

Mohammed Yasith vs The Food Safety Officer on 19 March, 2020

Author: G.Jayachandran

Bench: G.Jayachandran

CrI.O.P.(MD)No.165

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 11.03.2020

Pronounced on : 19.03.2020

CORAM:

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN
CrI.O.P.(MD)No.16501 of 2016
and
CrI.M.P.(MD)No.8088 of 2016

1.Mohammed Yasith
2.M.Marippan
3.A.Sankaralingam

.. Petitioners/A

Vs.

The Food Safety Officer,
Ambasamuthram Taluk,
Tirunelveli District.

.. Respon
Compla

Prayer:- Petition is filed under Section 482 of the Criminal Procedure Code, to quash the charge sheet insofar as the petitioners are concerned C.C.No.263 of 2014, pending on the file of the Judicial Magistrate, Ambasamuthram, Tirunelveli District.

For Petitioners : Mr.S.Sarvagan Prabhu

For Respondent : Mr.S.Chandrasekar
Additional Public Prosecutor

1/24

<http://www.judis.nic.in>

CrI.O.P.(MD)No.1

ORDER

This petition is filed under Section 482 Cr.P.C. to quash the criminal proceedings initiated by the

Food Safety Officer, the respondent herein under the Food Safety and Standards Act, 2006, against the petitioners, who are the Retailer, Distributor and Manufacturer respectively of a food product 'STK Brand Gingelly Oil'.

2.The respondent herein has filed a compliant before the learned Judicial Magistrate, Ambasamuthram, Tirunelveli District, against the petitioners herein for the offences under Sections 51, 55 and 63 r/w. Sections 3(1)(zx), 26(1), 26(2)(ii)(iii)(v), 27(1) and 31 of the Food Safety and Standards Act, 2006 and Regulation 2.2.1(12) of the Food Safety and Standards [Food Products Standards and Food Additives] Regulations, 2011 and Regulation 2.1.2(1) of the Food Safety and Standards [Licensing and Registration of Food Business] Regulations, 2011. The said complaint was taken cognizance by the learned Judicial Magistrate, Ambsamuthram, as C.C.No.263 of 2014.

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3.In the said complaint, the respondent has stated that on 28.12.2013 at 11.30 a.m., he inspected the shop of the first petitioner and after introducing himself as a Food Safety Officer of that Region, enquired about the STK Brand Gingelly Oil kept in the shop of the first petitioner/A1, for retail selling. The first petitioner/A1 informed the respondent that he had 10 packets of 1000 ml. STK Brand Gingelly Oil. After selling four packets, having six packets stock in hand. He informed that the second petitioner is the Distributor of the STK Brand Gingelly Oil, which is manufactured and marketed by the third petitioner through the second petitioner. To test the standard of the food product, namely STK Brand Gingelly Oil, sample was drawn from the packet in the presence of witnesses and sent for analysis. Four packets of STK Brand Gingelly Oil kept for sale by the first petitioner was purchased by the respondent on payment of cash Rs.700/-. The samples were sent for analysis to the Laboratory on 28.12.2013 after getting due permission from the Designated Officer.

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4.The Analysis Report dated 09.01.2014, disclosed the sample sent for analysis is a sub-standard food product, indicating the presence of Palmolein Oil, acid value and Saponification values are more than the maximum prescribed standards and the Butyro-refractometer reading and iodine value are less than the minimum prescribed standards for Gingelly Oil under Regulation 2.2.1(12) of the Food Safety and Standards [Food Products Standards and Food Additives] Regulations, 2011. Thereafter, the respondent/complainant inspected the premises of the Distributor M.Mariappan, second petitioner herein, to verify whether he has obtained requisite licence to sell the food product as per the Food Safety and Standards [Licensing and Registration of Food Businesses] Regulation, 2011. The second petitioner has answered in negative during the inspection.

5.Enquiry of the respondent disclosed that the second petitioner is the Distributor of the third petitioner's product viz., STK Brand Gingelly Oil. When the respondent asked for records relating to the licence, the third petitioner refused to produce the same. After ascertaining the details from the Commercial Tax Department about the third petitioner, who is the <http://www.judis.nic.in> Crl.O.P.(MD)No.16501 of 2016 Manufacturer of sub-standard product, the third petitioner was

asked to furnish details about the Firm. The third petitioner, on receipt of the request, had furnished the details of the Firm, Commercial Tax Department Licence and Food Safety Licence.

