Kaushik Keshavlal Lakhani And Others vs The State Of Maharashtra, Thr. Shri. ... on 26 September, 2023

Author: G. A. Sanap

Bench: G. A. Sanap

2023:BHC-NAG:14088

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

CRIMINAL APPLICATION (APL) NO.490 OF 2016

1. Kaushik Keshavlal Lakhani,
Food Business Operator and Proprietor
of M/s. V. K. Agencies, Plot No. 51,
Ward No. 72, Lendra Park,
Ramdaspeth, Nagpur

2. Rajendra K. Rajput,
Nominee M/s. Nestle India Limited,
C/o. Logistic Hub, Shed No.2,
Near Gondkhairi Toll Naka,
NH. 6, Amravati Road,
Gondkhairi, Tahsil Kalmeshwar,
District Nagar Pin 440 023

3. M/s. Nestle India Limited,
C/o. Logistic Hub, Shed No.2,
Near Gondkhairi Toll Naka,
NH. 6, Amravati Road,
Gondkhairi, Tahsil Kalmeshwar,
District Nagar Pin 440 023

4. Dilipkumar Narbherambhai Kotadiya,
Nominee of M/s. Makson Pharmaceutical
(I) Pvt. Ltd., 195, Rajkot Highway,
Surendranagar, 363 020

5. M/s. Makson Pharmaceutical (I) Pvt. Ltd.,
195, Rajkot Highway, Surendranagar,

363 020 .... APPLICANTS

// V E R S U S //

1. The State of Maharashtra,

At the Instance of Shri V. P. Dhawad,
Food Safety Officer, Food and Drugs
Administration (M.S.), Nagpur

2. Designated Officer and Assistant
Commissioner, Food and Drugs
Administration (M.S.), Nagpur

3. The Joint Commissioner, (Food)
Headquarter, Food and Drug
Administration, Maharashtra State.

2. The State of Maharashtra,
Department of Food and Drugs
Administration, Mantralaya, Madam
Cama Road, Mumbai 440 003. ... NON-APPLICANTS

Mr S. V. Manohar, Sr. Advocate assisted by Adv. Akshay Naik and Adv. Y. N. Sambre, Advocates for the applicants
Mr Amit Chutke, APP for the non-applicants/State

CORAM : G. A. SANAP, J.
JUDGMENT RESERVED ON : 26/07/2023
JUDGMENT PRONOUNCED ON : 26/09/2023

JUDGMENT :

1 Heard.

2 In this criminal application, filed under Section 482 of the Code of Criminal Procedure, 1973 the applicants (original accused) have prayed for quashing and setting aside the order

370.apl.490.2016 judge.odt issuing summons dated 13.11.2013 in Regular Criminal Case No. 4376 of 2013 passed by the learned Additional Chief Judicial Magistrate, Nagpur and also for quashing and

setting aside the complaint bearing Regular Criminal Case No. 4376 of 2013. 3 Background facts:

> The complaint in question was filed by respondent No.1 against the applicants for contravention of the provisions of Section 26(1) read with Section 26 (2)(i) read with Section 27(1) of the Foods, Safety and Standards Act, 2006 (For short 'the FSS Act 2006') and read with Section 3(1)(zz) (vii) read with Regulation 3.1.2 (7) of the Food Products (Standards and Food Additives) Regulations, 2011 (For short 'the Regulation of 2011). It is the case of the respondent No.1 in the complaint, that on 17.11.2012 at about 11:00 a.m. alongwith independent witnesses he visited the premises of M/s. V. K. Agencies owned by applicant No.1. On inspection of the premises he discovered about 200 wholesale packs of lozenges of 584.2 grams each. Respondent No.1 purchased the samples of lozenges of all flavors and seized the rest of the stock.
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> 370.apl.490.2016 judge.odt Respondent No.1 issued notice under Form VA and Rule 2.4.1 (4) and 2.4.5 of the Regulations to the applicants.

