

(1990) 04 GAU CK 0005

In the Gauhati High Court

Case No : Govt. Criminal Appeal No. 40 of 1983

The State of Assam

APPELLANT

Vs

Sri Nath Mal Goenka and Another

RESPONDENT

Date of Decision : 04-04-1990

Acts Referred:

Prevention of Food Adulteration Act, 1954 — Section 12, 13(2), 13(5), 16, 17
Prevention of Food Adulteration Rules, 1955 — Rule 16, 7, 7(3)

Citation : (1990) 2 GLR 33

Hon'ble Judges : B.P. Saraf, J

Bench : Single Bench

Advocate : B.B. Narzary, P.P, for the Appellant; S.S. Sharma, for the Respondent

Final Decision : Dismissed

Judgement

B.P. Saraf, J.—This is an appeal by the State against the appellate order of acquittal dated 20.7.82 passed by the learned Sessions Judge, Kamrup, Gauhati in C.A. No. 34 (K-3)82, a case under the Prevention of Food Adulteration Act, 1954 (hereinafter referred to as "the Act").

2. On 21.6.78 the Food Inspector, Kamrup visited the premises of a partnership firm, Subhash Trading Company, Gauhati and collected samples of jeera and ajowan for analysis. The samples were forwarded to the Public Analyst, who on analysis found that samples of both the items did not conform to the prescribed standard and therefore, found the same to be adulterated. On the basis of the report of the Public Analyst, prosecution was initiated against the firm and its four partners, The learned Chief Judicial Magistrate, Kamrup, who tried the case acquitted the three of the four partners of the firm on the ground that there was no evidence to show that they were in charge of and responsible for the conduct of the business of the firm at the time of commission of the offence. He however, found the firm and one of its partners, Nathmal Goenka guilty u/s 16/17 read with Section 7 of the Act and convicted them accordingly. Nathmal Goenka was sentenced to rigorous imprisonment for six months and to pay a fine of Rs.

1000/-, in default, further rigorous imprisonment for one month. The firm was sentenced to pay a fine of Rs. 2000/-. On appeal the conviction and sentence were set aside by the learned Sessions judge and the firm and its partner Nathmal Goenka were acquitted of the charge. The order of acquittal was passed mainly on three grounds, namely, (1) that the mandatory requirement of Rule 7(3) of the Rules was violated ; (2) the requirement of Rule 16 of the Prevention of Foods Adulteration Rules 1955 (hereinafter referred to as the Rules) which lays down the manner of taking and sending of samples was not Complied with and (3) the reports of the Public Analyst, which showed the date of receipt of the sample as 20.6.78, a day before the actual date of taking the sample could not be relied upon and this discrepancy, which was common in both the reports could not be overlooked as typographical error. On these grounds the learned Sessions Judge held that the accused persons were entitled to the benefit of doubt and acquitted them.

3. Against the order of acquittal the State has come in appeal. The submission of Mr. B.B. Narzary, learned Public Prosecutor is that the requirements of Rules 7(3) and 16 are directory and non-compliance with the same would not vitiate the prosecution, His further submission is that the wrong date of receipt of sample appearing in the report of the Public Analyst was only a typographical error which could be overlooked.

4. Mr. S.S. Sarma, learned Counsel for the Respondents on the other hand, submits that the requirements of both Rules 7(3) and 16 are mandatory and contravention thereof would be fatal to the prosecution, According to him, these valuable Rules contain safeguards to a person accused of the serious offence of food adulteration and the authorities cannot be allowed to flout the same by treating the provisions as directory. It regard to the wrong date of receipt of sample in the report of Public Analyst. Mr. Sharma submits it is a vital mistake which cannot be overlooked by terming as ""typographical error". The prosecution did not adduce any evidence at all to show that it was a mistake. Under the circumstances according to the learned Counsel, the possibility of any other samples of the very same items hiving been received by the Public Analyst for analysis on the date mentioned in the report cannot be ruled out and so also the possibility of the finding of analysis of other such samples being typed out as the finding of analysis of the samples taken in the instant case. It is, therefore, submitted that the learned Sessions Judge was fully justified in not relying on such a report and acquitting the accused persons from the charge based thereon.

