhi, 1978 CrL.J. 1032. Their Lordships while adverting to the said legal proposition relied upon the decision of the Supreme Court in Razabuland sugar co Ltd., v. The Municipal Board, Rampur, AIR 1965 SC. 895. In the said case their Lordships while dealing with the meaning of the word "shall" and its interpretation and connotation whether it is mandatory or directory have stated thus:

"The question whether a particular provision of a statute, which on the face of it appears mandatory inasmuch as it uses the word "shall" or is merely directory cannot be resolved by laying down any general rule and depends upon the facts of each case and for that purpose the object of the statute in making the provision is the determining factor. The purpose for which the provision has been made and its nature, the intention of the legislature in making the, provision, the

serious general inconvenience or injustice to persons resulting from whether the provision is read one way or the other, the relation of the particular provision to other provisions dealing with the same subject and other considerations which may arise on the facts of a particular case including the language of the provision, have all to be taken into account in arriving at the conclusion whether a particular provision is mandatory or directory."

Their Lordships of the Gujarat High Court in the aforementioned case after following the observations laid down by the Supreme Court, this is what they have observed:

"In order to place a proper construction it is necessary to find out the consequence which the statute has laid down as a result of non-compliance with the direction. The consequence may be penal, the consequence may be that a particular order is passed is invalidated, the consequence may be that a particular right is not acquired or a particular obligation is imposed, or the consequence may be not stated in the law at all. When no consequence is apparent in the law it is reasonable to take the view that although the legislature has used the expression "shall" it may be construed as directory or procedural rather than mandatory in the strict sense of the term. The legislature may be anxious that a particular procedure may be followed. Rule 9(j) lays down no penalty for its non-compliance, When a statute requires that a thing should be, done in a prescribed manner or form but does not set out the consequences of non-compliance, it is reasonable to construe the same as directory".....It is no doubt true that R. 9(j) has been amended from time to time but that does not change the procedural character of that part of the rule and it still remains directory as the object in enacting the rule continues to be the same"....." It will not be proper to accept a proposition of law that the accused is entitled to acquittal merely because the Food Inspector had not sent a copy of the report of the, Public Analyst to him by registered post even though the same was given to the accused by hand delivery. The main object of the legislation is to put down food adulteration with a, heavy hand. The object of rule 9(j) of the Rules is to promote private interest of an individual and the person affected can always waive the same. For the reasons aforesaid the provisions of rule 9(j) of the Rules with regard to the manner in which a copy of the report of the Public Analyst is to be sent to the person from whom the sample is taken, cannot be held to be mandatory". (underlining is mine)

In the above case their Lordships were considering only the latter half of Rule 9(j) of the Rules, as is evident by their observations in paragraph-4 of the judgment. Rule 9(j) of the Rules could be divided into two parts. The first and main provision casts a duty on the Food Inspector to send a copy of the report received from the public analyst to the person from whom the sample was taken within 10 days of the receipt of the said report. The latter half of the said rule is a subsidiary provision which requires the Food Inspector to send a copy of the report of the public analyst to the person from whom the sample was taken by

registered post and this part of the rule is obviously procedural. Their Lordships in the above case did not deal with the first portion of Rule 9(j) of the Rules and delineated only with regard to the latter half and ultimately came to, the conclusion that it is not mandatory but only procedural. I am in respectful agreement with the observations of the learned Judges of the Gujarat High Court. But the fact remains whether the former portion of Rule 9(j) of the Rules is mandatory or procedural. To understand this aspect of the matter, it would be relevant to consider the other provisions of the Act which throw light on the fact that this provision is mandatory. Reference may be made to S. 11 and 13 of the Act in this connection. S. 11 of the Act which lays down the procedure to be followed by the Food Inspector reads thus:

"11(1) When a food inspector takes a sample of food for analysis he shall.....

(a) Give notice in writing then and there of his intention to have it so analysed to the person from whom he has taken the sample and to the person, if any, whose name address and other particulars have been disclosed under Section 14-A;

(b) except in special cases provided by rules under this Act, divide the sample then and there, into three parts and mark and seal or fasten up each part in such a manner as its nature permits and take the signature or thumb impression of the person from whom the sample has been taken in such place and in such manner as may be prescribed:

Provided that where such person refuses to sign or put his thumb impression the food inspector shall call upon one or more witnesses and take his or their signatures or thumb impressions, as the case may be in lieu of the signature or thumb impression of such person;

(c) (i) send one of the parts for analysis to the public analyst under intimation to the Local (Health) Authority and.

(ii) send the remaining two parts to the Local (Health) Authority for the purposes of sub-section (2) of this section and sub-section (2A) and (2E) of section 13".

Section 13 so far as it is relevant for the purpose of this case reads thus:

"13(1) The public analyst shall deliver, in such form as may be prescribed, a report to the Local (Health) Authority of the result of the analysis of any article of food submitted to him for analysis.

(2) On receipt of the report of the result of the analysis under subsection (1) to the effect that the article of food is adulterated, the Local (Health) Authority shall, after the institution of prosecution against the person from whom the sample of the article of food was taken and the person, if any, whose name, address and other particulars have been disclosed under S. 14-A, forward, in such manner as may be prescribed, a copy of the report of the result of the analysis to such person or persons, as the case may be,, informing such person or persons that if it is so desired, either or both of them may make an application to the court

within a period of ten days from the date of receipt of the copy of the report to get the sample of the article of food kept by the Local (Health) Authority analysed by the Central Food Laboratory".

