

Itc Limited vs State Of Madhya Pradesh on 27 November, 2024

Author: Milind Ramesh Phadke

Bench: Milind Ramesh Phadke

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IN THE HIGH COURT OF MADHYA PRADESH
AT G W A L I O R

BEFORE

HON'BLE SHRI JUSTICE MILIND RAMESH PHADKE

ON THE 27th OF NOVEMBER, 2024

WRIT PETITION No. 2665 of 2013

(ITC LIMITED

Vs

STATE OF MADHYA PRADESH AND ANR)

Appearance:

(BY SHRI KISHORE SHRIVASTAVA - SENIOR ADVOCATE WITH SHRI
KUNAL THAKRE -ADVOCATE AND SHRI S.K. SHRIVASTAVA-
ADVOCATE FOR PETITIONER)

(BY SHRI B.M. PATEL - GOVERNMENT ADVOCATE FOR
RESPONDENT/STATE.

ORDER

The instant writ petition under Article 226 of the Constitution of India is directed against the arbitrary and illegal action of the respondents as disclosed in the impugned order dated 27.11.2012 whereby respondent No.2 had granted sanction to initiate proceedings against the petitioner and other co-accused and only on the basis of report of Food Analyst which does not disclose any offence. The petitioner is assailing the proceedings initiated against the petitioner in pursuance of the aforesaid sanction order before the Court of Adjudicating Officer cum Additional District Magistrate, District Guna registered as case No.7/Food Safety/2012.

2. The short facts leading to present controversy are that the petitioner is inter alia engaged in the business of manufacturing and marketing of various packaged food products including biscuits under the brand name 'Sunfeast' since 2003. The petitioner had established itself as one of leading biscuit brands and is a member of the Federation of Biscuits Manufactures of India (FBMI), an apex body of the biscuit industry. There are more than 26 varieties of biscuits that are being manufactured and sold under the brand name of 'Sunfeast'. The standards as stipulated for biscuits under the Act are in parimateria to the standards as was stipulated for Biscuits under Rule 5, Appendix B A.18.07 biscuits including Water Biscuits of the erstwhile Prevention of Food Adulteration Rules, 1955. The biscuits manufactured and marketed by the petitioner under the brand of Sunfeast are in compliance with the standards as provided under Regulation 2.4.15.1 of Food Safety and Standards (Food products Standards and Food Additives) Regulation 2011. The ingredients used in manufacturing process are in conformance with the standards prescribed for

biscuits and are listed on the label of each biscuit package in accordance with Food Safety and Standards (Packaging and Labelling) Regulations, 2011. As per the notification issued by the Ministry of Health under the Prevention of Food Adulteration Act 1954, vide GSR 664(E) dated 19.09.2008 pertaining to labelling of packages, the ingredient panel in the label is the critical and primary source of information to the consumers. It is the ingredient panel that the consumer relies on to take an informed decision on whether or not to purchase a particular food article. The ingredients and the nutritional information of the commodity are provided on the principal display panel of the label, which is also done in respect of biscuit sample picked by Respondent No.1.

3. The Respondent No.1 herein had picked up samples of Sunfeast Dream Cream Strawberry and Vanilla Biscuits from retail premises of M/S Ishika Agency on 30.05.2012 and issued notice in Form V A under Rule 2.4.1(3) of Food Safety and Standards Rules, 20/11 to Retailer only. The Respondent No.1 had submitted the sample for analysis to the Food Analyst, State Food Testing Laboratory, Bhopal. The Food Analyst has provided his report declaring the said samples of Sunfeast Dream Cream Strawberry and Vanilla Biscuit to be "misbranded" without providing any reason in the report as to why he is declaring the sample as "misbranded".