4 Respondent No.1 forwarded the sample to the Food Analyst, Regional Public Health Officer, Nagpur on 19.11.2012. Respondent No.1 received the report of the analyst dated 11.03.2013. The analyst opined that the sample of lozenges did not confirm to the standards laid down under the Regulation of 2011. It was stated that this was in contravention of Section 3(1)(zz)(v) of the FSS Act 2006. The copy of this report was provided to the applicants. The applicants exercised the right of appeal. The designated officer allowed the appeal and directed the sample to be sent to the Referral Laboratory, Gaziabad for fresh analysis. 5 The report of the Referral Laboratory, Gaziabad was received on 11.03.2013. The Referral Laboratory, Gaziabad analyst opined as follows:

> "The Sample of Lozenges (Cinnamon Flavour) does not conform to standards laid down under Regulation No. 2.7.2 of FSS (Food
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> 370.apl.490.2016 judge.odt Products Standards & Food Activities) regulations, 2011 in that colour content is above the maximum prescribed limits laid down under Regulation 3.1.2(7) and additive added as Lubricant (570) is not permitted under Regulation 2.7.2 (Appendix A). Hence sample is unsafe under Section 3(1)(zz)(vii)(v) of FSS Act, 2006."

6 The respondent No.2 on receipt of this report sought the approval for initiation of proceeding against the applicants. Respondent No.3- the Joint Commissioner, Food and Drugs Administration (MS) on 23.10.2013 sanctioned the initiation of proceedings against the applicants. Pursuant to this sanction the complaint was filed. Learned Magistrate took cognizance and issued the process/summons against the accused for the above offences.

7 The applicants being aggrieved by this complaint and the order of issuance of summons have filed this application seeking quashment of the criminal complaint as well as the order of issuance of summons. The grounds have been stated in the application. It is

370.apl.490.2016 judge.odt contended that the prosecution is not sustainable because the samples of identical lozenges, bearing the same lot/batch number and manufacture date, were sent for analysis to the same laboratory at Gaziabad in other independent cases. The report of the analyst in the said identical sample of lozenges reveled there was no excess amount of colouring matter in the sample. It is stated that considering the report of the three samples of the same batch/lot the department should not have initiated complaint against the applicants. It is contended that the conclusion drawn by the Referral Laboratory, Gaziabad of presence of excess colouring matter is either flawed or suffers from an error of judgment. 8 It is further stated that the applicants have been prosecuted on the ground that the product was covered under the definition of 'unsafe food' provided under Section 3(zz) FSS Act 2006. It is stated that the use of coloring matter in manufacturing of the instant food article is permissible as provided under the FSS Act 2006. It is further stated that in certain cases Regulation 3.1.2(7) permits use of synthetic Food Colour up to 200 ppm (parts

370.apl.490.2016 judge.odt per million). In this case, it is alleged that the colour in the instant sample was in excess of 100 ppm i.e. approximately 131.70 ppm. It is submitted that in terms of guidelines of the department, solely on the ground of the excess colour content found in the sample the prosecution is not advisable. It is further stated that the sanction for the prosecution of the applicants accorded by respondent No.2 is without considering the relevant facts. The sanction order indicates total non-application of mind. It is further stated that the learned Additional Chief Judicial Magistrate before issuing the summons has not applied his mind to the facts. He has not recorded the reasons. The order is passed mechanically. It is therefore submitted that the order cannot be sustained.

9 The respondents have filed reply and reiterated the facts from the complaint as stated herein above. 10 I have heard the learned Senior Advocate Mr. S. V. Manohar for the applicants and learned APP Mr. Amit Chutke for the State.

370.apl.490.2016 judge.odt 11 Learned Senior Advocate Mr S. V. Manohar for the applicants submitted that the order passed by the learned Additional Chief Judicial Magistrate, Nagpur dated 13.11.2013 issuing summons cannot be sustained inasmuch as the learned Additional Chief Judicial Magistrate failed to record the reasons. Learned Senior Advocate submitted that the order passed by learned Additional Chief Judicial Magistrate, Nagpur therefore does not reflect application of mind to the facts stated in the complaint and documents relied upon by respondent No.1. Learned Advocate pointed out that in this case the sanction for prosecution filed with the complaint does not reflect the application of mind by the sanctioning authority. In the submission of the learned Senior Advocate this fact was required to be considered appropriately by the learned Additional Chief Judicial Magistrate, Nagpur. 12 Learned Senior Advocate submitted that the process was issued against the accused for the offence defined under Section 3(1)(zz)(vii) of the FSS Act 2006. Learned senior Advocate submitted that the material placed on record is not sufficient to