6. Having found the product manufactured, distributed and sold by the petitioners 1 to 3 respectively, being sub-standard product, the respondent/complainant has obtained sanction from the Commissioner of Food Safety and on obtaining the sanction order dated 17.09.2014, the complaint has been filed before the Judicial Magistrate Court, Ambasamuthram, Tirunelveli District, on 15.10.2014, for the offences under Sections 51, 55 and 63 of the Food Safety and Standards Act, 2006, and the same was taken cognizance by the learned Judicial Magistrate, Ambasamuthram, Tirunelveli District, as C.C.No.263 of 2014.

7. The petitioners herein are before this Court challenging the legality of the complaint and the act of taking cognizance of the complaint by the learned Judicial Magistrate, Ambasamuthram, on the following grounds:-

<http://www.judis.nic.in> CrI.O.P.(MD)No.16501 of 2016 "(a) The Respondent/Complainant have registered a case under Section 51, 55, 63 of Food Safety and Standards Act, 2006 r/w 3(1)(Zx), 26(1), 26(2)(ii)(iii)(v), 27(1), 31 and 2.2.1(12) of Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011 and 2.1.2(1) of Food Safety and Standards (Licensing and Registration of Food Business) Regulations, 2011 against the above petitioners without properly conducting fair investigation.

(b) The respondent/complainant filed the case against the above petitioners without following the procedure as contemplated under the Act.

(c) The respondent/complainant filed the case with the intention to harass the petitioners.

(d) The respondent/complainant filed the case against the petitioners 1 and 3 under Sections 51 and 55 of Food Safety and Standards Act, 2006 and filed the impugned charge before the Judicial Magistrate, Ambasamuthuram. When a person is charged under <http://www.judis.nic.in> CrI.O.P.(MD)No.16501 of 2016 Sections 51 and 55 of Food Safety and Standards Act, 2006, the same has to be adjudicated under Section 68 of Food Safety and Standards Act, 2006. Whereas, the learned Judicial Magistrate does not have jurisdiction to conduct enquiry charged under Sections 51 and 55 of Food Safety and Standards Act, 2006.

(e) The respondent/complainant acted in violation of 3.1.1. of Food Safety and Standards Rules, 2011.

(f) The Rule contemplates and distinguish the proceedings in case of penalty and cases where imprisonment and fine under the provisions of the Act imposed.

(g)The Rule 3.1.1 (3) Food Safety and Standards Rules, 2011 is mandatory to initiate proceedings before adjudication officer in case of fine.

(h)The respondent/complainant has registered a case under Section 63 of Food Safety and Standards Act, 2006 against 2nd petitioner herein without <http://www.judis.nic.in> Crl.O.P.(MD)No.16501 of 2016 following the Food Safety and Standards (Licensing and Registration of Food Business) Regulations, 2011.

(i)The Food Safety and Standards (Licensing and Registration of Food Business) Regulations, 2011 came into force on 05.08.2011. Whereas the government has given time for the food business operator for conversion from old Act to get licence from the competent authority under the new Act.

(j)The respondent/complainant not given any valid reason for not considering the valid licence obtained from the local body under Prevention of Food Adulteration Act for running the business by the 2nd petitioner herein.

(k) The respondent/complainant filed the case against the 2nd petitioner herein in violation of 2.1.2 of the Food Safety and Standards (Licensing and Registration of Food Business) Regulations, 2011. The Regulation contemplates for conversion and extended time for conversion till 04.02.2016.

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(l)The Charge contains controverted allegations. The evidence collected in support of the same do not disclose the commission of any offence to make out a case against the accused.

(m) The allegations are frivolous and without any basis against the petitioners, which is clearly an abuse of process of law.

(n) The allegation are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceedings against the accused.

(o) There is no specific allegations against the petitioners even if they are taken at their face value and accepted in their entirety do not prima facie constitutes any offence or make out a case against the petitioner/accused."

8.The learned counsel appearing for the petitioners would submit that the complaint has been filed without proper investigation. The <http://www.judis.nic.in> Crl.O.P.(MD)No.16501 of 2016 Commissioner of Food Safety, without applying the mind properly, has accorded sanction for prosecution under Sections 51, 55 and 63 of the Food Safety and Standards Act, 2006.