4. Since the notice was only served on the retailer, right to appeal against the report of Food Analyst with respect to food article was only available with the retailer and as the petitioner was not given any notice, no right to appeal was available to it against the said report as would be evident from the letter issued by respondent No.1 dated 27.06.2012. On the basis of report of Food Analyst, respondent No.2 had accorded sanction to respondent No.1 to initiate adjudication proceedings against the petitioner and thereafter, in pursuance to the said sanction order, the Respondent No.1 had preferred a complaint before Court of Adjudicating Officer cum Additional District Magistrate, District Guna, against the petitioner and others, alleging commission of offence under Section 26 and Section 27 read with Section 52 of the Act. After filing of the complaint, the Learned Adjudicating Officer cum Additional District Magistrate, District Guna issued notice to the petitioner to appear and file reply on the said complaint.

5. The very sanction order and the complaint did not specify the offence under which proceedings have been initiated against the Petitioner. Both the sanction order and the complaint merely invoked section 26 and 27 without categorically stating the offence alleged to have been committed by the petitioner herein, thereby denying the petitioner an opportunity of defending itself in proper way. Though both the complaint and the sanction order were passed invoking Section 52 which deals with penalties for misbranding, however, there was no mention in the complaint about the ingredients of misbranding as provided Section 3(zf) of the Act to attract an offence of misbranding. The petitioner thus being aggrieved by the actions taken by the respondents in initiating adjudication proceedings against the petitioner has left with no other alternative and efficacious remedy except to approach this Court under Article 226 of the Constitution of India.

6. Learned senior counsel had raised first and foremost ground with regard to competency of report of Food Analyst of State Food Laboratory which was not a laboratory accredited by National Accreditation Board for Testing and Calibration Laboratories (NABL) and recognized by the Food Authority under Section 43 of Food Safety and Standards Act, as the provision for testing food

sample in a Laboratory accredited by NABL and recognized by the Food Authority under Section 43 of Food Safety and Standards Act is a mandatory provision and non-compliance whereof would vitiate the entire process of analysis.

7. It was further submitted that as per Section 43 of Food Safety and Standards Act, the Food Authority may notify food laboratories and research institutions accredited by National Accreditation Board for Testing and Calibration Laboratories or any other accreditation agency for the purposes of carrying out analysis of samples by the Food Analysts under this Act. Further, the Food Authority would be empowered to establish or recognise by notification, one or more referral food laboratory or laboratories to carry out the functions entrusted to the referral food laboratory by this Act or any rules and regulations made thereunder.

8. It was also argued that provisions of Section 43 Food Safety and Standards Act further provides that the Food Authority may frame regulations specifying-

(a) the functions of food laboratory and referral food laboratory and the local area or areas within which such functions may be carried out;

(b) the procedure for submission to the said laboratory of samples of articles of food for analysis or tests, the forms of the laboratory's reports thereon and the fees payable in respect of such reports; and"

(c) such other matters as may be necessary or expedient to enable the said laboratory to carry out its functions effectively.

and in the light of said power by issuing notification on 12.04.2012, the Food Safety and Standards Authority of India had notified certain laboratories accredited by NABL for the purpose of carrying out analysis of sample by the Food Analyst under this Act. The said notification further stipulates that the initial authorization would be for one year i.e. from 12.04.2012 to 11.04.2013 or till discontinuation of NABL accreditation whichever is earlier. The Authorization of the laboratories for the above purpose would automatically stand cancelled in the event of discontinuation of NABL accreditation.

9. It was further argued that as per said notification, for the western region which included State of Gujrat, Maharashtra, Dadra & Nagar Haveli, Daman & Diu, Goa and Madhya Pradesh, following laboratories were held to be eligible for empanelment:-

(i) SGS India Pvt. Ltd., Ahmadabad

(ii) Anacon Laboratory Pvt. Ltd. Nagpur

(iii) Gujrat Laboratory, Ahmedabad

(iv) SGS India, Indore

- (v) GEO Chem, Mumbai
- (vi) Envirocare Labs P Ltd. Mumbai
- (vii) Cali Labs Pvt. Ltd. Bhopal
- (viii) Scientific Precision Pvt. Ltd. Mumbai
- (ix) Choksi Lab Ltd. Indore
- (x) National Agriculture and Food Analysis and Research Institute, Pune
- (xi) Analytical and Environmental Services, Gujrat
- (xii) TUV India, Pune
- (xiii) Ashwamedh Engineers and Consultants, Nasik
- (xiv) Micro Chem Mumbai

