T.V. Usman vs Food Inspector, Tellicherry ... on 25 January, 1994

Equivalent citations: AIR1994SC1818, 1994(1)BLJR728, JT1994(1)SC260, 1994(1)KLT422(SC), 1994(I)OLR(SC)377, 1994(1)SCALE179, (1994)1SCC754, 1994(1)UJ365(SC), AIR 1994 SUPREME COURT 1818, 1994 (1) SCC 754, 1994 AIR SCW 1725, 1994 CRIAPPR(SC) 64, 1994 SCC(CRI) 187, 1994 APLJ(CRI) 25, 1994 (1) FAC 1, 1994 FAJ 105, 1995 CALCRILR 43, 1994 (1) UJ (SC) 365, (1994) 1 JT 260 (SC), 1994 (1) BLJR 728, (1994) SC CR R 502, (1995) 2 DMC 278, (1996) 1 HINDULR 14, (1995) 2 RECCRIR 268, (1995) 3 CURCRIR 653, (1994) 1 CHANDCRIC 79, (1994) 1 ALLCRILR 397, (1994) 1 CRICJ 715, (1994) 1 CURCRIR 78, (1994) 1 CURLJ(CCR) 296, (1994) 1 EFR 320, (1994) 1 FAC 1, (1994) 1 KER LT 422, (1994) 1 RECCRIR 532, (1994) 7 OCR 317, (1994) ALLCRIC 226, (1994) 2 EASTCRIC 129, (1994) MAD LJ(CRI) 456, (1994) 21 CRILT 382

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Bench: G.N. Ray

ORDER

1. This appeal arising under Prevention of Food Adulteration Act is filed against the Judgment of the Kerala High Court in Criminal Appeal No. 153 of 1982 (reported in 1986 (1) F.A.C., 328) and the main question that arises for consideration is whether Rule 7(3) of the Prevention of Food Adulteration Rules is mandatory or only directory? The appellant Usman (A-1) was a vendor. On 4.10.1978, the Food Inspector PW 3 purchased six packets of Pan supari from him which were duly sampled and sent for analysis to the Public Analyst who received the same on 5.10.78. But the Analyst's report was received by the Local Health Authority on 6.12.78 which was beyond 45 days. It was opined by the Analyst that the sample contained Saccharan, an artificial sweetened and thus adulterated. The Food Inspector filed a complaint on 15.12.1978 against the appellant (A-1) and also the manufacturer (A-2) and they were charged under Section 16(1)(a)(i) and (ii) read with Section 7(i) and (v) and 2(1a)(a) and (b) of the Prevention of Food Adulteration Act. The First-Class Magistrate acquitted both of them mainly on the ground that Rule 7(3) was violated inasmuch as the Local Health authority received Form III report beyond 45 days and the same is fatal to the prosecution. Incidently the trial Court also observed that Rule 9(a) was not properly complied with. The Food Inspector preferred an appeal before the High Court and the High Court while confirming the acquittal of A-2 convicted the appellant (A-1) and sentenced him to undergo six months S.I. and to pay a fine of Rs. 1,000/-, in default of payment of which to further undergo S.I. for two months. The High Court held that Rule 7(3) is not mandatory and non-compliance of the same need be considered only if the prejudice is established. Likewise, the High Court following the judgment of

the Supreme Court in Tulsiram v. State of Madhya Pradesh held that Rule 9(a) also is not mandatory but only directory.

2. In this appeal the only contention is that Rule 7(3) is not mandatory as held by the High Court and that violation of the same is fatal to the prosecution case. Rule 7(3) as it originally stood read thus:

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

3. The amendment in 1968 substituted the following Rule 7(3): 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 samples.

4. This rule was again substituted by a new rule with effect from 4.1.1977 which reads thus:

> 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.
>
> This was the rule in force on the date relevant for the purpose of this case. It may be noted here that a period of 45 days was reduced to 40 days by subsequent amendment in 1984 with which we are not concerned.