9.According to the learned counsel appearing for the petitioners, as per Section 51 of the Food Safety and Standards Act, 2006, any person himself or on his behalf manufactures for sale or stores or sells

or distributes or imports any article of food for human consumption, which is sub- standard, shall be liable to a penalty, which may extend to five lakh rupees. Similarly, as per Section 55 of the said Act, if a food business operator or importer without reasonable ground, fails to comply with the requirements of this Act or the rules or regulations or orders issued thereunder, as directed by the Food Safety Officer, shall be liable to penalty, which may extend to two lakh rupees. These two penal provisions have to be adjudicated by the Designated Officer, who shall be not below the rank of Additional District Magistrate of the District.

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10. In case of petty manufactures or retailers or temporary stall holders, the Commissioner of Food Safety may, by order, empower the Designated Officer to compound the offence in certain circumstances specified under the Act, as specified under Section 69 of the Food Safety and Standards Act, 2006. While so, Section 63 of the Food Safety and Standards Act, 2006 alone, is the penal provision, under which, a food business operator [except the persons exempted from licensing under sub- section (2) of Section 31 of this Act], himself or by any person on his behalf, who is required to obtain licence, manufactures, sells, stores or distributes or imports any article of food without licence, shall be prosecuted and punished with imprisonment for a term, which may extend to six months and also with a fine, which may extend to five lakh rupees.

11. Section 30(2)(e) of the Food Safety and Standards Act, 2006, empowers the Commissioner of Food Safety of the State to sanction prosecution for offences punishable with imprisonment under this Act. Since Sections 51 and 55 of the Food Safety and Standards Act, 2006 are not prescribing any imprisonment, sanction to prosecute the petitioners <http://www.judis.nic.in> Crl.O.P.(MD)No.16501 of 2016 under these two Sections is beyond the legal competence and power conferred on the Commissioner of Food Safety.

12. The learned counsel appearing for the petitioners would further submit that Section 63 of the Food Safety and Standards Act, 2006, prescribes punishment and fine on a food business operator, if he carry on business without licence. As far as the facts of this case are concerned, the second petitioner herein, who is the Distributor, has licence under the Prevention of Food Adulteration Act. As per the order of Ministry of Health and Family Welfare, Government of India, dated 06.08.2015, issued by the Director [Enforcement] of the Department, the time to get licence under the new Act was extended upto 04.08.2015. The second petitioner is the licence holder under the old Act and time for getting licence under the new Act, which came into force in 2006, was extended time to time upto 04.02.2016. While so, sanction to prosecute the petitioners for not possessing the licence under the new Act is ultra vires.

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13. The learned Additional Public Prosecutor appearing for the respondent would submit that during the inspection, the first petitioner was found selling sub-standard STK Brand Gingelly Oil. Samples were drawn and sent to analysis. The report of the Food Analyst reveals that though the label declaration of the product informs the consumer that it is 100% pure vegetarian, the test reveals the

following characters about the product:-

- "(i) the said oil tests positive for the presence of Palmolein Oil;
- (ii) the Acid value and Saponification values are more than the maximum prescribed standards; and also
- (iii) the Butyro-refractometer reading and Iodine value are less than the minimum prescribed standards.

for Gingelly Oil under Regulation 2.2.1(2) of Food Safety and Standards [Food Product Standards and Food Additives] Regulation 2011." Therefore, the Food Analyst opined that the product is a sub-standard one. Thereafter, the petitioners were informed about the report through communication dated 10.02.2014 by the Designated Officer and opportunity was given to them to exercise their option to send the second sample for <http://www.judis.nic.in> Crl.O.P.(MD)No.16501 of 2016 test, if they opt to do so. The petitioners have not exercised that right and thereafter, sanction for prosecution was issued by the Commissioner of Food Safety, vide order dated 17.09.2014. The petitioners at the time of inspection and during the course of enquiry, never produced licence. There is prima facie material to show that the product what they manufactured, distributed and sold, is a sub-standard product. Therefore, sanction was granted to prosecute them for the offences under Sections 51, 55 and 63 of the Food Safety and Standards Act, 2006.