I shall first take up the submissions based on Rule 7(3). Rule 7 deals with the duties of the Public Analyst. Sub-rule (3) thereof requires the Public Analyst to deliver the report of the result of analysis to the Local (Health) Authority within the period specified therein. The said Sub-rule (3), as it stood at the relevant time (1978), reads:

(3) The Public analyst shall within a period of forty-five days from the date of receipt of any sample for analysis deliver to the Local (Health) Authority a report

of the result of such analysis in Form III.

Provided that where any such, sample does not conform to the provisions of the Act of these rules, the public analyst shall deliver four copies of such reports to the said Authority:

Provided further that the public analyst shall forward a copy of such report also to the person who purchased an article of food and forwarded the same to him for analysis u/s 12 of the Act.

The question that arises for determination is whether this provision is mandatory in the sense that its contravention would vitiate the conviction. To decide this question it may be expedient to refer to the history of this sub-rule. Originally, it was in the following terms:

After the analysis has been completed he shall forthwith supply to the person concerned a report in Form III of the result of such analysis.

(emphasis supplied)

It was substituted by the Prevention of Food Adulteration (Amendment) Rules, 1968 by the following:

After the analysis has been completed he shall send to the person concerned two copies of the report of the result of such analysis in Form III within a period of sixty days of the receipt of the sample.

(emphasis supplied).

It was substituted by the existing sub-rule by the Amendment Rules of 1977, which has been set out above. Since then, two more amendments have been made. Though these amendments are not relevant for the purpose of the present appeal, they have an important bearing on the interpretation of this sub-rule, it will be expedient to refer the same. The first amendment was made in the year 1984 with effect from 9.7.84 by which the period of 45 days was further reduced to 40 days. By the second amendment made in the year 1987 with effect from 29.7.87 the word "deliver" in sub-rule was substituted by the words "send by registered post or by hand"

From the reading of Rule 7(3), it is clear that at the relevant time, the duty of the Public Analyst was to deliver the report of analysis to the Local (Health) Authority within 45 days of the receipt of the sample for analysis. In the instant case, admittedly the sample was received by the Public Analyst on 22.6.78 and the report of the result of analysis was delivered to the Health Officer on 19.9.78 after about 88 days, much beyond the period of 45 days specified in Rule 7(3). Rule 7(3) was thus dearly violated. If the requirement is mandatory and non-compliance with it is fatal, the order of acquittal would be justified, Otherwise not.

6. The decision, therefore, hinges on the determination of the question whether Rule 7(3) is mandatory or directory. To determine the question whether a

particular statutory provision is mandatory or directory regard must be had to the context, subject matter and object of the statutory provisions in question. No rule of universal application can be laid down. It is the real intention of the legislature that will be determinative. If the object of the enactment would be defeated by holding the same directory it will be construed as mandatory. The use of the expression "shall" in the absence of anything to the contrary, is also indicative of the mandatory nature of the provisions more particularly those dealing with duties of public officers. These principles are too well known to need any elaboration. The question whether Rule 7(3) is mandatory or directory has to be determined in the light of these principles.

7. First of all, I shall try to ascertain the legislative intent and Purpose of the requirement in question in Rule 7(3) in the light of the object and scheme of the Act. The object of the Act is to prevent adulteration of foodstuff, and the manufacture, storage and sale of adulterated foodstuffs for human consumption. It is a social legislation meant for the protection of the general public. Its aim is to ensure the purity of the articles of food sold to the public and to eradicate the anti-social evil of adulteration. It contains stringent provisions to achieve that object. It imposes strict liability, Mens rea is not an ingredient of an offence under this Act. An act done in contravention of the provisions of the Act or the Rules framed thereunder is an offence irrespective of the intention of the person who is made liable. Ignorance of the vendor about the nature, substance or quality of the article of food is no defence. The report of the Public Analyst is the foundation of the prosecution. It is in this context, that it became necessary to provide adequate safeguards to the persons from whom samples are taken for analysis and who are charged with commission of serious offence of food adulteration, A close look at the scheme of the Act and the Rules and the various provisions contained therein, makes it abundantly clear that the law makers were conscious of the necessity of giving due protection or safeguards to the innocent persons against any abuse or misuse of the power under the Act by the various authorities as well as against the injustice and hardship that might be caused due to carelessness or recklessness of the authorities at various stages. It is with this object in view that elaborate procedure and manner performing every important act, right from the stage of purchasing the article of food for analysis upto the delivery of the report of the Public Analyst to the Local (Health) Authority, have been laid down. These procedures are not empty formalities. There is a purpose behind them. Non-compliance with some of them might not be fatal. Such case would fall in the zone of irregularity which would only affect the weight of the evidence or put the Court on the guard to accept the evidence and materials placed by the prosecution with utmost care and caution. On the other hand, there are requirements which are vital and go to the root of the prosecution. Any non-compliance with or contravention of such requirements would definitely be fatal to the prosecution. The requirements falling in the latter category are termed as mandatory, in the sense that the expression is commonly understood it is to be decided in the case in which of the two categories the

