Supreme Court of India
Prabhu vs State Of Rajasthan on 7 April, 1994

PETITIONER:
PRABHU

Vs.

RESPONDENT:
STATE OF RAJASTHAN

DATE OF JUDGMENT07/04/1994

BENCH:

ACT:

HEADNOTE:

JUDGMENT:

The Judgment of the Court was delivered by HANSARIA, J.- Leave granted.

2. The two appellants were appointed as Deputy Director (Finance) on promotion vide Notification No. 14 of 1991 issued by Respondent 1, Indian Airlines. The validity of the same came to be challenged by filing a writ petition in the High Court of Delhi by one Sushma Chawla (Respondent 4 herein) on the ground that while promoting the appellants as aforesaid the relevant guidelines holding the field were not adhered to and as such their promotions were not in accordance with law. The High Court accepted the contention of the writ petitioner and set aside the promotion of the appellants. Feeling aggrieved, this Court has been approached under Article 136 of the Constitution.

3. The short point which needs determination is whether there was violation of the guidelines, the applicability of which has not been questioned before us. The requirement of the guidelines which is said to have been violated is that in judging the suitability of the persons within the zone of consideration last three years' "Annual Performance Appraisal Report" (APR) would be considered. It is an admitted position that while considering the case of the appellants APRs of the immediately preceding three years had not been taken into consideration; what had instead been done was to take into consideration three years' immediately preceding available APRS. According to the High Court this was not permissible, because that would amount to adding the word "available" in the guidelines, which is not permissible.

4. The three APRs as required by the guidelines could not be considered in the case of the appellants for a cogent and adequate reason. The same was that + From the Judgment and Order dated 25-10-1991 of the Delhi High Court in C.W. No. 1227 of 1991 the Managing Director of Respondent I

who was to write the APRs for the years in question, namely, 1988-89 and 1989-90, did not do so as the then incumbent (one Shri R. Prasad) had resigned in February 1990; and despite efforts being made by Respondent I to get the concerned APRs written by him after resignation the same did not bear fruit as he did not agree to do so. It is for this reason that these APRs being not available could not be considered while considering and promoting the appellants.

5. On the aforesaid facts the question is whether the view taken by the High Court can be sustained. The reason given by the High Court is that Shri Prasad being available, the fact that he did not agree to write the APRs could not be used against the writ petitioner permitting Respondent 1 to attach another criterion beyond prescribed guidelines. We are, however, of the view that for the aforesaid disinclination of Shri Prasad to write the two APRs, the reason of which cannot be said to be motivated or untenable, the High Court took an unreasonable view by observing that the non-writing of two APRs was due to "lapse and fault of Respondent 1". It is really not a question of taking advantage of 'one's own default' as observed by the High Court. According to us, in the facts and circumstances of the case the consideration of the APRs of the years 1985-86, 1986-87 and 1987-88, which were the APRs of the three preceding available years, has to be taken as a due compliance of the guidelines in this regard. The ratings as per these three APRs gave a total of 35.68 insofar as Respondent 4 is concerned, whereas the two appellants got 39.84 and 39.68 respectively. In the interview also the two appellants got more marks than Respondent 4 as would appear from the averment made in para 7 of the special leave petition, which fact has not been disputed in the counter- affidavit filed by Respondent 4.

6. The aforesaid being the position, we are of the opinion that the High Court committed an error in setting aside the promotion of the appellants to the post of Deputy Director (Finance). We, therefore, allow the appeal by quashing the impugned judgment and dismissing the writ petition filed by Respondent 4. In the facts and circumstances of the case, we leave the parties to bear their own costs.

ORDER

1. Special leave granted.

2. The appellant is a milk vendor. On 19-3-1983, the Food Inspector took samples of milk from the custody of the appellant under Section 10(7) of the Prevention of Food Adulteration Act, 1954 (for short the 'Act'). He sent the sample for analysis on 21-3-1983. The Analyst in his report dated 30-3-1983 found that the milk fat was 4.8% and milk solids non-fat was 6.36% whereas the prescribed standard for milk fat is 4.5% and milk solids non-fat 8.5%. Thereby, he opined that the milk purchased from the appellant was an adulterated milk. On the basis of the said report, the prosecution was laid against the appellant. The Magistrate in his judgment dated 11-3-1987 found that the appellant had adulterated milk and convicted him under Section 7 read with Section 16 of the Act and sentenced him to a minimum period of 6 months and a fine of Rs 1000. On appeal, it was confirmed and in Revision No. 61 of 1991, the Single Judge by judgment dated 30-3-1991 confirmed the conviction but the sentence was reduced to a period of 3 months and a fine of Rs 500. Thus this appeal by special leave.

