

Bashir Ahmad Shergojri vs Ut J&K & Others on 27 October, 2021

Author: Sanjay Dhar

Bench: Sanjay Dhar

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

Reserved on: 12.10.
Pronounced on: 27.10.

WP(C) No.1198/2021
CM No.4003/2021
CM No.6487/2021
CM No.5537/2021

BASHIR AHMAD SHERGOJRI

...PETITIONER

Through: - Mr. Gulzar Ahmad Bhat, Advocate.

Vs.

UT J&K & OTHERS

...RESPONDENT(S)

Through: - Mr. Shah Aamir, AAG-for R1 to R3
Mr. A. H. Naik, Sr. Adv. with
Mr. Zia, Advocate-for R4

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) Petitioner has challenged notice bearing No.ACF/Estt/Pul/21- 22/71 dated 12.06.2021 issued by respondent No.3, whereby petitioner has been directed to stop the manufacturing of toned milk under the brand name of "SAAF SHEER" with immediate effect. A further direction commanding the respondents to permit the petitioner to run his milk processing unit M/S Insha Dairy Products without any hindrance, has also been sought.

2) The case set up by the petitioner is that he is running a milk processing unit under the name and style of M/S Insha Dairy Products, Lassipora Pulwama. It is averred that petitioner is manufacturing toned milk under the brand name of "SAAF SHEER"

whereas the respondent No.4 is manufacturing toned milk under the brand name of "SAFA SHEER". Petitioner alleges that at the behest of respondent No.4, Vice

Chairperson, J&K Khadi and Village Industries Board addressed a communication to Commissioner, Food Safety Department, Jammu and Kashmir, asking the aforesaid authority to stop the petitioner from using POLYPACK film of "SAAF SHEER" as the same affects the goodwill of SAFA SHEER by misguiding the consumers. According to the petitioner, on the basis of this communication and under the political influence, respondent No.3 has issued the impugned notice directing the petitioner not to manufacture toned milk under the brand name "SAAF SHEER".

3) Petitioner has challenged the aforesaid communication on the grounds that "SAAF SHEER" being a registered trademark of petitioner cannot be allowed to be infringed by asking him to stop production under the aforesaid brand name; that the petitioner has not violated any regulation pertaining to packing and labelling and, as such, action of respondent No.3 is not in accordance with law; that by issuing the impugned notice petitioner's fundamental right to carry on business has been taken away without following due procedure and that action of respondent No.3 is without jurisdiction.

4) The writ petition has been contested by respondents including private respondent No.4 by filing replies thereto. The official respondents, in their reply, have submitted that the impugned notice has been issued by respondent No.3 as the brand name "SAAF SHEER" contravenes Regulation No.2.4.6(6) of Food Safety and Standards (Packaging and Labelling) Regulations, 2011. According to the said respondents, word "pure" or any word or words of the same significance cannot be included in the label of the package. Therefore, the name "SAAF SHEER" that is being used by petitioner for branding its milk products contravenes the regulations. It has been admitted by the official respondents that they had received a complaint from respondent No.4 to the effect that the petitioner is using brand name "SAAF SHEER" which has identical graphics/drawing to the brand name "SAFA SHEER" that is being used by respondent No.4 thereby deceiving the consumers. It is averred that on 11.05.2021, petitioner had submitted an application for adding brand name "SAAF SHEER" and the same was examined together with application of respondent No.4 whereafter the impugned notice came to be issued directing the petitioner to stop manufacture of toned milk under the brand name "SAAF SHEER".

5) Respondent No.4 in his reply to the writ petition has averred that he is running a unit of manufacturing milk and milk products for the last several decades under the brand name "SAFA SHEER". It is averred that the said respondent is having certificate of registration issued in his favour by the Department of Legal Metrology. According to respondent No.4, his unit has been established much prior to the establishment of unit by the petitioner who, with a deliberate intent to pass off his product with a similar brand name as that of respondent No.4, has started manufacturing of milk products under the brand name "SAAF SHEER". This compelled the respondent No.4 to make a complaint against the petitioner and, accordingly, respondent No.3 issued the impugned notice directing the petitioner to stop production of toned milk under the brand name "SAAF SHEER". It is contended by respondent No.4 that petitioner's application for registration of trademark of brand name "SAAF SHEER" stands rejected. It is also averred that the petitioner has executed an agreement on 16.06.2021 whereby he has undertaken that he shall stop production of his milk products under the brand name "SAAF SHEER". It has been further

contended that the milk products of respondent No.4 under the brand name "SAAF SHEER" are very popular amongst the general public and the petitioner, in order to derive benefit of goodwill of brand name of respondent No.4, has started manufacturing milk products under the brand name "SAAF SHEER" which is deceptively similar to the brand name of the product of respondent No.4 "SAFA SHEER" thereby rendering himself liable for penal action and damages.