requirements of Rule 7(3) would fall.

7A. As earlier stated, the entire foundation of the prosecution is the report of the Public Analyst. It can be demolished only by obtaining a certificate from the Central Food Laboratory in accordance with the provisions contained in Sub-section (2) of Section 13 of the Act. That can be done only on receipt of a copy of the report of analysis by the accused from the Local (Health) Authority who shall forward it to him after launching the prosecution. Section 13(2) thus gives a very valuable right to the accused person. In fact, that is only way in which the accused can prove his innocence.

8. Rule 7(3) along with its legislative history has been set out above. This rule underwent many changes. The most important changes which are relevant for deciding the point at issue are as follows. Originally this rule required the Public Analyst to send the report to the Local (Health) Authority. This was changed and at the relevant time, under the rule as it stood, he was required to deliver the report to the authority concerned. The next important change that may be noticed is that in the original rule there was no time limit for sending the report. It was to be sent forthwith after analysis. In 1968, a time limit of 60 days from the date of receipt of the sample was introduced for the purpose. This time limit was reduced to 45 days with effect from 4.1.77. Thus at the relevant time the Public Analyst was required to deliver to the Local (Health) Authority a report of the result of the analysis in Form III within a period of 45 days of the receipt of the sample for analysis. The time limit, however, was further reduced to 40 days in the year 1984, with which we are not concerned in the present case. Similarly, the word "deliver" has "also been substituted with effect from 29.4.87 by the words "send by registered post or by hand". The Change made in Rule 7(3) by the law maker from time to time cannot be taken lightly. These were made consciously and evidently with a purpose in mind. The object of fixing a time limit for delivery of the report within a specified time can very well be visualized. Firstly, it is a guarantee against the analysis having been made by the Public Analyst within such period. It leaves no scope for suspicion that the report might have been back dated. The very fact that the report has to be delivered within the specified time ensures that the analysis will be done within that period itself. This scheme has been preserved even after the amendment made in 1987, which now allows the report to be sent by "registered post or by hand". Besides, any sample of food taken for analysis despite all preservative used at the time of taking the sample might in many cases deteriorate in course of time and may result in misleading reports. The right of the accused to get the sample further analyzed by the Central Laboratory u/s 13(2) of the Act might also be seriously affected by delay in submitting the report by the Public Analyst. Considering all these factors, as also the seriousness of an offence and the strict liability which has been fastened to a vendor under the Act, the duty has been cast on the Public Analyst under Rule 7(3) to deliver the report of his analysis to the Local (Health) Authority within specified time. This indicates that the time limit specified in Rule 7(3) is mandatory. This view gets further support from the fact

that the rule-making authority reduced the time from 60 days to 43 days and then to 40 days. The legislative intent will be frustrated, if the rule is held to be directory and the time limit is ignored.