3. Mr S.K. Jain, learned counsel for the appellant, contended that from the date of taking the sample till the date of laying the prosecution, there was considerable delay. There is an inordinate delay to forward the sample for analysis by the Directorate of Central Food Laboratory which caused considerable prejudice to the appellant, The High Court did not consider this aspect of the matter from this perspective. Therefore, the appellant is entitled to the acquittal. We find no force in the contention.

4. Section 13 of the Act provides that (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, and (2) 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, 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 10 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.

5. Rule 9-A provides that the local authority shall within a period of 10 days, after the institution of the prosecution, forward a copy of the report of the result of the analysis in Form III under sub-rule (3) of Rule 7 by registered post or by hand as may be appropriate to the person from whom the sample of the article was taken by the Food Inspector and simultaneously also to the person, if any, whose name, address and other particulars have been disclosed under Section 14-A of the Act.

6. This Court considering the language of Section 13(2) in Babu Lal Hargovindas v. State of Gujarat' held that the accused had an opportunity to make an application to the court for sending the sample to the Central Food Laboratory for analysis. He did not avail the same. Therefore, it was no longer open to him to contend that he had no opportunity to send the sample in his custody to the Director, Central Food Laboratory under Section 13(2), since he did not make any application to the court for sending it. This view was followed in Ajit Prasad Ramkishan Singh v. State of Maharashtra2. In Tulsiram v. State of Mp.3 this Court held that Rule 9-A is directory and if after receiving the Public Analyst's report, the accused does not apply to the court to have the sample sent to the Central Food Laboratory, he may not be heard to complain about delay in receipt of the report by him, unless he is able to establish some other prejudice to him.

7. The decision of this Court in Municipal Corpn. of Delhi v. Ghisa RaM4 was based on the fact that the sample had, in fact, been sent to the Director who returned the same saying that the sample had become highly decomposed and could not be analysed; as the Food Inspector had not taken the precaution of adding the preservative. This decision was distinguished in Babu Lal Hargovindas1.

8. Thus, it is settled law that the appellant has a right under Section 13(2) to avail of sending the sample in the custody of the court for analysis by the Central Food Laboratory after the prosecution was laid or immediately after notice was received by him in the case, by making an application to the court. The duty of the prosecution to send the report is governed by Rule 9-A of the rules. After

4-1-1977, the word 'immediately' was used replacing the words "within ten days" in this rule. The decision of this Court in Ahmed Dadabhai Advani v. State of Maharashtra5 relied on by the appellant does not help him. Therein, the report was stated to have been despatched on 13-6-1974. But, in fact it was despatched on 11-7-1979. The report was of 1-9-1978. The Magistrate on the basis of those facts held that it must have been received in due course and there was delay in launching prosecution. Since the acquittal ordered by the Magistrate was interfered with by the High Court, this Court stated that the High Court was not justified in interfering with the same. The fact of non-availing of the remedy under Section 13(2) had not been considered by this 1 (197 1) 1 SCC 767: AIR 1971 SC 1277 2 (1972) 2 SCC 180: AIR 1972 SC 1631 3 (1984) 4 SCC 487 4 (1967) 2 SCR 1 16: AIR 1967 SC 970 5 1991 Supp (2) SCC 652: JT (1991) 5 SC 178 Court. Therefore, the ratio in Ahmed D. Advani case5 does not run counter to the consistent law laid by this Court in the above cases that despite non-availment of the remedy under Section 13(2), prejudice could be inferred.

9.Under these circumstances and following the consistent law laid by this Court,.we are of the considered view that since admittedly the appellant had not availed of the remedy under Section 13(2) to send the sample of the article of food for analysis by the Central Food Laboratory, it cannot be held that the appellant suffered prejudice on account of delay in laying the prosecution. It is also seen from the record that within 10 days from the date of the filing of the prosecution, the report was sent to the appellant, though Shri S.K. Jain seeks to contend that there is no proof of service. Since it being a question of fact and not disputed in the courts below, we cannot go into that question. In that view, we hold that no prejudice has been caused to the appellant and the conviction of the appellant under Section 7 read with Section 16 of the Act and sentence of 3 months' imprisonment imposed by the High Court does not warrant interference.

10. The appeal is accordingly dismissed.