370.apl.490.2016 judge.odt establish the ingredients of Section 3(1)(zz)(vii). Learned senior Advocate took me through the record and particularly, the report of the analyst dated 11.03.2013 and pointed out that the violation was only with regard to the excess colour contents namely 131.70

ppm against the permitted synthetic food colour up to 100 ppm. Learned senior Advocate relying upon this report submitted that in terms of the order dated 01.03.2006 issued by the Commissioner, Food and Drugs Administration, State of Maharashtra the prosecution could not have been lodged against the applicants. Learned Advocate took me through this order and annexures attached to the order and submitted that in this case the complainant was required to seek a previous permission/guidance of Commissioner before filing the prosecution. Learned Senior Advocate drew my attention to Annexure 'D' Clause 9, which inter alia provides that no prosecution should be lodged if permitted food colour added in food article, in which it is allowed, but it is added in quantity more than the prescribed limit under the Rules. Learned Senior Advocate pointed out that this order was passed by the Commissioner under Sections 3 and 4 of the Maharashtra Food

370.apl.490.2016 judge.odt Adulteration Prevention Rules, 1962. These rules were framed under the Food Adulteration Act, 1954. Learned senior Advocate being conscious of the fact that the process was issued under the FSS Act 2006, submitted that this order issued by the Commissioner on 01.03.2006 would be applicable to this case because after coming into force of new act the order issued under the repealed Act of 1954 was in force inasmuch as it was neither superseded by any notification or order issued under the provisions of re-enacted act. He therefore submitted that therefore this order would be deemed to have been part of the new enactment till it was specifically repealed or reversed by separate notification. Learned Senior Advocate on the basis of the reply affidavit filed by the respondents pointed out that fresh guidelines/order came to be issued for the first time on 03.12.2021. Learned senior Advocate therefore submitted that this order dated 01.03.2006 was holding the field till 3.12.2021, as per provisions of Sections 6 and 24 of the General Clauses Act, 1897. Learned senior Advocate therefore submitted that on this ground, in view of the alleged breach, the prosecution against the accused is not sustainable. In order to seek support to

370.apl.490.2016 judge.odt this submission learned senior Advocate has placed heavy reliance on two decisions in the cases Neel alias Niranjan Majumdar .v/s. The State of West Bengal1, and State of Punjab .v/s. Harnek Singh2. 13 Learned APP submitted that with the repeal of the Food Adulteration Act, 1954 by the FSS Act 2006, which came into force on 05.08.2011, the order dated 01.03.2006 relied upon by the accused stood repealed. Learned APP pointed out that under the FSS Act 2006 the separate guidelines have been issued on 03.12.2021 and as per the guideline No. (viii), the food article having presence of any colouring matter or preservatives other than that specified under the Act has been declared as 'unsafe food' as understood by Section 3(1)(zz)(vii) of FSS Act 2006. Learned APP submitted that in view of this, the decisions relied upon by the learned senior Advocate may not be applicable to the case of the accused. Learned APP relying upon the decision in the case Rajkumar .v/s. State of Uttar Pradesh3 submitted that food article failing to comply with the standards, which may not be injurious to 1 (1972) 2 SCC 668 2 (2002) 3 SCC 481 3 (2019) 9 SCC 427

370.apl.490.2016 judge.odt health, needs to be treated as adulterated food. Learned APP further submitted that necessary facts have been pleaded in the complaint. The complainant placed on record the necessary documents which includes the report of the analyst and the sanction order for the prosecution of the accused. Learned APP submitted that the learned Additional Chief Judicial Magistrate has taken into consideration the material facts pleaded in the complaint and the

documents relied upon by the complainant before issuance of process. Learned APP therefore submitted that it cannot be said that the order passed by the learned Additional Chief Judicial Magistrate was passed mechanically.

14 In order to appreciate the rival submissions I have gone through the record and proceedings. Learned senior Advocate has mainly relied upon the order dated 01.03.2006 issued by the Commissioner, Food and Drug Administration, Government of Maharashtra and the Annexure D. At the outset, it would be necessary to see what the Annexure D contemplates. Reliance is placed on Annexure D Clause 9 Section 2 (ia)(j). It provides that if

