

(2023) 10 KL CK 0187

In the High Court Of Kerala

Case No : Criminal Revision Petition No. 1503 Of 2012

T.J.Thomas

APPELLANT

Vs

Food Inspector, Kanhangad Circle Hosdurg P.O., Kanhangad

RESPONDENT

Date of Decision : 25-10-2023

Acts Referred:

Code of Criminal Procedure, 1973 — Section 313
Prevention of Food Adulteration Act, 1954 — Section 2(ia)(j), 7(i), 14A, 16(1A)(i),
16(1)(d), 16(1)(c), 23(1A)(ee)

Citation : (2023) 10 KL CK 0187

Hon'ble Judges : C.S.Dias, J

Bench : Single Bench

Advocate : George Kutty Mathew, C.N.Midhun, Seetha S

Final Decision : Allowed

Judgement

C.S.Dias, J

1. The revision petition is filed questioning the legality, correctness and propriety of the judgment in CrI.A.No.17/2011 of the Court of the Additional Sessions Judge, (Adhoc-I), Kasaragod Division (Appellate Court) and C.C. No.280/2009 of the Court of the Judicial First Class Magistrate-II, Hosdurg(Trial Court), holding the revision petitioner guilty for the offenceS under Sections 16(1-A)(i) read with Section 7(i) & 2(ia) and (j) of the Prevention of Food Adulteration Act, 1954 and Rule 29 of the PFA Rules(in short, 'Act & Rules). The revision petitioner was the third accused and first respondent was the complainant before the Trial Court. For the sake of convenience, the parties are referred to as per their status before the Trial Court.

Relevant facts:

2. The prosecution case was that, on 24.09.2008 the complainant along with the witnesses inspected the premises of Vellarikundu Trading Company in Balal Grama Panchayat. At the time of inspection, the first accused was conducting the

trade of food articles in the shop. The complainant purchased three sealed packets of banana chips containing 160 gms each. Consequently, he sent one sample for analysis to the Public Analyst, Kozhikode. The Public Analyst, by Ext P10 Form III, found that the sample was adulterated, since it contained a synthetic food colour of tartrazine, which is in contravention of Rule 29 of the PFA Rules. Thus, the accused have committed the above offence.

3. The accused denied the accusation read over to them.

4. In the trial, the complainant examined PWs 1 to 4 and marked Exts P1 to P25 in evidence. The accused denied the incriminating circumstances appearing against them in the questioning under Section 313 of the Code of Criminal Procedure, 1973.

5. The learned Magistrate, after analysing the materials on record, found the accused guilty and convicted and sentenced them to undergo simple imprisonment for a period of one year and pay a fine of Rs.2,000/-, and in default to undergo simple imprisonment for a further period of three months. The third accused was further sentenced to undergo imprisonment (till the rising of the Court) and pay Rs.500/-.

6. Aggrieved by the said judgment, the accused Nos. 1 & 2 filed CrI.A. No.14/2011 and accused No.3 filed CrI.A.No.17/2011 before the Appellate Court.

7. The Appellate Court, after re-appreciating the materials placed on record, by the impugned common judgment, dismissed both the appeals and confirmed the conviction and sentence passed by the Trial Court.

8. It is challenging the concurrent judgments of the courts below, the third accused has filed the revision petition.

9. Heard; Sri. Raju Joseph, the learned Senior Counsel appearing for the revision petitioner and Smt.Seetha S., the learned Senior Public Prosecutor appearing for the respondents.

10. The learned Senior Counsel appearing for the revision petitioner placed reliance on the judgments of the Honourable Supreme Court in *Pepsico India Holdings Pvt. Ltd v. Food Inspector and Another* [2010 (4) KHC 767] and the Division Bench of this Court in *Rasheed v. Food Inspector* [2016 (2) KLT 390] and argued that since the sample was analysed in a laboratory not recognised by the Central Government as provided under Section 23(1-A)(ee) of the Act, the prosecution has to fail and the revision petitioner is to be acquitted. He submitted that without even going into merits of the other grounds urged, the revision petition is to be allowed.