6) I have heard learned counsel for the parties and perused the material on record.

7) The bone of contention is the impugned notice dated 12.06.2021, whereby petitioner has been prohibited from manufacturing toned milk under the branch name "SAFA SHEER". According to the official respondents, petitioner by branding his product "SAFA SHEER" has violated Regulation No.2.4.6(4) of Food Safety and Standards (Packaging and Labelling) Regulations, 2011, as word "pure" or any word or words which are of similar significance cannot be used by a business unit on the labels of its products. The question, however, arises as to whether violation of a regulation gives power to the authorities under the Act of 2006 to direct a business unit to stop its production/manufacture. For finding an answer to this question, we need to understand the scheme of the Food Safety and Standards Act, 2006. We also need to trace the source of power to issue a direction in the nature of the impugned notice.

8) Chapter VI of the Act of 2006 enumerates special responsibilities as to food safety. Section 26 to 28 of the Act fall under this Chapter. Section 26 provides for responsibilities of the food business operators whereas Section 27 provides for liability of manufacturers, packers, wholesalers, distributors and sellers. Section 28 of the Act of 2006 governs the food recall procedures. Thus, provisions contained in Chapter VI though oblige a food business operator not to manufacture, store or sale any article of food in contravention of the provisions of the Act, rule or regulation made under the Act, yet the power to direct stoppage of manufacture of a product which contravenes provisions of the Act, rule or regulation cannot be traced to any of the provisions contained in Chapter VI of the Act.

9) Chapter VII of the Act deals with the provisions relating to enforcement of the Act. Section 29 to Section 42 fall under this Chapter. While Section 29 of the Act enumerates the authorities who are responsible for enforcement of the Act, Section 31 deals with licensing and registration of food business. So far as the power of issuing the orders of prohibition is concerned, the provisions contained in Sections 30, 33, 34 and 36 are relevant to the context and are required to be noticed so as to trace the power of authorities under Food Safety and Standards Act to issue an order of prohibition of the nature which is subject matter of the instant writ petition.

10) Section 30 of the Act of 2006 reads as under:

"30. Commissioner of Food Safety of the State.-(1) The State Government shall appoint the Commissioner of Food Safety for the State for efficient implementation of food safety and standards and other requirements laid down under this Act and the rules and regulations made thereunder.

(2) The Commissioner of Food Safety shall perform all or any of the following functions, namely:-

(a) prohibit in the interest of public health, the manufacture, storage, distribution or sale of any article of food, either in the whole of the State or any area or part thereof for such period, not exceeding one year, as may be specified in the order notified in this behalf in the Official Gazette;

(b) carry out survey of the industrial units engaged in the manufacture or processing of food in the State to find out compliance by such units of the standards notified by the Food Authority for various articles of food;

(c) conduct or organise training programmes for the personnel of the office of the Commissioner of Food Safety and, on a wider scale, for different segments of food chain for generating awareness on food safety;

(d) ensure an efficient and uniform implementation of the standards and other requirements as specified and also ensure a high standard of objectivity, accountability, practicability, transparency and credibility;

(e) sanction prosecution for offences punishable with imprisonment under this Act;

(f) such other functions as the State Government may, in consultation with the Food Authority, prescribe.

(3) The Commissioner of Food Safety may, by Order, delegate, subject to such conditions and restrictions as may be specified in the Order, such of his powers and functions under this Act (except the power to appoint Designated Officer, Food Safety Officer and Food Analyst) as he may deem necessary or expedient to any officer subordinate to him."

A perusal of the aforesaid provision reveals that Section 30(2)(a) gives power to the Commissioner Food Safety to prohibit, in the interests of public health, the manufacture, storage, distribution or sale of any article of food.

Section 33 reads as under:

"33. Prohibition orders.-(1) If -

(a) any food business operator is convicted of an offence under this Act; and

(b) the court by or before which he is so convicted is satisfied that the health risk exists with respect to that food business, the court, after giving the food business operator an opportunity of being heard, may by an order, impose the following

prohibitions, namely:-

(i) a prohibition on the use of the process or treatment for the purposes of the food business;

(ii) a prohibition on the use of the premises or equipment for the purposes of the food business or any other food business of the same class or description;

(iii) a prohibition on the use of the premises or equipment for the purposes of any food business.

