

Sri.Amit C Jain Proprietor vs Food Safety Inspector And Anr on 12 October, 2023

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NC: 2023:KHC-K:8196

WP No. 201187 of 2016

IN THE HIGH COURT OF KARNATAKA

KALABURAGI BENCH

DATED THIS THE 12TH DAY OF OCTOBER, 2023

BEFORE
THE HON'BLE MR. JUSTICE VENKATESH NAIK T

WRIT PETITION NO. 201187 OF 2016 (GM-RES)
BETWEEN:

1. SRI.AMIT, PROPRIETOR,
VIJAY MODIS TEA HOUSE,
PLOT.NO.14, ADIKE BUILDING,
FILTER BED ROAD, KALABURAGI.

...PETITIONER

(BY SRI SHIVASHANKAR H. MANUR;
SRI MANU. KULKARNI AND SRI SHRISTI WIDGE,
ADVOCATES)

AND:

Digitally signed by
SHILPA R
TENIHALLI
Location: HIGH
COURT OF
KARNATAKA

1. FOOD SAFETY INSPECTOR AND ANR

DEPARTMENT OF THE FOOD SAFETY AND STANDARDS

KALABURAGI
KALABURAGI DISTRICT
2. DESIGNATED OFFICER
DEPARTMENT OF THE FOOD SAFETY AND STANDARDS
KALABURAGI
KALABURAGI DISTRICT

...RESPONDENTS

(BY SMT. ANITA M. REDDY, HCGP)

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WP No. 201187 of 2016

WRIT PETITION FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA, WITH R/W SEC. 482 OF CR.P.C. PRAYING TO, CALL FOR THE RECORDS IN C.C.NO.316/203/54/2015-16 ON THE FILE OF UPPER DISTRICT MAGISTRATE CUM ADJUDICATING AUTHORITY, KALABURAGI; ISSUE A WRIT OF CERTIORARI OR ANY OTHER APPROPRIATE WRIT OR ORDER OR DIRECTION QUASHING THE ORDER DATED 29.12.2015 PASSED IN C.C.NO.316/203/54/2015-16 ON THE FILE OF UPPER DISTRICT MAGISTRATE CUM ADJUDICATING AUTHORITY, KALABURAGI (ANNEXURE-A) .

THIS PETITION HAVING BEEN HEARD AND RESERVED ON 29.08.2023, COMING ON FOR PRONOUNCEMENT OF ORDER THIS DAY, THIS COURT MADE THE FOLLOWING:

ORDER

This Writ Petition is filed under Article 226 and 227 of the Constitution of India read with Section 482 of Cr.P.C. praying to issue a writ of certiorari or any other appropriate writ or order or direction to quash the order dated 29.12.2015 passed in C.C.No.316/203/54/2015-16 on the file of Upper District Magistrate cum Adjudicating Authority, Kalaburagi (Annexure-A).

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2. For the sake of convenience, the parties are referred to as per their ranking before the Competent Authority. The petitioner is accused No.1 and respondent No.1 is de-facto complainant and respondent No.2 is the Designated Officer, Department of Food Safety and Standards, Kalaburagi.

3. The factual matrix leading to the case are that, the petitioner is a Company within the meaning of Companies Act, 2013 and engaged in various business, inter-alia, manufacturing and/or marketing of instant noodles under the brand name "Sunfeast Yippee! Noodles" viz., Classic Masala, Magic Masala and Chinese Masala. Each pack of instant noodles contains the noodle block and the sachet of Masala mix with cooking instruction provided on the pack label. The instant noodle block is made from wheat flour and the sachet Masala Mix is made of spices, herbs, dehydrated vegetables etc., and the label provides the list of ingredients both for the noodle block and the Masala Mix.

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4. It is further contended that, on 08.06.2015 the first respondent picked up samples of Sunfeast Yippee Noodles Magic Masala of 35 gram by paying Rs.143/- from the premises of one Sri Amit P Jain(Accused No.1), Vijaya Medies Tea House, Plot No.14, Adeke Building, Filter Bed Road,

Kalaburagi by issuing Form No.V-A for Rs.143/- and obtained a receipt, thereafter a mahazar was also drawn at the spot. Subsequently, one sample was sent to Divisional Food Laboratory at Kalaburagi and remaining three packets were retained and on 20.06.2015, the report of the Chief Food Analyst, Divisional Food Laboratory was received, wherein, it is stated that, it is misbranded. Thereafter, a prosecution was launched before a Designated Officer i.e., Upper District Magistrate cum Adjudicating Authority, Kalaburagi.

5. It is further contended that, the manufacturing unit of petitioner located at Ranjangoan, Pune, and it was in receipt of notice dated 25.08.2015 from the office of NC: 2023:KHC-K:8196 the Upper District Magistrate cum Adjudicating Authority, Kalaburagi, wherein, it has stated that, a case has been filed against the petitioner under the Food Safety and Standards Act, 2006 (herein after refer to as 'Act') and the petitioner required to appear before said authority on 15.09.2015, hence, the petitioner came to know about the proceedings after receipt of notice. In fact, the petitioner has not received any notice under Form VA of the Food Safety and Standards Rules, 2011, (herein after refer as 'Rules'). It is further contended that, the petitioner has not been provided with right to appeal, to challenge the test report of the Food Analyst by the designated officer under Section 46 (4) of the Act and Rule 2.4.6 of the Rules.