370.apl.490.2016 judge.odt a permitted food colour added in food article, in which it is allowed, but it is added in quantity more than the prescribed limit under the rule, then the prosecution shall not be lodged. The order dated 01.03.2006, mandates that in such cases if it is found that the criminal case has to be filed then the reference be made to the Commissioner and his order should be obtained. It is to be noted that in this case, in terms of the report of the analyst, the color content found was above the maximum prescribed limit. In this case, the maximum prescribed limit of colour content was up to 100 ppm. As per the report, the colour content found in the sample was 131.70 ppm. It has come on record that depending upon the food article the maximum colour content provided under Regulation is up to 200 ppm. In the backdrop of this factual position it appears that the case of the accused would be squarely covered by the order dated 01.03.2006. The main contentions that needs to be addressed is whether this order would be applicable to the case on hand, which has been filed under the FSS Act 2006 and Rules framed thereunder. At this stage, it is necessary to state that the Food, Safety and Standards Rules 2011 came into force on

370.apl.490.2016 judge.odt 5.05.2011. It is not out of place to mention that on the date of order dated 01.03.2006, the Food Adulteration Act 1954 as well as the Maharashtra Food Adulteration Prevention Rules, 1962 were in existence. The question is whether this order dated 01.03.2006 would be applicable to the case on hand or not. It is undisputed that the fresh guidelines have been issued on 03.12.2021 by the Food safety Commissioner, Food and Drug Administration, (M.S.), Mumbai. In my view, this issue has been fully covered by the decisions relied upon by the learned senior Advocate for the accused.

15 In the case of Neel alias Niranjan Majumdar .v/s State (supra) the issue was as to whether the notification issued under Section 4 of the Arms Act 1959 or the rules made there under would automatically get repealed after the repeal of Arms Act, 1878 under which the relevant notification was issued. The Hon'ble Apex Court in this case has considered Sections 6 and 24 of the General Clauses Act, 1898. The relevant observation can be found in para Nos. 8 and 9 of the decision. The same are extracted

370.apl.490.2016 judge.odt below:

> "8. Section 6(b) of the General Clauses Act, however, provides that where any Central Act or regulation made after the commencement of the Act repeals any earlier enactment, then, unless a different intention appears, such repeal shall not "affect the

previous operation of any enactment so repealed or anything duly done or suffered thereunder".

Section 24 next provides that where any Central Act is repealed and re-enacted with or without modification, then, unless it is otherwise expressly provided, any notification issued under such repealed Act shall, so far as it is inconsistent with the provisions re-enacted, continue in force and be deemed to have been made under the provisions so re-enacted unless it is superseded by any notification or order issued under the provisions so re-enacted. The new Act nowhere contains an intention to the contrary signifying that the operation of the repealed Act or of a notification issued thereunder was not to continue. Further, the new Act re- enacts the provisions of the earlier Act, and Section 4 in particular, as already stated, has provisions practically identical to those of Section 15 of the earlier Act. The combined effect of Sections 6 and 24 of the General Clauses Act is that the said notification of 1923 issued under Section 15 of the Act of 1878 not only continued to operate but has to be deemed to have been enacted under the new Act.

9. Possession of arms, such as a sword without a licence or contrary to the terms and conditions of such a licence would thus be an offence punishable with imprisonment under the Arms Act, 1959. Though the possession of and carrying a sword were alleged to have been committed in 1970, that is,

370.apl.490.2016 judge.odt after the repeal of the Arms Act, 1878, the said notification of 1923 issued under the repealed Act would, despite its repeal, continue to be in force and its provisions would be deemed to have been enacted under the new Act by virtue of S.24 of the General Clauses Act."

16 Somewhat similar question fell for consideration in the case of State of Punjab .v/s. Harnek Singh (supra). In this case, the issue was whether the notification issued under the Prevention of Corruption Act, 1947 authorizing the inspector of police to investigate the anti corruption cases would get repealed on coming into force of the Act of 1988 by repealing the Act of 1947. In this case the Hon'ble Apex Court has considered the provisions of Section 6 as well as Section 24 of the General Clauses Act, 1897. The Hon'ble Apex Court has held that the notification would continue to be in force and be deemed to have been issued under the Act of 1988 till the same are superseded or specifically withdrawn. It is therefore crystal clear that the notification or order issued under the repealed Act remains in force till the same are superseded or specifically withdrawn in terms of the provisions of the repealing Act. It is further pertinent to mention that no

370.apl.490.2016 judge.odt provision has been made in the FSS Act 2006 to expressly repeal all the circulars, notification or order issued under the repealed Act of 1954. In my view, therefore, the submissions advanced on this point by the learned senior Advocate deserves acceptance. Learned APP has relied upon the circulars/guidelines dated 03.12.2021 issued in terms of the provisions and the rules framed under the FSS Act 2006. Learned APP has not been able to point out any such circular notification or order to fill the vacuum till 03.12.2021. In my view, therefore, the submissions advanced by the learned APP that the order dated 01.03.2006 and the Annexures there to would not be applicable to the case on hand cannot be accepted. On the basis of this order dated 01.03.2006 and by relying upon the decisions the learned senior Advocate has been able to make

good his point. In my view, therefore this is one aspect which is in favour of the accused.

