Food Inspector, Ernakulam And Anr vs P.S. Sreenivasa Shenoy on 19 July, 2000

Bench: K.T.Thomas, R.P.Sethi

PETITIONER:
FOOD INSPECTOR, ERNAKULAM AND ANR.

Vs.

RESPONDENT:
P.S. SREENIVASA SHENOY

DATE OF JUDGMENT: 09/07/2000

BENCH:
K.T.Thomas, R.P.Sethi

JUDGMENT:

THOMAS, J.

Delay condoned. Leave granted.

When Report of a Public Analyst was superseded by a certificate of Director of Central Food Laboratory, is it necessary to obtain a fresh consent to institute prosecution and recommence the proceedings under the Prevention of Food Adulteration Act, 1954 (for short the Act)? A Single Judge of the High Court of Kerala held that it is necessary, and directed the trial magistrate to wait for some more time and in the event of no such consent of the appropriate authority is obtained and produced before the magistrate within a reasonable time not exceeding one month for the purpose, discharge the accused. The Food Inspector who instituted the prosecution as well as the State have filed this appeal by special leave against the said order of the High Court.

The facts out of which the said order happened to be passed, are the following: Appellant Food Inspector filed a complaint against the respondent with the following allegations: While the complainant was acting as Food Inspector of Mobile Vigilance Squad (Ernakulam) he visited the grocery shop of the respondent on 15.4.1996 and purchased 750 gms. Of Toor Dal for the purpose of taking sample as per the provisions of the Act. The sample was taken in the manner provided by the Act and one of the three parts of the sample was sent to the Public Analyst who, after analysis, sent a Report stating that the sample contained Kesari Dal and hence it was adulterated. Thereupon the complaint was filed on the premise that the respondent has committed the offence under Section 16(1-A) of the Act read with Section 2(1)(h) and Section 7(1) of the Act.

Additional Chief Judicial Magistrate, Ernakulam before whom the complaint was filed issued process to the respondent as accused. After entering appearance in the case the respondent moved an application for sending a second part of the sample to the Director of Central Food Laboratory. It was sent accordingly and upon the same being analysed at the Central Food Laboratory the Director thereof sent a certificate to the trial court stating that the sample does not contain Kesari Dal but the food article in the sample was adulterated as it contained synthetic Coal Tar Dye (Tarterzine). On receipt of the said Certificate the trial magistrate converted the case from summary trial to a warrant case trial. After examining three witnesses for the prosecution the trial magistrate framed a charge against the accused on 10.3.1997. The material portion of the charge reads thus: Whereas on 15.4.1996 at 2 p.m. Food Inspector had purchased 750 grams of Toor Dal exposed for sale in your shop in a bag for Rs.21/- and when it was sent for analysis to the Central Food Laboratory it was found that the Toor Dal purchased from you was below standard and had contained synthetic colour and was adulterated as revealed from examination of prosecution witnesses and records and your act is an offence punishable under Section 2(1-A)(a)(h); 7(i) read with 16(1-A)(I) of the Prevention of Food Adulteration Act, 1954 and that you are to be tried for the aforesaid offence before this Court.

Respondent filed a revision before the High Court in challenge of the order framing charge. The counsel for respondent contended before the High Court that no such charge could be framed since a new offence had been revealed by the Certificate of the Director of Central Food Laboratory. He also contended, alternatively, that when the Report of the Public Analyst was found to be wrong the only course open to the court was to acquit the accused because the complaint was based on that Report. Lastly, it was contended that the complainant had not obtained sanction under Section 20 of the Act on the strength of the new facts revealed in the Certificate issued by the Director of Central Food Laboratory and hence a fresh sanction is necessary for proceeding with the case.

Learned Single Judge did not accept the first set of contentions. However, learned Single Judge found the last contention acceptable in the light of a decision rendered by the Calcutta High Court in M/s. S.M. Anwar & Co. v. State of West Bengal (1994 All India Prevention of Food Adulteration Journal 594). Learned Single Judge extracted the following passage from the above said Calcutta decision:

> Since however, the certificate of the Director of Central Food Laboratory discloses a totally different kind of adulteration than what was mentioned in the report of the Public Analyst and since the report of the Public Analyst has been totally overturned and negatived to the point of no offence, by the certificate of the Director, Central Food Laboratory, I must hold that the prosecution cannot continue on a totally new fact about the nature of adulteration as indicated in the certificate of the Director without obtaining necessary consent from the appropriate authority.
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> However, learned Single Judge of the High Court of Kerala did not choose to consider how far the said decision of the Calcutta High Court is legally adoptable, but merely followed that decision and held thus: Accepting this decision, I have to hold that a fresh sanction is necessary to proceed further with the case. Therefore, I direct that the learned Magistrate, before proceeding further, will give the prosecution an

opportunity to place the certificate of the Director of Central Food Laboratory before the appropriate authority for consideration and consent for continuance of the prosecution and in the event of no such consent of the appropriate authority is obtained and produced before the Magistrate shall discharge the accused and drop the present proceedings.