5. The learned Counsel submits that specifying the period in a statute of this nature and the historical background of the rule would show that the word "forthwith" is of great importance and the provisions should be held to be mandatory. In support of his submission he relied upon several decisions of the various High Courts as well as of this Court.

6. In State Public Prosecutor v. Meenakshi Achi and Ors., 1973 F.A.C. 43, learned single Judge of the Madras High Court held that Rule 7(3) is mandatory and in no event and under no circumstances full rigour of Rule 7 should not be permitted to be relaxed otherwise it would even result in the effective deprivation of the valuable right under Section 13(2) of the Act.

7. In State of Maharashtra v. Deepchand, 1983 (1) F.A.C, 174, a single Judge of the Maharashtra High Court held that Rule 7(3) is mandatory.

8. In Om Parkash v. The State of Punjab 1984 (2) F.A.C. 136, a single Judge of Punjab and Haryana High Court, relying upon the Judgment of the Madras High Court in State Public Prosecutor v. Meenakshi Achi and Ors. (supra), also held that Rule 7(3) is mandatory.

9. In The Food Inspector v. Jaladanki Fajamma and Anr., 1984 (2) F.A.C. 239, a single Judge of the Andhra Pradesh High Court held that Rule 7(3) is mandatory.

10. In State of Madhya Pradesh v. Ghasiram Malviya 1986(3) F.A.C. 62, a single Judge of the Madhya Pradesh High Court held that Rule 7(3) is mandatory, placing reliance on the Judgment of the Andhra Pradesh High Court in The Food Inspector v. Jaladanki Fajamma and Anr. (supra) and Stale of Maharashtra v. Deepchand (supra).

11. In Food Inspector, Pal that Municipality v. Moosa and Ors. 1984 K.L.T. 80, a Division Bench of the Kerala High Court held that Rule 7(3) is mandatory.

12. In Food Inspector v. Viswanatha Pillai 1987 (2) F.A.C. 288, a single Judge of the Kerala High Court, relying on the Judgment in Food Inspector, Palghat Municipality v. Moosa and Ors. 1984 (1) F.A.C. 347 equal to 1984 K.L.T. 80 held that Rule 7(3) is mandatory.

13. Now we shall also list out the cases where the said Rule is held to be only directory and not mandatory. In Food and Sanitary Inspector, Giddalur Panchayat v. Koppu Subbaratnam, 1984 (1) F.A.C. 4 (a case of Andhra Pradesh High Court) wherein Hon" K. Ramaswamy, J., as he then was, held that Rule 7(3) is only directory and not mandatory. In State of Hunachal Pradesh v. Punnu Ram 1985 (1) F.A.C. 91, a single Judge of the Himachal Pradesh High court held that Rule 7(3) is only directory. In Bhavirisetti Deva Mohan Rao and Anr. v. The State of Andhra Pradesh 1986 (1) F.A.C. 12, a Division Bench of Andhra Pradesh High Court consisting of Hon. Jeevan Reddy (as he then was) and Sriramulu, JJ. held that Rule 7(3) is only directory and not mandatory and there by did not agree with the view taken by the learned Sessions Judge of the same High Court in The State through Food Inspector v. Shaik Nisar Ahmed 1983 (II) F.A.C. 211 and Food Inspector v. Jaladanki Fajamna and Anr. (supra). Again a Division Bench of the Kerala High Court in Kunhamu v. Food Inspector 1989 (2) F.A.C. 51 considered very elaborately the scope of Rule 7(3) and referred to all the earlier decisions and held that Rule 7(3) is only directory and not mandatory.

14. Shri P.S. Poti learned senior counsel appearing for the appellant submitted that though there is divergence of opinion, the rule must be held to be mandatory and having regard to the stringent provisions of the Act, strict compliance with the provisions of the Act as well as the Rules should be insisted upon and where there is a failure to comply with, prejudice per se must be inferred.

15. In Maxwell on Interpretation of Statutes, Eleventh Edition, at page 362 it is suited as under:

> Where, indeed, the whole aim and object of the legislature would be plainly defeated if the command to do the thing in a particular manner did not imply a prohibition to do it in any other manner, no doubt can be entertained as to the intention;
>
> that is to say, such a requirement would be imperative.