(xv) Food Hygiene and Health Laboratory, Pune (xvi) Reliable analytical Labs P Ltd. Mumbai Admittedly, the sample which was sent for analysis to State Food Testing Laboratory, Bhopal was not one of the agency which was authorized for testing accredited by NABL for the purpose of carrying out analysis of sample by food analyst under the Food Safety and Standards Act, 2006, thus the very report submitted by the Food Analyst, State Food Testing Laboratory, Bhopal was nonest and on its basis, no prosecution could have been initiated against the petitioner.

10. Learned senior counsel for the petitioner vehemently argued that on 05.07.2011, The Director, Food Safety and Standards Authority of India (A Statutory Regulatory Body of Govt. of India) had issued a notification with regard to clarification on the status of Public Labs functioning at Center/State/UT after the promulation of Food Safety and Standards Act, 2006 w.e.f. 05.08.2011. In the aforesaid notification, it was mentioned that Section 43 of the Food Safety and Standards Act, 2006 requires that all food testing under the Act will be done in NABL or any other FSSAI approved accredited Lab. State Government and UT Government have already been advised in this regard and the results of a 'gap analysis' commissioned by FSSAI in respect of the State Labs have been shared for appropriate action for the upgradation of the Labs to accredited standards. However, from the interaction with the State Government, it is clear that the process is likely to take some time and the labs will not be able to get accreditation before 5 th August, 2011 when the Food Safety and Standards Act will become operational and in the light of the aforesaid, it was clarified that the existing Public Food Testing Laboratories which were testing food samples under PFA will continue to perform their functions of food testing under Section 98 of Food Safety and Standards Act, 2006 till any notification issued under Section 43 of Food Safety and Standards Act, 2006 and the Central Food Laboratories at Kolkata, Pune and Mysore and FRSL, Ghaziabad will function as the referral

laboratories.

11. Learned senior counsel for the petitioner while referring to the notification dated 06.12.2016 published in Gazette of India, argued that while exercising power under sub-section 1 of Section 43 of Food Safety and Standards Act, 2006, the Health and Family Welfare Department, while superseding the earlier notification dated 13.07.2016 issued by Indian Food Safety and Standards Authority and leaving the earlier work done, new laboratories were notified for the purpose of carrying out analysis of sample for food analyst in which so far as the State of M.P. was concerned, Choksi Laboratories, Indore, Kali Labs Pvt. Ltd, Bhopal, QTTL Lab Pvt. Ltd, Indore, SGS India Pvt. Ltd. Indore were included.

12. On the basis of aforesaid arguments, it was submitted that State Food Testing Laboratory, Bhopal was not accredited to the NABL, the sample which has been made basis for prosecution was invalidated due to its non-accreditation and thus, could not have been relied upon.

13. It was further argued that even if it is assumed that the report of Food Analyst is correct, then it does not indicate any adulteration or non-compliance with the applicable standards as provided under the Regulation 2.4.15.1 of the Food Safety and Standards (Food Products Standards and Food Additives) Regulation, 2011 and for the food product to be declared as misbranded, the same must satisfy the ingredients as provided under Section 3(zf) of the Act.

14. It was also argued that though in the report of Food Analyst, it was observed that the product in question classified under item No.2.4.15.1 was tested by D.S.H.S. method and the findings recorded are in-conformity with the prescribed standard, however, the Food Analyst, in its report had held the sample to be misbranded without providing any reasoning or recording any findings as to why the said product was deemed to be misbranded. Further, the report of Food Analyst suffers from inherent contradiction as in Coloum No.(iii) Label Declaration, the Food Analyst has written "as per rule"

whereas in coloum Report, he has simply written the same as misbranded and has not mentioned, the provision in which, it had found to be misbranded. Thus, the action of respondent No.1 in initiating the proceedings against the petitioner on the basis of said Food Analyst report is vitiated and contrary to the provisions of law, thus liable to be set-aside.