Ms. Malini Poduval, learned counsel for the State of Kerala, contended first that there was no question of any fresh sanction or consent to be obtained in this case as the prosecution was not instituted even earlier with any consent of the Government, because the complainant was an authorised person, falling within the purview of Section 20(1) of the Act, to institute the complaint. The said sub-section reads thus: No prosecution for an offence under this Act, not being an offence under Section 14 or Section 14-A, 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 or recognised consumer association referred to in Section 12, if he or it produces in court a copy of the report of the public analyst along with the complaint.

(As the sub-section stands now subsequent to the amendments carried out therein by Act 34 of 1976) The sub-section envisages five different authorities/persons any one of whom can institute the prosecution for an offence thereunder. First is by the Central Government; second is by a person authorised in this behalf by general or special orders of the Central Government; third is by State Government; fourth is by a person authorised in this behalf by general or special orders of the State Government, and fifth is by any person with a written consent of any of the other four authorities/persons.

Learned counsel for the appellant State invited our attention to a notification issued by the Government of Kerala dated 20.3.1996 (it was published in the Gazette dated SRO 320 of 1996) by which food inspectors of the State have been authrorised to institute prosecution proceedings under Section 20 of the Act. But the said notification was not considered by the High Court.

Shri Romy Chacko, learned counsel for the respondent submitted that the High Court was not told about the said general authorisation and hence the learned Single Judge would have proceeded on the premise that the prosecution was instituted on the strength of the written consent granted to the complainant in respect of this case. We do not think it necessary to countenance the said contention whether the prosecution was instituted with the written consent envisaged in Section 20 of the Act or whether it was instituted under a general authorisation made by the State Government. We propose to proceed on the assumption, without prejudice to the aforesaid contention, that the appellant instituted the prosecution proceedings on the strength of the

written consent of one of the authorities concerned.

The stage at which the prosecution proceedings reached in the trial court was, as pointed out above, the receipt of the Certificate from the Director of the Central Food Laboratory holding that there is no Kesari Dal in sample, nevertheless the sample is adulterated inasmuch as it contained synthetic Coal Tar Dye. When the Certificate superseded the Report of the Public Analyst the latter stands sunk to the bottom and in that place the Certificate alone would remain on the surface of evidence and hence that certificate alone can be considered as for the facts stated therein regarding the sample concerned. Thus the real contention posed is whether a fresh consent of the authority concerned is required when the said Certificate has taken the place of the Report of the Public Analyst.

Shri Romy Chacko, learned counsel for the respondent, based his contention on the language of Section 20 of the Act as well as Section 216 of the Code of Criminal Procedure. He made an endeavour to take support from the decisions of certain High Courts, including the decision of a Full Bench of the Himachal Pradesh High Court. Ms. Malini Poduval, on the other hand, contended that the consent contemplated in Section 20 of the Act is only for the institution of the prosecution and once the prosecution has been instituted there is no provision for instituting the same complaint over again. Learned counsel invited our attention to the decisions of certain other High Courts, including a Full Bench decision of the High Court of Gujarat, in support of her contention.

Before we refer to the decisions of the High Court it is necessary to examine the relevant provisions of the Act. Section 10 of the Act empowers a Food Inspector to take sample of any article of food from any person selling such articles and to send such sample for analysis to the Public Analyst appointed for the local area within which the sample has been taken. Section 11 says that when a food inspector takes a sample of food article for analysis he shall divide the sample then and there into three parts in the manner prescribed therein and send one of the parts of the sample to the Public Analyst, while the remaining two parts of the sample shall be forwarded to the Local Health Authority.