16. It is further stated on page 364 that:

> The general rule is, that an absolute enactment mast be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially.

XXX XXX XXX When a public duty is imposed and the statute requires that it shall be performed in a certain manner, or within a certain time, or under other specified conditions, such prescriptions may well be regarded as intended to be directory only in cases when injustice or inconvenience to others who have no control over those exercising the duty would result if such requirements were essential and imperative.

In Craies' Statute Law, Seventh edition at page 62 it is stated thus:

When a statute is passed for the purpose of enabling something to be done and prescribes the formalities which are to attend its performance, those prescribed formalities which are essential to the validity of the thing when done are called imperative or absolute; but those which are not essential and may be disregarded without invalidating the thing to be done, are called directory.

17. At page 250 it is further states thus:

The question whether the provisions in a statute are directory or imperative has frequently arisen in this country, but it has been said that no general rule can be laid down and that in every case the object of the statute must be looked at.... When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in respect of this duty would work serious general inconvenience or injustice to persons who/have no control over the main object of the legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable not affecting the validity of acts done.

In Dattatraya v. State of Bombay it was held as under:

Generally speaking the provisions of a statute creating public duties are directory and those conferring private rights are imperative. When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty and at the same time would not promote the main object of the legislature, it has been the practice of the courts to hold such provisions to be directory only; the neglect of them not affecting the validity of the acts done.

In Rule 7(3) no doubt the expression "shall" is used but it must be borne in mind that the Rule deals with stages prior to launching the prosecution and it is also clear that by the date of receipt of the report of the Public Analyst the case is not yet instituted in the court and it is only on the basis of this report of the Public Analyst that the concerned authority has to take a decision whether to institute a prosecution or not. There is no time limit prescribed within which the prosecution has to be instituted and when there is no such limit prescribed then there is no valid reason for holding the period of 45 days as mandatory. Of course that does not mean that the Public

> Analyst can ignore the time limit prescribed under the Rules. He must in all cases try to comply with the time limit. But if there is some delay, in a given case, there is no reason to hold that the very report is void and on that basis to hold that even prosecution can not be launched. May be, in a given case, if there is inordinate delay, the court may not attach any value to the report but merely because the time limit is prescribed, it can not be said that even a slight delay would render the report void or inadmissible in law. In this context it mast be noted that Rule 7(3) is only a procedural provision meant to speed up the process of investigation on the basis of which the prosecution has to be launched. No doubt, Sub-section (2) of Section 13 of the Act confers valuable right on the accused under which provision the accused can make an application to the court within a period of 10 days from the receipt of copy of the report of Public Analyst to get the samples of food analysed in the Central Food Laboratory and in case the sample is found by the said Central Food Laboratory unfit for analysis due to decomposition by passage of time or for any other reason attributable to the lapses on the side of prosecution, that valuable right would stand denied. This would constitute prejudice to the accused entitling him to acquittal but mere delay as such will not per se be fatal to the prosecution case even in cases where the sample continues to remain fit for analysis inspite of the delay because the accused is in no way prejudiced on the merits of the case in respect of such delay. Therefore it mast be shown that the delay has led to the denial of right conferred under Section 13(2) and that depends on the facts of each case and violation of the time limit given in Sub-rule 3 of Rule 7 by itself can not be a ground for the prosecution case being thrown out.