6. It is further contended that, later, the petitioner filed objection to the competent authority contending that, the copy of complaint was not furnished to the authorities of accused, contending that accused No.2 is Company and no reasons were assigned by the NC: 2023:KHC-K:8196 Food Analyst as to what is the reason for holding sample as 'misbranded'. Further, it is contended that, before taking sample, he was not given any notice and it was not collected in his presence; the sanction was also challenged; the Food Analyst Report itself discloses that it complied all the requirements and without verification, the prosecution has been launched; however, the Designated Officer has rejected the said grounds by holding that, the product is misbranded as per the Regulation No.2.2.1(3) of Food Safety and Standards (Packaging and Labeling) Rules, 2011 and hence, imposed a fine of Rs.10,000/- on accused No.2 under section 52 of the Act. Aggrieved by the said order, petitioner has filed this writ petition.

7. Heard the learned counsel for the petitioner and the learned High Court Government Pleader for the respondents - State. Perused the record.

8. The learned counsel for the petitioner would submit that, there is no evidence to show that, the product is 'misbranded', as the report of the Food Analyst NC: 2023:KHC-K:8196 produced at Annexure-E discloses that, it complied all the requirements and the Chief Food Analyst opined that, "The sample sent for analysis confirms to the standards for aforesaid parameters'. However, the report is incomprehensive one, as test for metal contaminants is not performed in this laboratory. Also the sample package contravenes the regulation 2.2.1 (3) of FSS (Packaging and Labeling) regulations 2011. Hence, it is 'misbranded'.

9. However, the Chief Chemist noted certain observations as under;

The designated officer is suggested to get the sample further analyzed by the FSSAI Notified referral Laboratory (i.e. CFL Kolkatta) for its metal contaminants like lead, copper, arsenic, mercury, tin, cadmium and zinc"

10. It is further contended that, without getting it tested, the prosecution itself is illegal and the orders passed by the Food Safety and Standards Authority would vitiate the proceedings; the entire proceedings NC: 2023:KHC-K:8196 commenced and order passed by the adjudicating authority against the petitioners is contrary to the Act and Rules; the first respondent was required to send the notice to petitioner in Form V-A informing it, of picking the samples for analysis under the Act, but it has not complied with the requirement as provided under Rule 2.4.1 (4) of the Rule. It is contended that, the second respondent has not accorded the petitioner, the mandatory right to appeal aggrieved by the order of Food Analyst report, as per section 46(4) of the Act, thus, the petitioner is deprived the right of appeal to challenge the Food Analyst report dated 20.06.2015. Further, the sample confirms to all the parameters tested but opine the sample, is misbranded under Rule 2.2.1(3) of Rules, as there is statement "no added MSG" on the label. Further, report of Food Analyst is totally silent as to why the sample is misbranded and in order to satisfy the term misbranded, one has to satisfy the ingredients of section 3 (zf) of the Act. Therefore, the action of respondent No.1 in initiating proceedings against petitioner, on the NC: 2023:KHC-K:8196 basis of Food Analyst report is vexatious and contrary to principles of natural justice and hence, the proceedings initiated by respondents against petitioner required to be vitiated and hence, prosecuting the present petitioner as the product is 'misbranded' itself is against the law. Hence, he has sought for quashing of the impugned order.

11. Per contra, the learned High Court Government Pleader has contended that, the product is misbranded, as, on the product, there is a reference that 'No Added MSG', which is evident from Annexure-B and the petitioner has not attempted to get the second sample to be analyzed through NABL accredited or referral laboratory and hence, the prosecution is just and proper. Accordingly, learned High Court Government Pleader seek for rejection of the petition.

12. Having heard the arguments and perusing the records, it is evident that, the dispute is confined only to

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NC: 2023:KHC-K:8196 a small aspect regarding 'No Added MSG' been quoted on the packaging label. Admittedly, the sample is collected by the Food Analyst Officer from accused No.1 suspecting that, it is adulterated. Further, the sample was sent to Divisional Food Laboratory, Kalaburagi Division, Kalaburagi and the report was submitted in Form-B. The report reads as under:

"FORM B"

Report of the Food Analyst (Refer Regulation (ii) of 2.3.1.) Report No.: DFL/KLB/FSSA/PPP/73/2015/311 The condition of seals on the container and the outer covering on receipt was intact.