The purpose of sending the remaining two parts of the sample to the Local Health Authority is two-fold. One purpose is to use one of the parts if and when the Public Analyst or the food inspector requisition the Local Health Authority for sending one of those parts of the sample again to the Public Analyst on the ground that the first part of the sample was lost or damaged. This is actually a reserve purpose to meet any contingency. The second purpose is to send one of the parts to the Director of the Central Food Laboratory, if so required under Section 13 of the Act.

Section 13(1) of the Act says that the Public Analyst shall deliver a report of the result of the analysis of the food article submitted to him, to the Local Health Authority.

Sub-section (2) of Section 13 is the important provision in this context and hence it is extracted below:

On receipt of the report of the result of the analysis under sub-section (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 Section 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.

Thus the stage for sending the other part of the sample to get it analysed by the Central Food Laboratory arises only during the post-institutional proceedings of the prosecution in the court. It is the courts function to dispatch the other part of the sample to the Director of the Central Food Laboratory. The Director shall complete the analysis within one month of the date of receipt of the part of sample and send the Certificate to the court before which the prosecution is pending.

Section 13(2-D) says that the court shall not continue with the proceedings pending before it until the receipt of the Certificate of the analysis from the Director of the Central Food Laboratory. The purpose of keeping the trial under suspended animation is that further proceedings can be revived only after receipt of the Certificate, because the Certificate must, under law, supersede the report of the Public Analyst. It is a statutory operation as can be seen from sub-section (3) which says that the certificate issued by the Director of the Central Food Laboratory under sub-section (2-B) shall supersede the report given by the Public Analyst under sub-section (1). In this context a reference to sub-section (5) will also be advantageous and it is extracted below: Any document purporting to be a report signed by a public analyst, unless it has been superseded under sub-section (3), or any document purporting to be a certificate signed by the Director of the Central Food Laboratory, may be used as evidence of the facts stated therein in any proceeding under this Act or under Section 272 to 276 of the Indian Penal Code (45 of 1860):

Provided that any document purporting to be a certificate signed by the Director of the Central Food Laboratory not being a certificate with respect to the analysis of the part of the sample of any article of food referred to in the proviso to sub-section (1-A) of Section 16 shall be final and conclusive evidence of the facts stated therein.

The aforesaid scheme of the Act, particularly the setting of different sub-sections in Section 13 very forcefully indicate that the certificate of the Director of the Central Food Laboratory can be brought

in evidence only in the post-institutional stage of a case, whereas the report of the Public Analyst can be obtained during pre- institution stage of the prosecution. There is no scope for countenancing a situation when prosecution proceedings can be instituted with the certificate of the Director of the Central Food Laboratory. What was in evidence in the form of Report of the Public Analyst stands substituted, during the evidence stage, by the Certificate of the Director of Central Food Laboratory. In other words, after evidence stage is commenced a new document would take the place of an existing material already admitted in evidence. Thereafter no legal provision requires the case to be switched back to the pre-institution stage.

That apart, what is the need for obtaining a fresh consent when the certificate of the Director of the Central Food Laboratory has reached the court. Shri Romy Chacko, learned counsel, contended that the authority consenting prosecution must apply his mind to the facts of the case for satisfying himself that the facts warrants a prosecution and a prima facie case exists against the alleged offender. Learned counsel relied on the decisions in the State of Bombay v. Parshottam Kanaiyalal (AIR 1961 SC 1) and A.K. Roy and anr. V. State of Punjab and ors. {1986(3) FAC 66}. The purpose of insisting that the consenting authority should seriously apply his mind before according consent for launching prosecution, is to prevent unnecessary or frivolous prosecution at the instance of any complainant against traders in food articles. But once prosecution is instituted validly the matter is in the hands of the judicial functionary and further proceedings can be controlled by such functionary. The authority granting consent for institution of prosecution is in no way more suited for preventing unnecessary prosecution than judicial functionaries. Therefore, a switch back to the pre-institution stage is unnecessary and hence unwarranted.