18. In this context it is useful to refer to the judgment of this Court in Dalchand v. Municipal Corporation, Bhopal and Anr. wherein the question was whether Rule 9(j) of Prevention of Food Adulteration Rules under which report of the public analyst has to be supplied within ten days, is mandatory or directory and it was held as under:

> There are no ready tests or invariable formulas to determine whether a provision is mandatory or directory. The broad purpose of the statute is important. The object of the particular provision must be considered. The link between the two is most important. The weighing of the consequences of holding a provision to be mandatory or directory is vital and, more often than not, determinative of the very question whether the provision is mandatory or directory. Where the design of the statute is the avoidance or prevention of public mischief, but the enforcement of a particular provision literally to its letter will tend to defeat that design the provision must be held to be directory, so that proof of prejudice in addition to non-compliance of the provision is necessary to invalidate the act complained of. It is well to remember that quite often many rules, though couched in language which appears to be imperative, are no more than mere instructions to those entrusted with the task of discharging statutory duties for public benefit. The negligence of those to whom public duties are entrusted cannot be statutory interpretation be allowed to promote public mischief and cause public inconvenience and defeat the main object of the statute. It is as well

to realise that every prescription of a period within which an act must be done, is not the prescription of a period of limitation with painful consequences if the act is not done within that period.

In this view of the matter this Court held that Rule 9(j) is only directory and not mandatory. Regarding the effect of non-compliance of Rule 9(j) it was further held that:

Where the effect of non-compliance with the rule was such as to wholly deprive the right of the person to challenge the Public Analyst's Report by obtaining the report of the Director of the Central Food Laboratory, there might be just cause for complaint, as prejudice would then be writ large. Where no prejudice was caused there could be no cause for complaint. I am clearly of the view that Rule 9(j) of the Prevention of Food Adulteration Rules was directory and not mandatory.

In Tulsiram's case (supra) this Court has laid down that Rule 9-A is only directory and not mandatory. In the course of the judgment, there is a reference to Dalchand's case (supra) and the ratio laid down there has been followed and it was held as under:

The first thing to be noticed is that Rule 9-A certainly refrains from mentioning any definite limit of time such as that found in old Rule 9(j) which gave rise to the controversy whether the rule was mandatory or directory, and instead uses the general expression "immediately'. The Local (Health) Authority is now required to forward to the person from whom the sample was taken in the manner prescribed, a copy of the report of the Public Analyst immediately after the institution of the prosecution. While prescribing the manner in which the report may be forwarded the opening words of Rule 9-A "The Local (Health) Authority shall (immediately) after the institution of prosecution forward' (bracket supplied), are borrowed verbatim from Section 13(2) with the word "immediately' inserted in between. The rule-making authority could never have intended to amend the statute by superadding the word "immediately' as indeed it was not competent to do. Rule 9-A has to be interpreted so as to keep it in tune with and within the bounds of Section 13(2).

xxx xxx xxx In the context the expression 'immediately' is only meant to convey 'reasonable despatch and promptitude' and no more. The idea is to avoid dilatoriness on the part of officialdom and prevention of unnecessary harassment lo the accused. But the idea is not to penalise the prosecution and to provide a technical defence.

xxx xxx xxx Our conclusions on this question are: The expression 'immediately' in Rule 9-A is intended to convey a sense of continuity rather than urgency. What must be done is to forward the report at the earliest opportunity, so as to facilitate the exercise of the statutory right under Section 13(2) in good and sufficient time before the prosecution commences leading evidence. Non-compliance with Rule 9-A is not

fatal, it is a question of prejudice. Applying these principles, we find no merit in the submissions based on Rule 9-A. The same reasoning applies to the case of non-compliance of Rule 7(3) also and unless there is proof of prejudice, there can be no cause for complaint by the accused.

In Craies' Statute Law, VIII Edn. at page 262 it is stated thus:

It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed.... That in each case you must look to the subject-matter, consider the importance of the provision and the relation of that provision to the general object intended to be secured by the Act, and upon a review of the case in that aspect decide whether the enactment is what is called imperative or only directory.

Likewise in State of Kerala and Ors. v. Allasserry Mohammed and Ors. , Hon Untwalia, J. speaking for the Supreme Court and while holding that Rule 22 of Prevention of Food Adulteration Rules is only directory, held that 'If the object is not frustrated and is squarely and justifiably achieved without any shadow of doubt, then it will endanger public health to acquit offenders on technical grounds which have no substance.

19. Therefore we are of the view that Rule 7(3) is only directory and not mandatory. No interference is called for in this appeal. It is accordingly dismissed.