(2) The court may, on being satisfied that it is necessary so to do, by an order, impose a prohibition on the food business operator participating in the management of any food business, or any food business of a class or description specified in the order.

(3) As soon as practicable after the making of an order under sub-section (1) or sub-section (2) (in this Act referred to as a "prohibition order", the concerned Food Safety Officer shall-

(a) serve a copy of the order on the food business operator; and

(b) in the case of an order under sub-section (1), affix a copy of the order at a conspicuous place on such premises used for the purposes of the food business, and any person who knowingly contravenes such an order shall be guilty of an offence and be punishable with a fine which may extend to three lakh rupees.

(4) The concerned Food Safety Officer shall with the approval of the Designated Officer issue a certificate to the effect that the food business operator has taken sufficient measures justifying lifting of the prohibition order, within seven days of his being satisfied on an application made by the food business operator for such a certificate or the said officer shall-

(a) determine, as soon as is reasonably practicable and in any event within fourteen days, whether or not he is so satisfied; and

(b) if he determines that he is not so satisfied, give notice to the food business operator of the reasons for that determination.

(5) A prohibition order shall cease to have effect upon the court being satisfied, on an application made by the food business operator not less than six months after the prohibition order has been passed, that the food business operator has taken sufficient measures justifying the lifting of the prohibition order.

(6) The court shall give a direction on an application by the food business operator, if the court thinks it proper so to do having regard to all the circumstances of the case, including in particular, the conduct of the food business operator since the making of the order;

but no such application shall be entertained if it is not made-

(a) within six months after the making of the prohibition order; or

(b) within three months after the making by the food business operator of a previous application for such a direction.

Explanation.-For the purpose of this section,-

(i) any reference above shall apply in relation to a manager of a food business as it applies in relation to the food business operator; and any reference to the food business operator of the business, or to the food business operator, shall be construed accordingly;

(ii) "manager" in relation to a food business, means any person who is entrusted by the food business operator with the day-to-day running of the business, or any part of the business A bare perusal of aforesaid provision reveals that the power to issue orders of prohibition under the said provision lies with the Court after a food business operator has been convicted of an offence under the Act.

Section 34 reads as under:

"34. Emergency prohibition notices and orders.-(1) If the Designated Officer is satisfied that the health risk condition exists with respect to any food business, he may, after a notice served on the food business operator (in this Act referred to as an emergency prohibition notice), apply to the Commissioner of Food Safety for imposing the prohibition.

(2) If the Commissioner of Food Safety is satisfied, on the application of such an officer, that the health risk condition exists with respect to any food business, he shall, by an order, impose the prohibition.

(3) The Designated Officer shall not apply for an emergency prohibition order unless, at least one day before the date of the application, he has served notice on the food business operator of the business of his intention to apply for the order.

(4) As soon as practicable after the making of an emergency prohibition order, the Designated Officer shall require the Food Safety Officer to-

(a) serve a copy of the order on the food business operator of the business; or

(b) affix a copy of the order at a conspicuous place on such premises used for the purposes of that business; and any person who knowingly contravenes such an order shall be guilty of an offence and shall be punishable with imprisonment for a term which may extend to two years and with fine which may extend to two lakh rupees.

(5) An emergency prohibition order shall cease to have effect on the issue by the Designated Officer of a certificate to the effect that he is satisfied that the food business operator has taken sufficient measures for justifying the lifting of such order.

(6) The Designated Officer shall issue a certificate under sub-section (5) within seven days of an application by the food business operator for such a certificate and on his being not satisfied, the said officer shall give notice to the food business operator within a period of ten days indicating the reasons for such decision."

The aforesaid provision gives power to Commissioner of Food Safety to impose prohibition if he is satisfied that the health risk condition exists with respect to any food business.

Section 36 reads as under:

"36. Designated Officer.-The Commissioner of Food Safety shall, by order, appoint the Designated Officer, who shall not be below the rank of a Sub- Divisional Officer, to be in-charge of food safety administration in such area as may be specified by regulations.

(2) There shall be a Designated Officer for each district.