15. It was further argued that the petitioner has been deprived of its mandated right under the Act, thereby denying it an opportunity of effective representation before the Authorities. Further, the petitioner has not been furnished with the Food Analyst report and has been deprived of the statutory right of Appeal as mandated under Section 46(4) of the Act and further the biscuits manufactured by the petitioner have an expiry of six months from the date of manufacture and in the instant case, the samples were collected on 30.05.2012 hence, the samples must have surpassed the expiry date, thus denying the petitioner its valuable right to have the sample analysed through a NABL accredited/FSSAI notified laboratory which is fatal to the case of petitioner and thus on this ground also the very prosecution launched against the petitioner deserves to be quashed.

16. To bolster his submissions, learned senior counsel for the petitioner has relied upon the judgment of Hon'ble Apex Court rendered in the case of Pepsico India Holdings Private Limited Vs. Food Inspector and Anr. (2011) 1 SCC 176,, N.K. Rasheed Vs. Food Inspector 2015 SCC Online Ker 39483, M/s. Nestle India Limited Vs. FSSAI & Ors. 2015 SCC Online Bom. 4713, decision of High Court of Judicature at Bombay at Nagpur Bench rendered in F.A. No.158/216 (State of Maharashtra & ors. Vs. M/s. Ruchi Soya Industries Ltd. & ors.) on 08.12.2020, decision of High Court of Kerala at Ernakulam rendered in Balamurugan Vaithyanathan & Anr. Vs. State of Kerala & Anr. rendered in CRL. MC No.5330/2017 on 19.09.2023, judgment of High Court of Bombay rendered in W.P. Nos. 3413/2022, 3416/2022 and 8003/2021 on 23.09.2022.

17. Per contra, learned counsel appearing for respondent/State had raised preliminary objection that by virtue of sub-section 1 Section 70 of the Food Safety and Standards Act, 2006, the State Government had established the Food Safety Appellate Tribunal vide its notification No.F-10-6-2013-S VII-Medi.2 dated 30.08.2013 in every District of the State to hear against decisions of the Adjudicating Officer working in the District under Section 68 of the said Act. The State Government has appointed the District and Sessions Judge as Presiding Officer of the Food Safety Appellate Tribunal and now since the District and Sessions Judge has been given power as a Presiding Officer of Food Safety and Standard Appellate Tribunal, therefore, the present petition directly filed before this Court challenging the sanction for the prosecution as well as report of Food Analyst is not maintainable as the petitioner is having alternative and efficacious remedy. Placing reliance on a decision rendered by the Coordinate Bench of this Court in W.P. No.19958/2013 on 03.12.2013 wherein in similar set of facts, the petition was dismissed as withdrawn with liberty to file the appeal before the Appellate Tribunal to challenge the impugned order. It was prayed that the present petitioner on the aforesaid count, deserves to be dismissed.

18. Learned Government Advocate has further argued that challenging report of Food Analyst in the present petition is wholly misconceived as under Section 46(6) of the Act alternative remedy of appeal to any aggrieved party to adjudicate the report of the Food Analyst is provided. Further reliance was placed on the provisions of Rule 2.4.6 of Food Safety and Standards Rules, 2011 which also provides for appeal to the designated officer. On this count also, learned counsel for the State prays for dismissal of present petition.

19. Further with regard to other contentions to the non- application of mind of Food Analyst and the Sanctioning Authority, it was argued that only after examining the relevant rules, i.e. Rule 2.4.6 of the Rules, 2011 and the provisions of Section 26(2)(ii) of the Food Safety and Standards Act, 2006 that report was submitted and the sanction was granted, therefore, the contentions as raised by the petitioner that conclusion of holding product to be misbranded is not proved, is wholly incorrect and baseless. Further placing reliance on the contents of reply, it was argued that no case is made out in favour of present petitioner. Thus, present petition being devoid of any merits, be dismissed.