9. The mandatory nature of the requirements of Rule 7(3) can also be inferred from Anr. circumstance, i.e. the substitution of the word "deliver" in place of the word "send" with effect from 4.1.77. Earlier the duty of the Public Analyst was confined to sending the report. By the amendment, the scope of his duty was enlarged and he was required not only to "send" but to "deliver" the report of analysis to the Local (Health) Authority, The two expressions "send" and "deliver" are not interchangeable. They refer to two different acts. The word "send" in connection with any writing or notice means "to deposit in the mail or deliver for transmission with any other usual means of communication with postage or cost of transmission," The word "delivery" on the other hand, denotes an act by which the res or substance there of is placed within the actual or constructive possession or control of Anr. . (See Black's Law Dictionary). Evidently, the expression "delivery" requires something more to be done than sending or supplying, With reference to the duty of the Public Analyst under Rule 7(3) it can be said that when a duty is cast on him to deliver the report within a specified time to the Local (Health) Authority, it will not be enough that he sends the report. He has to go a step ahead and deliver the report in the tense that it is placed within the actual or constructive possession or control of such authority. That of course does not mean that he should himself go and deliver. What is required is that he must ensure the delivery within the time specified therein. This change of duty of the Public Analyst from sending the report to "delivery" thereof is also indicative of the legislative intent of Rule 7(3).

10. In the light of the discussion made above, I am of the opinion that Rule 7(3) is mandatory and non-compliance with its requirements will be fatal to the prosecution.

11. While arriving at this decision, I have also considered the decisions of the various High Courts on this point. Most of the High courts appear to have taken the view that Rule 7(3) is mandatory. Reference may be made in this connection to a Division Bench decision of the Kerala High Court in *The Food Inspector, Palghat Municipality Vs. K.M. Moose and Others*, decision of the Bombay High Court in *State of Maharashtra v. Shivraj Shankar Gourav* AIR 1985 FAJ 103 and *State of Maharashtra v. Z.V. Paryan* 1981 Cri. L.J. 283, decision of Madras High Court in *Public Prosecutor v. Meenakshi Achi* 1972 Cri. L.J. 1984 decision of Himachal Pradesh High Court in *Moninder Singh v. State of H.P.* 1985 Cri L.J. 118 and *Amar Singh v. State of Haryana* 1987 FAJ 88. In these cases Rule 7(3) has been held to be mandatory.

12. The High Court of Andhra Pradesh has taken a contrary view and in *B. Deb Rao v. State of A.P.* 1986 Cri. L.J. 495, held that the time limit prescribed in Rule 7(3) is only directory and not mandatory. However, the Court made it directory, its requirement cannot be ignored. It observed:

This does not, however, mean that the Public Analyst can ignore the said requirement. He must in all cases, observe the said time limit. Indeed, where there is undue delay, the Court may ignore the report on that ground alone. In the event of undue delay, the Court may presume prejudice, without calling for proof thereof....

13. I have considered these decisions. For the reasons discussed above, I find it difficult to agree with the aforesaid decision of the Andhra Pradesh High Court. I find myself in agreement with the ratio of the decisions which have held it to be mandatory. Accordingly, I hold that Rule 7(3) is mandatory and non-compliance with its requirements would be fatal to the prosecution.

14. Now, it is turn to Rule 16 of the Rules, which deals with the manner of packing and sealing the sample. A very detailed procedure has been laid down in the said Rule, which was amended from time to time. Rule 16, provides:

16. Manner of packing and sealing the samples--All samples of food sent for analysis shall be packed, fastened and sealed in the following manner, namely:

(a) The stopper shall first be securely fastened so as to prevent leakage of contents in transit ;

(b) The bottle, jar or other container shall then be completely wrapped in fairly strong thick paper. The ends of the paper shall be neatly folded in and affixed by means of gums or other adhesive ;

(c) A paper slip of the size that goes round completely from the bottom to top of the container, bearing the signature and code and serial number of the Local (Health) Authority, shall be pasted on the wrapper, the signature or the thumb impression of the person from whom the sample has been taken being affixed in such a manner that the paper slip and the wrapper both carry a part of the signature or thumb impression:

Provided that in case, the person from whom the sample has been taken refuses to affix his signature or thumb impression the signature or thumb impression of the witness shall be taken in the same manner ;

(d) The paper cover shall be further secured by means of strong twine or thread both above and across the bottle, jar or other container, and the twine or thread shall then be fastened on the paper cover by means of sealing wax on which there shall be at least four distinct and clear impressions of the seal of the tender, of which one shall be at top of the packet, one at the bottom and the other two on the body of the packet. The knots of the twine or thread shall be covered by means of sealing wax bearing the impression of the seal of the sender.