11. The learned Senior Public Prosecutor on the contrary contended that the decision in *Pepsico India Holdings Pvt. Ltd. (supra)* needs to be reconsidered, particularly because Section 8 of the Act enables the Central Government and the State Government to appoint a Public Analyst for the local areas as assigned

by the Central Government and State Government. In the State of Kerala, Public Analysts have been appointed invoking the above provision. Therefore, the decision in Pepsico India Holdings Pvt. Ltd. (supra) has no application to the case on hand. Hence, the revision petition may be dismissed.

12. Is there any illegality, impropriety or irregularity in the impugned judgments.

13. The Hon'ble Supreme Court rendered the judgment in Pepsico India Holdings Private Ltd. (supra) on 18.11.2010. Subsequent to the pronouncement of the judgment, there were several cases filed before this Court to quash the proceedings initiated under the Act.

14. There was cleavage of opinion and divergent views taken by three learned Single Judges of this Court in interpreting the ratio decidendi in Pepsico India Holdings Private Ltd.(supra).

15. Due to cleavage of opinion in interpreting the above judgment, a bunch of cases were referred to a Division Bench of this Court for an authoritative pronouncement.

16. Accordingly, in Rasheed v. Food Inspector (supra), a Division Bench of this Court, on a threadbare analysis of the law laid down in Pepsico India Holdings Private Ltd. (supra), has answered the reference in the following manner:

"18. Bearing in mind the fact that the Hon'ble Apex Court in Pepsico's case (supra) held that the provisions under S.23(1A)(ee) and (hh) are not directory and that this Court has erred in holding that they are only enabling provisions we will proceed further to answer the referred questions. For answering the terms of reference a broad understanding of the said declaration is necessary. When once the Hon'ble Apex Court held that the said provisions are not directory and the failure to adhere to the provisions cannot be said to be not fatal to the prosecution it has to be understood and applied in all cases where a public analyst was to carry out an analysis and to give a report to form the basis for launching the prosecution. Thus, evidently, for that purpose the report should be one made after conducting an analysis in a laboratory defined under S. 23(1A) (ee). It is to be noted that after the decision in Pepsico's case (supra) by the Hon'ble Apex Court a notification was followed whereby Rule in relation to S.23(1A)(hh) was framed as R. 4(9) of the PFA Rules. Thus, in the light of Pepsico's case (supra) in order to be reliable and to be taken the basis for the purpose of launching prosecution a report by a public analyst must be one made after conducting an analysis in a laboratory defined under S.23(1A)(ee) of the Act. In that context the indisputable common case is that till the repealing of 1954 Act no laboratory was defined in terms of the provision under S.23(1A) (ee). If that be so, there could not have been any question of conducting an analysis by a public analyst under the PFA Act in a laboratory defined under S. 23(1A)(ee) of the PFA Act. In view of the above findings and conclusions we will answer the questions referred. First question referred is as follows: (1) Could all the prosecutions under the Act of 1954 be stifled by raising a contention that the

laboratories or methods of analysis were not defined? In the light of what we have held herein before the said it can only be answered in the following manner: Wherever an analysis has to be conducted from a laboratory to find whether the particular sample of item of the particular food article is adulterated, to form the basis for initiation of prosecution under the PFA Act the report of the analyst in relation to that sample must be one conducted in a laboratory defined under S.23(1A) (ee). Since no such laboratory was defined till the repealing of the PFA Act wherever an analysis from a laboratory was inevitable for making a report regarding item concerned as adulterated there cannot be any successful prosecution in the absence of such a report. In such circumstances the prosecution proceedings have to be terminated for the failure to define laboratories in terms of S. 23(1A)(ee) and the consequential failure to conduct an analysis of the particular sample by the public analyst from such a laboratory. In other words taking note of the nature of the food article involved and the method to be employed to find out the adulteration if an analysis from a laboratory is not at all required in such circumstances the prosecution cannot be stifled on the ground that the laboratories in terms of provisions under S.23(1A) (ee) were not defined. It cannot be said that all the prosecutions under the 1954 Act should be stifled owing to the failure to define laboratories in terms of S.23(1A)(ee) as there may be cases registered against persons for contravention of the provisions under S.16(1)(c), S.16(1)(d) and S.14A (Prevention of Food Adulteration Act, 1954). So also a case where the Article in food was lifted and sent for analysis prior to the introduction of the provisions under S.23(1A)(ee) viz. 01/04/1976 cannot be stifled as anything previously done could not be invalidated owing to the failure to define laboratory in terms of S.23(1A)(ee) in view of the provisions under S.23(2). In the context of the term of reference No. 1 it is to be noted that subsequent to Pepsico's case (supra) the method of analysis was, in fact, defined and it was brought into by incorporating R.9(4) in the PFA Rules with effect from 25/03/2008.