(3) The functions to be performed by the Designated Officer shall be as follows, namely:--

(a) to issue or cancel licence of food business operators;

(b) to prohibit the sale of any article of food which is in contravention of the provisions of this Act and rules and regulations made thereunder;

(c) to receive report and samples of article of foods from Food Safety Officer under his jurisdiction and get them analysed;

(d) to make recommendations to the Commissioner of Food Safety for sanction to launch prosecutions in case of contraventions punishable with imprisonment;

(e) to sanction or launch prosecutions in cases of contraventions punishable with fine;

(f) to maintain record of all inspections made by Food Safety Officers and action taken by them in the performance of their duties;

(g) to get investigated any complaint which may be made in writing in respect of any contravention of the provisions of this Act and the rules and regulations made thereunder;

(h) to investigate any complaint which may be made in writing against the Food Safety Officer; and

(i) to perform such other duties as may be entrusted by the Commissioner of Food Safety."

The aforesaid provision gives power to a designated officer to prohibit the sale of any article of food which is in contravention of the provisions of the Act, rules and regulations made thereunder.

11) From an analysis of the aforesaid provisions, it appears that the impugned prohibition order has been passed by respondent No.3 under Section 36 of the Act of 2006. It cannot be an order under Section 30 of the Act as the prohibition has, admittedly, not been imposed in the interests of public health. It cannot be an order under Section 33 as the power to pass an order of prohibition in terms of said provision vests only with a Court. It can also not be an order under Section 34 of the Act as it is not the case of official respondents that prohibition order was made to take care of health risk conditions.

12) Now the question arises that if the impugned order is to be treated as one under Section 36 of the Act, whether the same fulfils the requirements of the said provision. A bare perusal of Section 36(3)(b), as quoted hereinbefore, reveals that a designated officer of a District is vested with the power to prohibit the sale of any article of food which is in contravention of the provisions of the Act, rules and regulations. The power vested with the designated officer only extends to prohibition of sale and not to manufacture. In the instant case, the impugned notice prohibits the manufacture of the milk product in question. Thus, the order, which seemingly has been issued by respondent No.3 under Section 36 of the Act, is beyond the scope of aforesaid provision.

13) There is yet another aspect of the matter which is required to be considered. Respondent No.3 before passing the impugned order has, admittedly, not issued any notice to the petitioner. Although Section 36 of the Act does not envisage issuance of a prior notice before MOHAMMAD ALTAF BHAT passing of an order of prohibition yet the order in question directing the petitioner to stop manufacture of the product has visited him with civil consequences. The issue as to whether principles of natural justice should be read into administrative action of an authority which visits the affected party with civil consequences has been a topic of discussion before the various High Courts and the Supreme Court in a number of cases. The Supreme Court in the case of A. K. Kraipak vs. Union of India, (1969) 2 SCC 262, while examining the law on the point, has made certain observations in para 13 of the judgment which are relevant to the context and the same are reproduced as under:

"13. The dividing line between an administrative power and a quasi-judicial power is quite thin and is being gradually obliterated. For determining whether a power is an administrative power or a quasi-judicial power one has to look to the nature of the power conferred, the person or persons on whom it is conferred, the framework of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised. In a welfare State like ours it is inevitable that the organ of the State under our Constitution is regulated and controlled by the rule of law. In a welfare State like ours it is inevitable that the jurisdiction of the administrative bodies is increasing at a rapid rate. The concept of rule of law would lose its validity if the instrumentalities of the State are not charged with the duty of discharging their functions in a fair and just manner. The requirement of acting judicially in essence is nothing but a requirement to act justly and fairly and not arbitrarily or capriciously. The procedures which are considered inherent in the exercise of a judicial power are merely those which facilitate if not ensure a just and fair decision. In recent years the concept of quasi-judicial power has been undergoing a radical change. What was considered as an administrative power some years back is now being considered as a quasi-judicial power....."