15. It is evident that every minute detail about the manner of packing the sample has been specified in the rule itself. The law making authorities could have very well done away with all that by simply using the expression like "shall be packed properly". But it did not do so--definitely with a purpose. It did not

intend to give any discretion to the authority taking the sample in the matter of manner of packing and sealing of samples. These requirements were intended to be complied with scrupulously. These are not mere guidelines. The object of these requirements is clear. A person from whom sample is taken runs the risk of prosecution and conviction if the sample is found to be adulterated by the Public Analyst. A very strict liability has been created by the Act in this regard. Even the proof of ignorance of the vendor about quality or content of the article is of no consequence. It is, therefore, imperative that the sample taken from him reaches in tact and elaborate procedure and manner of packing and sealing have been laid down to achieve that object. It is in this context that the requirement of securing the cover of the container of the sample "by means of strong twine or thread, both above and across the bottle, jar or other container" assumes great importance, If a container is secured by means of strong twine or thread not "above and across" but "above or across" it might be possible, even while keeping the knot of the twine on thread intact, to remove the same, replace the contents, and put back the thread in its original position. That is not possible in a case where a container is secured by means of twine or thread, both above and across. This is a very important safeguard given to the citizens against any possibility of mischief against them and the same cannot be allowed to be treated lightly or whittled down by treating the same as directory. The requirements of Rule 16 more particularly Clause (d) thereof, therefore, have to be held to be mandatory. The admitted position in the instant case is that the container was not secured by thread both above and across the bottle. It was only above the container not both above and across. Under the circumstances the inescapable conclusion is that the mandatory requirement of Rule 16 was not complied with.

16. I may now deal with the last submission, which is based on the wrong date of receipt of sample appearing in the report of the public Analyst. The sample in the instant case was obtained on 21.6.78 and it was received by the Public Analyst on 22.6.78. However, in the report of the analysis, the date of receipt of sample was shown as 20.6.78, a day before the same was taken. The accused contended that such a report cannot be acted upon whereas the prosecution tried to get but of the difficulty by terming it as typographical error. I have given my careful consideration to the matter, In my opinion, this discrepancy cannot be brushed aside, in the absence of anything more, by treating It as typographical error. The entire prosecution is based on the report of the Public Analyst it can be received in evidence under Sub-section (5) of Section 13 of the Act without examination on of the Public Analyst as a witness. The information contained in the report is the basis on which the prosecution is launched. The report, therefore, must be a report in relation to the sample taken from the accused, If the date of receipt of the sample is shown as a day before the date when the sample was taken from the accused lit give rise to suspicion as to whether the report relates to the sample taken from the accused or not. It might be a typographical error--might not be also. The possibility of report of analyst of

similar article received by the Public Analyst earlier having been wrongly reproduced in this report also cannot be ruled out. This is a serious matter and goes to the root of the prosecution. If the report relates to a sample received by the Public Analyst on 20.6.78, it cannot be a report of analysis of the sample collected from the accused. If it was a typographical mistake, the prosecution could have produced the Public Analyst along with the original records before the Court and examined him to prove the same. No such attempt was made. In a criminal trial of such serious nature it is not only difficult but also most improper to draw Inference of a typing mistake regarding a very vital information in a document which is the foundation of the prosecution. Besides, a Public Analyst, who very well knows that on the basis of his report, a citizen might be convicted and sentenced to imprisonment, cannot be allowed to take the matters so lightly and sign the report in a mechanical manner. He must exercise utmost care and caution in comparing all the details including the dates of receipt of sample himself to ensure that they have been properly reproduced. Otherwise the report will lose its credibility. If the plea of the prosecution that the date of receipt of sample was wrongly typed in the report, can be accepted, without any evidence or material in support thereof, what is the guarantee that the specifications noted therein on the basis of which the finding of adulteration is arrived at is correct. In such case the Court have no option but to refuse to act upon the report at all. In the Instant case, on consideration of the facts and circumstances, the learned appellate Court below has rightly held that no reliance can be put on the report of the Public Analyst for the purpose of conviction of the accused.

17. Thus in the Instant case, the mandatory requirements of Rules 7(3) and 16 were not complied with. The report of Public Analyst also could not be acted upon for the reasons indicated above. The learned Sessions Judge, therefore, was justified in setting aside the conviction and acquitting the accused persons. I, therefore, do not find any merit in the appeal and the same is accordingly, dismissed.