(2A) When an application is made to the Court under Sub-sec. (2), the Court shall require the Local (Health) Authority to forward the part or parts of the sample kept by the said Authority and upon such requisition being made the said Authority shall forward the part or parts of the sample to the court within a period of five days from the date of receipt of such requisition."

These two sections make it abundantly clear that the person from whom the product is seized has been given a right, not only to obtain a sample of the same from the Food Inspector but also to send the said sample to an analyst of his choice for being analysed and to obtain a report therefrom Further, sub-sec. (2) of S. 13 of the Act makes it clear that even after the institution of a prosecution an accused-vendor or the complainant is given an opportunity to make an application to the Court for sending the sample produced before the Court to the Director of Central Food Laboratory for a certificate.

Sri Krishna Bhat, the learned Counsel appearing for accused in Cr.R. P. Nos. 459 and 460 of 1978 relied upon a decision reported in *State of Maharashtra v. Jesti Dosa*, 1978 Cr.L.J. 427, to canvass the position that the Rules is not pro- cedural but on the other hand it is mandatory. That case arose after the amendment of the Rules which name into force on 13-2-1974 It was incumbent upon the Food Inspector to have sent a report of the analysis to the accused by registered post within 10 days of the receipt of the report from the Analyst. But what happened in that case was that instead of sending the same by registered post the report was handed over to the accused by hand delivery and it was canvassed on behalf of the accused that the handing over of the report by the Food Inspector by hand delivery is in contravention of the mandatory provisions of Rule 9(j) of the Rules. His Lordship accepting the contention of the accused observed thus:

"It would therefore appear that with effect from 13-2-1974 the rule as amended does not provide, (1) for the report being sent by hand and (2) unlike the earlier rule which required the Food Inspector to send the copy of the report of the Public Analyst to the person from whom the sample was taken, as soon as the case is filed in the, Court, the amended rule makes it obligatory on the Food Inspector to send by registered post a copy of the report received from the Public analyst to the person from whom the sample was taken within 10 days of the receipt of the said report. It would therefore appear that substantial changes have been made in R. 9(j) with effect from 13-2-74. One of the changes as is pointed out is that it can be no more sent by hand as per the earlier rule. Another change which is made is that the report must be sent by registered post only within 10 days of the receipt of the report. After the amendment he cannot wait to send the report by registered post till the filing of the case in Court as was the earlier provision. The report must be sent by registered post within 10 days of the receipt of the same. It is evident therefore that the intention of the

legislature was that after the amendment of the rule which came into force on 13-2-1974 the only mode of sending the report which was recognised was by registered post and that too within the stipulated period of 10 days of the receipt of the same. That would clearly show that the rule was intended to be mandatory".

It should be noted that if no report is sent to the accused as envisaged under Rule 9(j) of the Rules it would result in serious inconvenience to the person concerned as the purpose and object of the rule and the relevant statutory provisions are that the accused has an opportunity to effectively meet the report of the Public Analyst which is evidence against him.

In all these three petitions, as already mentioned, P.W. 1, the Food inspector, has not sent the report either by hand or by registered post. There is no mention of the same in the complaint either. Even in his evidence he has not stated anything about it, which clearly proves that the Food Inspector has not complied with the mandatory provisions of Rule 9 (j) of the Rules. It is pertinent to note here that in C.C. No. 1601 of 1976 which is the subject-matter of Cr.R.P.No. 458 of 1978, P.W.1, the Food Inspector, has admitted in unequivocal terms that though he received the report of the Public Analyst, he has not sent the same to the accused by registered post. In the other two cases also he is silent about the same. This makes abundantly clear that the Food Inspector, who was enjoined under the mandatory provisions of Rule 9(j) of the Rules, should have sent the report of the Public Analyst to the accused within 10 days of the receipt of the same, but he has failed to do so. Sri Krishna Bhat also brought to the notice of the Court that the, Complaint lodged by the. Food Inspector is not in conformity with S. 20(1) of the amended Act. Elaborating his argument what he submitted was that after the amendment this is how Section 20(1) reads:

"No prosecution for an offence under this Act, not being an offence under section 14 or section 14A shall be instituted except by or with the written consent of the central Government or the State Government or a person authorised in this behalf, by general or special order, by the Central Government or the State Government;

Provided that a prosecution for an offence under this Act may be instituted by a purchaser referred to in section 12, if he produces in court a copy of the report of the public analyst along with the complaint".

Sri Krishna Bhat, submitted that the Food Inspector of the Puttur Town Municipality is not a government servant and even if he is construed to be a government servant, there is nothing to show in the records that he had obtained the written consent of the State Government to institute criminal prosecution against the accused and that this goes to the very root of the prosecution and on this ground itself the complaints ought to have been rejected by the learned Magistrate.

In view of the interpretation, of Rule 9(j) of the Rules and the findings in the

case it is not necessary to go into this aspect of the matter in detail.

For the reasons stated above. I am unable to agree with the contentions of the learned High Court Government Pleader appearing on behalf of the State, Hence, the petitions are liable to be dismissed and the orders of discharge passed by the learned Magistrate have to be confirmed.

In the result, these revision petitions fail and are dismissed and the orders passed by the Additional Munsiff and judicial Magistrate First Class, Puttur, in C.C.No. 1601 of 1976 on 12-7-1978, in C.C. No. 1148 of 1976 on 25-7-1978 and in C.C.No. 1150 of 1976 on 12-7-1978, discharging the accused in each of the cases, are hereby confirmed.