17 It is not the case of the respondents that any guidance or order in terms of the order dated 01.03.2006 was sought from the Commissioner before filing complaint. Since this order dated

370.apl.490.2016 judge.odt 01.03.2006, issued under Rules 3 and 4 of the Maharashtra Prevention of Food Adulteration Rules 1962, was in operation, it was necessary to make compliance of the same. In terms of Annexure D attached to this order the prosecution without the permission, order and guidance of the Commissioner could not have been filed. No justification has been provided or placed on record. Therefore, in my view, on this ground the complaint filed against the accused was not sustainable.

18 The next important issue is with regard to the non application of mind by the learned Additional Chief Judicial Magistrate Nagpur while passing the order of issuance of summons. It is seen on perusal of the order that it is a one line order of issuance of summons. Learned Additional Chief Judicial Magistrate Nagpur has not recorded any reasons. Learned Magistrate was required to apply his mind to the facts stated in the complaint and the documents relied upon by the respondents. On the basis of the material on record by recording brief reasons learned Additional Chief Judicial Magistrate was required to record his prima facie

370.apl.490.2016 judge.odt satisfaction. It is to be noted that for the purpose of invoking Section 3(1)(zz)(vii) of the FSS Act 2006 the intention to commit the offence must be spelt out. In case of addition of excess colour there ought to have been intention to cause damage or to conceal the article or to make it appear better or of a greater value than it really is. It is to be noted that three different samples of lozenges of cinnamon flavor bearing the same lot or batch number and manufacturing date contains the colouring content of 100 ppm as prescribed under the FSS Act 2006. The report in the case on hand was therefore required to be appropriately considered, first by the officer filing the complaint and subsequently by the learned Additional Chief judicial Magistrate.

19 Learned senior Advocate submitted that the sanction order indicates total non application of mind. The sanction order is dated 23.10.2013. Perusal of the sanction order would show that there is no reference to the relevant matter and material considered by the sanctioning authority. The order indicates that the relevant sections of the Act were not considered. In my view, learned

370.apl.490.2016 judge.odt Additional Chief Judicial Magistrate before issuing process was required to consider this fact. He was required to record his satisfaction that this sanction order was consistent with the law. 20 The Hon'ble Apex Court in Lalankumar Singh and others .v/s. State of Maharashtra4 has considered the issue of failure to record the reasons and the consequences flowing from the same. In this case, the Hon'ble Apex Court has held that under Section 204 of the Code of Criminal Procedure, 1973 the Magistrate is required to apply his mind as to whether sufficient ground for proceeding against the accused exists in the case or not. The formation of such an opinion is required to be stated in the order itself. The order cannot be maintained if reasons have not been stated while coming to the conclusion that there is prima facie case against the accused. It is held that order need not contain the detail reasons but the reasons to record the

satisfaction must be stated. It is held that the order of issuance of process is not an empty formality. The criminal prosecution is a serious matter. In my view, this proposition is squarely applicable to the facts of this case. 4 2022 LiveLaw (SC) 833

370.apl.490.2016 judge.odt 21 In view of the above, I conclude that the complaint as well as the impugned order is liable to be quashed and set aside. The law laid down in the decision relied upon by the learned APP for the State is not applicable to the facts of the case for the reasons recorded herein above. Accordingly, the application is allowed. 22 The order issuing summons dated 13.11.2013 passed by the learned Additional Chief Judicial Magistrate, Nagpur is quashed and set aside. Consequently, the Regular Criminal Case No. 4376 of 2013 is also quashed.

23 The application stands disposed of, accordingly.

(G. A. SANAP, J.) Namrata Signed by: Miss Namrata Suryawanshi Designation: PA To Honourable Judge Date: 26/09/2023 18:02:14