19. The second question referred is as hereunder: (2) Is it proper to hold that since Central Government has not taken steps to effectuate S.23(1A)(ee) and (hh) of the Act of 1954, no prosecution will lie under the Act of 1954 even if it is established that the standards prescribed for various food items have been flouted? In respect of items of food articles where, for holding that the standard prescribed for the same was flouted or it was not maintained if an analysis from a laboratory is inevitable in such cases also if the analysis was conducted by the public analyst under the PFA Act in a laboratory not defined in terms of S.23(1A) (ee), in the light of Pepsico's decision, no prosecution will lie based a report made after such an analysis. The last question referred is follows: (3) Whether the ratio in Pepsico's case (supra) can be applied to all cases of alleged food adulteration under the Act of 1954 irrespective of the fact whether or not standards have been prescribed for food items? In cases where standard is prescribed or in respect of a food item to say that the said item of food is adulterated and to launch the prosecution, if an analysis from a laboratory by a

public analyst is inevitable in such circumstances also the ratio in Pepsico's case (supra) will be applicable. In the light of the answers to the referred questions it has become absolutely unnecessary to go into the question referred herein before based on the decision in Narayana Reddiar's case which was declined to be referred.

20. Having answered the reference as above, we are of the view that the fate of the criminal revision petitions and the Crl MCs depend upon the question whether in respect the item of food involved in individual cases, the sample of which was collected, an analysis from a laboratory is required or not for holding the same as adulterated. If the answer is in the affirmative necessarily in the absence of a report made after an analysis from a laboratory defined in terms of the provisions under S.23(1A)(ee) there can be no successful prosecution. We will therefore, consider the individual cases in the aforesaid manner and in the light of the answers to the referred questions. Needless to say that if the answer to the aforesaid question in respect of a particular case is in the negative there can be no legal impediment in continuing with the prosecution. In view of the fact that till the repealing of the said Act no laboratories were defined in terms of S.23(1A)(ee) all those cases have to be decided based on a consideration as aforesaid."

(emphasis given by me)

17. The exposition of law in Rasheed v. Food Inspector (supra), following the declaration in Pepsico India Holdings Private Ltd (supra) leaves no room for any further interpretation on the question that, if an allegedly adulterated food sample is not analysed in a laboratory under Section 23(1-A)(ee) of the Act, the same is fatal to the prosecution and the prosecution has to necessarily fail.

18. In the instant case, the prosecution was launched on the basis of Ext P10 Form III report of the Public Analyst, wherein it was found that the food sample was adulterated, since it contained synthetic food colour of tartrazine, which is in contravention of the Rules.

19. Admittedly, the food sample was analysed by the Public Analyst in a laboratory, which is not notified by the Central Government under Section 23(1-A) (ee) of the Act. Thus, the ratio decidendi in Pepsico India Holdings Private Ltd and Rasheed vs. Food Inspector (supra) stands attracted and prosecution fails. Consequentially, the revision petitioner/third accused is to be found not guilty and has to be acquitted.

20. In the result,

(i) The revision petition is allowed;

(ii) The impugned judgments in Crl.Appeal No.17/2011 and in C.C. No.280/2009 of the courts below are set aside.

(iii) The revision petitioner is held not guilty and is acquitted, and is set at liberty.

(iv)The bail bonds executed by the revision petitioner and his sureties are hereby cancelled.