Different High Courts have taken two different views on the above legal proposition. We may first refer to the decision rendered by a Division Bench of the Gujarat High Court in State of Gujarat v. Ambalal Maganlal {1978(2) FAC 53}. That case happened to be referred to a Division Bench as Ahmadi, J. (as the learned Chief Justice then was) doubted the correctness of a decision rendered by another Single Judge of the Gujarat High Court who upheld the acquittal of an accused on the ground that the Certificate issued by the Director of Central Food Laboratory indicated deficiency in milk solid non-fat as against the report of the Public Analyst which indicated deficiency only in milk fat, and that sanction for prosecution was accorded only on the strength of the report of the Public Analyst. Upon the reference being made by Ahmadi, J., a Division Bench of the Gujarat High Court after considering various aspects of the matter held that once the written consent to prosecution is given by any of the four competent authorities, the institution of prosecution should be regarded as if it is by that authority; no further question as regards the validity of written consent as a result of subsequent event would arise in such a case, where cognizance of offence is taken by the court. The reasoning of the Division Bench is that the consent once given, cannot become invalid merely because the evidence by which the offence is sought to be proved changes as a result of subsequent events. Learned Judges observed that the offence being one and the same, another written consent because of difference of opinion between the Public Analyst and the Director of the Central Food Laboratory, cannot be insisted upon before proceeding with the trial of such a case.

Subsequently a Full Bench of the same High Court in Prahladbhai Ambalal Patel v. State of Gujarat and anr. {1984(2) PFA Cases 27} has approved the ratio of the Division Bench in Ambalal Maganlal

(supra). S.B. Majumdar, J. (as his Lordship then was) speaking for the Full Bench, after referring to various passages of the said Division Bench decision, has observed that the aforesaid decision of the Division Bench in our view succinctly brings out the correct legal position pertaining to prosecution of accused under the Act.

But a Full Bench of the Himacahal Pradesh High Court, after considering the aforesaid decisions of the Gujarat High Court took a different view in Rattan Lal v. State of Himachal Pradesh {1989 (2) PFA Cases 190}. The ratio of the said decision is extracted below: We are clearly of the opinion, that where the report of the Director finds the sample to be adulterated for a reason, though different from the one found by the Public Analyst, which does not alter the nature of the offence in the sense of bringing about a change of specie for which it is punishable under Section 16 of the Act, there is no necessity of seeking a fresh written consent for continuance of the proceedings against the offender. Where, however, the difference in the two reports is such that it results in altering the basic nature of the offence, in the sense of the specie thereof, for which the consent was obtained earlier on the basis of the report of the Public Analyst, the complainant must bring the facts found by the Director to the notice of the appropriate authority for a decision whether the offender deserved to be prosecuted or not.

We find the reasoning of the Division Bench of the Gujarat High Court in State of Gujarat v. Ambalal Maganlal (supra) as sound and in accordance with law. There is no good reason for making two different categories of cases with the help of Certificates issued by Central Food Laboratory. The Full Bench of the Himachal Pradesh High Court missed the basic legal position in this regard that report of the Public Analyst alone is contemplated for instituting the prosecution and consent or sanction is necessary only for such institution, and that a post- institutional development while exercising a statutory right conferred on the accused for challenging the report of the Public Analyst during trial is not a premise for turning the key backward for a fresh institution of the prosecution, whatever be the result of the analysis made by the Central Food Laboratory. Hence in our view the legal position propounded by the Full bench of Himachal Pradesh High Court is erroneous.

Nor would the alternative contention advanced by Shri Romy Chacko, learned counsel for the respondent, based on Section 216(5) of the Code of Criminal Procedure, help the respondent. That section deals with alteration of charges framed by courts. The section enables the court to alter or add to any charge at any time before judgment is pronounced. Sub-section (5) thereof reads thus: If the offence stated in the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the altered or added charge is founded.

What is intended is that a prosecution, which requires previous sanction, cannot be started without such sanction even by way of amending the charge midway the trial. If the amended charge includes a new offence for which previous sanction is necessary then prosecution for such new offence cannot be started without such sanction. However, the second limb of the sub-section makes it clear that if sanction was already obtained for prosecution on the same facts as those on which the new or altered charge is founded then no fresh sanction is necessary.

The facts on which prosecution is founded under the Act were broadly that the accused had sold adulterated Toor Dal to the Food Inspector on 15-4-1996. Variation regarding the reasons or the data by which two different analysts had reached the conclusion that the sample is adulterated is not sufficient to hold that the basic facts on which the prosecution is founded, have been altered. Hence Section 216(5) of the Code would not improve the position of the accused for the purpose of obtaining fresh consent on the facts of this case.

We are, therefore, of the view that if the prosecution has been validly instituted, neither any new data nor any added reasons contained in the Certificate issued by the Director of the Central Food Laboratory would be sufficient to annul the sanction already obtained with which the prosecution was already instituted. The trial has to proceed with the Certificate on record which superseded the Report of the Public Analyst.

For the aforesaid reasons we allow this appeal and set aside the impugned order of the High Court.