14.The learned Additional Public Prosecutor would further submit that no doubt, the statute prescribes only penalty for manufacturing, storing, distributing and selling sub-standard product, for which, sanction is not required under Section 30(2)(e) of the Food Safety and Standards Act, 2006. It does not mean that they are only liable for penalty under adjudication and they cannot be prosecuted. When a graver offence of selling product without licence has been made out, for which, the statute prescribes punishment of imprisonment as well as fine, the lesser offence, which may be adjudicated, will not be a bar or impediment for prosecution. <http://www.judis.nic.in> Crl.O.P.(MD)No.16501 of 2016

15.The learned Additional Public Prosecutor would also submit that nowhere in the statute, there is restriction for the authorities to only adjudicate for selling the sub-standard quality product and not to prosecute.

16.Heard the learned counsel appearing for the petitioners and the learned Additional Public Prosecutor appearing for the respondent and perused the materials on record.

17.Before advertng to the merits of this case, since the facts have already been narrated above, the relevant provision of the Food Safety and Standards Act, 2006 also needs reference. Hence, they are extracted below:-

"3.Definitions.-

(n) "food business" means any undertaking, whether for profit or not and whether public or private, carrying out any of the activities related to any stage of manufacture, processing, packaging, storage, transportation, distribution of food, import and includes food services, catering services, sale of food or food ingredients.

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(o) "food business operator" in relation to food business means a person by whom the business is carried on or owned and is responsible for ensuring the compliance of this Act, rules and regulations made thereunder.

30.Commissioner of Food Safety of the State.-

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

51.Penalty for sub-standard food.- Any person who whether by himself or by any other person on his behalf manufactures for sale or stores or sells or distributes or imports any article of food for human consumption which is sub-standard, shall be liable to a penalty which may extend to five lakh rupees.

55.Penalty for failure to comply with the directions of Food Safety Officer.- If a food business operator or importer without reasonable ground, fails to comply with the requirements of this Act or the rules or regulations or orders issued thereunder, as directed by the Food Safety Officer, he shall be liable to a penalty <http://www.judis.nic.in> Crl.O.P.(MD)No.16501 of 2016 which may extend to two lakh rupees.

63.Punishment for carrying out a business without licence.- If any person or food business operator (except the persons exempted from licensing under sub-section (2) of section 31 of this Act), himself or by any person on his behalf who is required to obtain licence, manufactures, sells, stores or distributes or imports any article of food without licence, shall be punishable with the imprisonment for a term which may extend to six months and also with a fine which may extend to five lakh rupees.

68.Adjudication.- (1) For the purposes of adjudication under this Chapter, an officer not below the rank of Additional District Magistrate of the district where the alleged offence is committed, shall be notified by the State Government as the Adjudicating Officer for adjudication in the manner as may be prescribed by the Central Government.

(2) The Adjudicating Officer shall, after giving the person a reasonable opportunity for making representation in the matter, and if, on such inquiry, he <http://www.judis.nic.in> Crl.O.P.(MD)No.16501 of 2016 is satisfied that the person has committed the contravention of provisions of this Act or the rules or the regulations made thereunder, impose such penalty as he thinks fit in accordance with the provisions relating to that offence.

(3) The Adjudicating Officer shall have the powers of a civil court and-

(a) all proceedings before him shall be deemed to be judicial proceedings within the meaning of sections 193 and 228 of the Indian Penal Code (45 of 1860).

(b) shall be deemed to be a court for the purposes of sections 345 and 346 of the Code of Criminal Procedure, 1973 (2 of 1974).

(4) While adjudicating the quantum of penalty under this Chapter, the Adjudicating Officer shall have due regard to the guidelines specified in section 49."

18.The Commissioner of Food Safety after reading the report of the Food Analyst had found that the STK Brand Gingelly Oil sold by the first petitioner manufactured by the third petitioner is of sub-standard quality <http://www.judis.nic.in> Crl.O.P.(MD)No.16501 of 2016 product. Section 3(zx) of the Food Safety and Standards Act, 2006, defines sub-standard quality food. For selling sub-standard quality food, the Act contemplates only penalty. Certain provisions of the Act indicates penalty to be imposed by the adjudicating authority and certain provisions of the Act indicates imprisonment and fine by Judicial Magistrate. Any adjudication is amenable for compounding and further appeal to Tribunal. Whereas any imprisonment or fine imposed by the Magistrate, the appeal lies with the Sessions Court and further appeal or revision before the High Court.