20. Heard counsel for the parties and perused the record.

21. The first ground which has been raised by the petitioner which requires appreciation is as to whether the laboratory from where the food sample was sent for testing was accredited by National

Accreditation Board for Testing and Calibration Laboratories (NABL) by notification as envisaged under Section 43 of Food Safety and Standards Act, 2006 and if not what would be the effect? Admittedly, the sample of Sunfeast Dream Cream Biscuit were taken from one Ishika Agency on 30.05.2012. On 12.04.2012, DD (E-II) had issued an information that as per Section 43 of Food Safety and Standards Act, 2006, the Food Authority has notified following laboratories accredited by National Accreditation Board for Testing and Calibration Laboratories (NABL) for the purpose of carrying out analysis of samples by the Food Analysts under this Act and as per the said information, for western region in which the State of M.P. falls, total 16 laboratories as mentioned above were held to be eligible for empanelment.

22. Though initially the said authorization was for one year i.e. from 12.04.2012 to 11.04.2013 or till discontinuation of NABL Accreditation whichever was earlier. Later on, by various notifications, the recent one being 06.12.2016, following laboratories of State of Madhya Pradesh have been accredited by NABL for the purpose of carrying out analysis of sample by Food Analyst. List of laboratories where were accredited are quoted herein-below:-

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23. Admittedly, the State Food Testing Laboratory, Bhopal is not one of the laboratories which was accredited by National Accreditation Board and therefore, cannot be said to be a laboratory recognized by the Food Authority under Section 43(1) of the Food Safety and Standards Act, 2006. Even the said laboratory is not a laboratory established or notified by the Central or State Government with respect to Rule 2.4.2(2) of Food Safety and Standards Rules, 2011. In view of the said matter, the report of Food Analyst dated 15.06.2012 loses its significance as the sample was not analysed by the accredited laboratory under Section 43 of the Food Safety and Standards Act, 2006. Therefore, the report which is the foundation for launching prosecution against the petitioner cannot be relied upon and hence, the prosecution launched against the petitioner is not sustainable.

24. In terms of Rule 2.4.3. of Food Safety and Standards Rules, 2011, the Designated Officer after receipt of report of Food Analyst is required to forward the sample to referral laboratory for analysis and if the referral laboratory reports that the sample of food is unsafe or substandard or

mis-branded or containing extraneous matter (as the case herein), then the case shall be referred to Adjudicating Officer, but in the absence of report from referral laboratory that the sample was mis-branded, reference by the Designated Officer to the Adjudicating Officer being contrary to Rule 2.4.3 of Food Safety and Standards Rules, 2011, itself was unwarranted.

25. Further, as per Rule 2.4.5 Food Safety and Standards Rules, 2011, the Food Business Operator has a right to have the food analysed. This procedure was not followed as no notice as required under Rule 2.4.1(4) was sent to the petitioner due to which the petitioner could not exercise its right to get the sample sent to laboratories accredited by National Accreditation Board for Testing and Calibration Laboratories (NABL) for analysis under the intimation to the Designated Officer. Even the right to appeal could not be exercised by the manufacturer, instead notice was sent to proprietor of Ishika Agency which is not a compliance of the aforesaid Rule.

26. So far as the plea taken by the respondent/State that since there is availability of alternative remedy to the petitioner as provided under Section 70(1) of the Food Safety and Standards Act, 2006, therefore, the present petition is not maintainable is concerned, this aspect has already been considered by this Court vide order dated 01.02.2016 while deciding I.A. No.309/2016 preferred by the State vide order dated wherein on this very ground, the dismissal of petition was sought. By the said order, the said plea had been discarded and negatived. Thus, again raising the similar ground is of no consequence.

27. In view of aforesaid discussion, the report dated 15.06.2012 (Annexure P/3) which is foundation for launching prosecution against the petitioner is hereby quashed. Consequently, the Impugned sanction order dated 29.11.2012 is hereby quashed.

28. Accordingly, the petition stands allowed and disposed of.

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(MILIND RAMESH PHADKAR)
JUDGE