14) In *Mohinder Singh Gill v. The Chief Election Commissioner, New Delhi*, (1978) 1 SCC 405, the Supreme Court has, after taking into consideration its earlier judgments, observed as under:

"Therefore, we are inclined to hold that there was a requirement of show-cause notice by the Deputy Commissioner before passing the order of recovery irrespective of the fact whether Section 11A of the Act is attracted in the instant case or not. But that is not the end of the matter. While the law on the principle of audi alteram partem has progressed in the manner mentioned above. At the same time, the Courts have also repeatedly remarked that the principles of natural justice are very flexible principles. They cannot be applied in any strait-jacket formula. It all depends upon the kind of functions performed and to the extent to which a person is likely to be affected. For this reason, certain exceptions to the aforesaid principles have been invoked under certain circumstances. For example, the Courts have held that it would be sufficient to allow a person to make a representation and oral hearing may not be necessary in all cases, though in some matters, depending upon the nature of the case, not only full-fledged oral hearing but even cross-examination of witnesses is treated as necessary concomitant of the principles of natural justice. Likewise, in service matters relating to major punishment by way of disciplinary action, the requirement is very strict and full-fledged opportunity is envisaged under the statutory rules as well. On the other hand, in those cases where there is an admission of charge, even when no such formal inquiry is held, the punishment based on such admission is upheld. It is for this reason, in certain circumstances, even post-decisional hearing is held to be permissible. Further, the Courts have held that under certain circumstances, principles of natural justice may even be excluded by reason of diverse factors like time, place, the apprehended danger and so on."

15) From the analysis of the ratio laid down by the Supreme Court MOHAMMAD ALTAF BHAT in the aforesaid cases, it is clear that the question as to whether an affected party has to be given a hearing or not would depend on the facts and circumstances of each case.

16) Coming to the facts of the instant case, as already noted, the impugned order of prohibition has serious consequences on petitioner's right to continue with trade and business of manufacturing milk and milk products. It is a settled principle of law that no man can be condemned without being heard. If the petitioner's business is closed down without hearing him, it is going to affect his livelihood. Such a valuable right of petitioner which is guaranteed to him under Article 19(1)(g) of the Constitution cannot be taken away without giving him an opportunity of being heard.

17) If we have a look at the scheme of the Act of 2006, it becomes clear that wherever an authority has been vested with the power to prohibit a business operator from manufacturing or selling a product, a prior right of hearing has been provided for in the relevant statute. Even in the cases of emergency prohibition notices and orders under Section 34 of the Act, the Designated Officer is obliged to serve a notice on the food business operator of his intention to apply for an order of prohibition to the Commissioner of Food Safety. Similarly, under Section 33 of the Act, even after conviction of a food business operator, the Court has to give an opportunity of hearing to such operator before imposing prohibition. The case of the petitioner stands on a higher pedestal, inasmuch as the same neither involves MOHAMMAD ALTAF BHAT any health risk nor has he been convicted of any offence under the Act. The right of hearing to petitioner before passing the impugned notice of prohibition was an absolute necessity in the instant case

18) The question whether use of brand name "SAAF SHEER"

infringes Regulation No.2.4.6(6) of Food Safety and Standards (Packaging and Labelling) Regulations, 2011, could have been better determined by the authorities concerned after hearing the petitioner on this issue. The authority has stopped the manufacturing activities of the petitioner on the ground that Urdu word "SAAF" is similar to the expression "pure" used in the Regulations but at the same time it has allowed respondent No.4 to use the Urdu word "SAFA" which is synonym of Urdu word "SAAF". The word "SAAF" when translated into English, means "clean" or "clear" whereas the word "pure" when translated into Urdu, means "Khalis". The question whether the words "clean", "clear" and "pure" are synonymous and, as such, infringe Regulation No.2.4.6(6) of Food Safety and Standards (Packaging and Labelling) Regulations, 2011, could have been better determined only if the affected party i.e., petitioner herein, was given an opportunity of being heard, which in the instant case has not been afforded to him by the respondent No.3 before issuing the impugned order. The same, therefore, is not sustainable in law.

19) So far as the grievance of respondent No.4 that petitioner is using a brand name which is deceptively similar to his brand name is concerned, the same cannot be a subject matter of these proceedings MOHAMMAD ALTAF BHAT nor could the official respondents in exercise of their powers under the Act of 2006, stop the

manufacturing of products by the petitioners, on these grounds. The remedy for respondent No.4 lies in bringing an action for infringement of trademark or an action for passing off.

20) For the forgoing reasons, the writ petition is allowed and impugned notice dated 12.06.2021, issued by respondent No.3, is quashed. The respondent No.3 shall, however, be at liberty to pass a fresh order after giving an opportunity of hearing to the petitioner. It is also made clear that it will be open to the respondent No.4 to file an action for infringement of trademark/pass off against the petitioner, if he so desires.

(Sanjay Dhar) Judge Srinagar 27.10.2021 "Bhat Altaf, PS"

Whether the order is speaking:

Yes

Whether the order is reportable:

Yes