19.Section 3(zz) of the Food Safety and Standards Act, 2006 defines "unsafe food", which means an article of food whose nature, substance or quality is so affected as to render it injurious to health. If any person manufactures or stores or sells or distributes or imports unsafe food is liable for punishment under Section 59 of the Food Safety and Standards Act, 2006, which includes imprisonment for a term, which may extend to one year and also with fine, which may extend to three lakh rupees. Therefore, from a reading of Sections 51, 55 and 59 of the Food Safety and Standards <http://www.judis.nic.in> Crl.O.P.(MD)No.16501 of 2016 Act, 2006, in the light of the definition of "sub-standard" quality food under Section 3(zx) of the Act, and "unsafe food" defined under Section 3 (zz) of the Act, it is clear that to prosecute a Trader in food products, he must sell unsafe food product, then, he can be prosecuted under Section 59 of the Act. If the product is found to be sub-standard, only adjudication is permissible. Hence, as pointed out by the learned counsel appearing for the petitioners, the sanction to prosecute the petitioners under Sections 51 and 55 of the Food Safety and Standards Act, 2006, is without application of mind. In other words, when there is no provision to prosecute a seller, dealer or manufacturer for selling, distributing or manufacturing the sub-standard quality food, grant of sanction to prosecute is an empty exercise of power. The Department ought to have proceeded against the petitioners before the Adjudicating Authority for violation of Sections 51 and 55 of the Food Safety and Standards Act, 2006.

20.As far as prosecuting the petitioners under Section 63 of the Food Safety and Standards Act, 2006, for carrying out business without licence, the learned counsel for the petitioners across the bar, produced certain <http://www.judis.nic.in> Crl.O.P.(MD)No.16501 of 2016 papers to indicate that the second petitioner had valid licence under the Prevention of Food Adulteration Act, which was sufficient as per the order passed by the Central Government. This is a disputed fact and matter for

trial. Whether the licence held by the second petitioner was valid or not, has to be decided during the trial. The second petitioner has not produced it to the respondent, in spite of notice to him. Even the said defence now taken by the second petitioner is not available for the other petitioners, since there is no material produced by them to show that they had valid licence to carry the business in food product at the relevant point of time.

21. Applying the ratio laid down by the Hon'ble Supreme Court in the case of State of Haryana Vs. Bhajan Lal reported in 1992 Cri.L.J. 527, even if the allegations made in the complaint is taken at the face value and accepted in its entirety, for selling the sub-standard quality product, the petitioners cannot be prosecuted and at the most, penalty can be imposed in the adjudication process. Contrarily, there is a prima facie material to prosecute the petitioners under Section 63 of the Food Safety and Standards Act, 2006, for carrying on food business without licence, this Court is of the <http://www.judis.nic.in> Crl.O.P.(MD)No.16501 of 2016 view that to the extent of prosecuting the petitioners under Section 63 of the Food Safety and Standards Act, 2006, sanction granted by the Commissioner of Food Safety, is valid. Hence, to that extent, it is saved. Whereas, the sanction granted to prosecute the petitioners under Sections 51 and 53 Food Safety and Standards Act, 2006, is without any competency. Hence, to that extent, the proceedings in C.C.No.263 of 2014, on the file of the Judicial Magistrate Court, Ambasamuthram, Tirunelveli District, is quashed.

22. The Trial Court is directed to proceed against the petitioners insofar as the offence under Section 63 of the Food Safety and Standards Act, 2006.

23. The respondent is at liberty to proceed against the petitioners before the Adjudicating Authority for violation under Sections 51 and 55 of the Food Safety and Standards Act, 2006.

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24. Accordingly, this Criminal Original Petition is partly allowed. Consequently, connected Miscellaneous Petition is closed.

19.03.2020 Index : Yes Internet : Yes smn2 To

1. The Judicial Magistrate, Ambasamuthram, Tirunelveli District.
2. The Food Safety Officer, Ambasamuthram Taluk, Tirunelveli District.
3. The Additional Public Prosecutor, Madurai Bench of Madras High Court, Madurai.

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smn2 Pre-delivery order made in Crl.O.P.(MD) No.16501 of 2016 19.03.2020
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