I found the sample to be instant Noodles falling under Regulation No.2.4.10 (for noodle part) and 2.12 (for Masala Mix) of Chapter 2 of Food Safety and Standards Regulations, 2011. The sample was in a condition fit for analysis and has been analyzed on 10/06/2015 to 20/06/2015 and the result of its analysis is given below/** was not in a condition fit for analysis for the reasons given below :-

Reasons : NIL

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NC: 2023:KHC-K:8196 Analysis report:

1 Sample Description Prepared Food 35 g X 5 Yeppee noodles in a Air tight polythene cover 2 Physical Appearance Satisfactory 3 Label Sunfeast YiPPee Noodles magic Masala Best before: 9 months from packing

d) Mfd by : ITC Limited, plot No.D-1, MIDC, Ranjangoan, Taluka Shirur, Dist Pune - 412220.

e) Veg Logo: printed on the packet.

f) Declaration: Words 'no added MSG' read on the packet.

TEST FOR NOODLE 1 Physical appearance DGHS Satisfactory Should be satisfactory 2 Odour -- Agreeable Should be agreeable 3 Presence of DGHS Not detected Should not be present permitted natural food colour 4 Synthetic food colour DGHS Not detected Should not be present 5 Presence of Dirt and DGHS Not detected Should not be present Insect larvae 6 Moisture DGHS 4.60% Not more than 12.5% 7 Total Ash wxcluding DGHS 0.54% Not more than 1% 8 Ash insoluble in DGHS 0.08% Not more than 0.1% dil.HCl

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NC: 2023:KHC-K:8196 TEST FOR MASALA 1 Physical appearance DGHS Satisfactory Should be satisfactory 2 Odour -- Agreeable Should be agreeable 3 Presence of DGHS Not detected May be present permitted natural (as per Appendix A) food colour 4 Synthetic food DGHS Not detected Should not be present colour 5 Presence of Dirt and DGHS Not detected Should not be present Insect larvae Opinion:- The sample sent for analysis conforms to the standards for aforesaid parameters. However the report is incomprehensive one, as tests for metal contaminants is not performed in this laboratory. Also the sample package contravenes the Regulation 2.2.1(3) of FSSA (packaging & labeling) Regulation 2011, vide Label III (f). Hence, it is Misbranded. Note:- The Designated Officer is suggested to get the sample further analyzed by the FSSAI Notified Referral Laboratory (i.e. CFL Kolkata) for its metal contaminants like lead, copper, arsenic, mercury, tin, cadmium and zinc.

th Signed this 20 day of June 2015.

Chief Food Analyst Divisional Food Laboratory, Kalaburagi Division, Kalaburagi"

13. Hence, it is evident that, the opinion of the Chief Food Analyst discloses that, the sample confirms to the standards as per the above parameters. However, the Food Analyst stated that, it is misbranded as per Rule 2.2.1(3) of FSSA (Packaging and Labeling) Rules, 2011. Very interestingly, he has also specifically directed that, "the designated officer is suggested to get the sample

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NC: 2023:KHC-K:8196 further analyzed by the FSSAI notified referral laboratory (i.e. CFL Kolkata) for its metal contaminants like lead, copper, arsenic, mercury, tin, cadmium and zinc", since there was no facility in the laboratory to test for metal contaminants. It is important to note here that, the Chief Food Analyst has analyzed the sample and due to non availability of the facility test for metal contaminants, he directed the petitioner to get the sample analyzed for the same from FSSAI notified referral laboratory. But, admittedly, the Designated Officer has not get it tested from FSSAI notified referral laboratory and only on the basis of the report of the Food Analyst, he has prosecuted the petitioner on the ground of No added MSG. The entire prosecution is based upon the Food Analyst Report and issue is only regarding mentioning 'No Added MSG' on the label. But, it is to be noted here that, there is no evidence to show that, MSG was added.

14. Misbranding is defined under Section 3(zf) of the Act. Further, it is also important to note here that, the

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NC: 2023:KHC-K:8196 notification issued by the Director (Enforcement), Food Safety and Standards Authority of India dated 31.03.2016, the paragraph Nos.2 and 3 of the said notification reads as under:

"2. It is widely known that Glutamate is naturally found in several common foods such as milk, spices, wheat, vegetables, etc. MSG is the sodium salt of Glutamic acid and one of the many forms of glutamate. Presently, there is no analytical method to determine whether MSG was added to the product during its manufacture or was naturally present in the product. This can however be checked through inspection of the manufacturing premises

3. To prevent, both, avoidable harassment/prosecution of Food Business Operators (FBOs) as well as to ensure that consumers are facilitated to exercise informed choices in respect of what they eat, proceedings may be launched against FBOs only

when the labels state "No MSG" or "No added MSG" and MSG is actually found in the impugned foodstuff. Commissioners of Food Safety are advised that specific enforcement/prosecution may not be

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NC: 2023:KHC-K:8196 launched against the manufacturers of Noodles/Pasta on account of presence of MSG/Glutamic Acid unless it is ascertained by the department that Monosodium Glutamate flavour enhancer (INS E-621) was deliberately added during the course of manufacture without required declaration on the label as indicated in Para 1 above."

15. Hence, it is evident that, the glutamate is naturally found in several common foods such as milk, spices, wheat, vegetables, etc., and MSG is the sodium salt of glutamic acid and one of the many forms of glutamate. Admittedly, there is no analytical method to determine whether MSG was added to the product during its manufacture or was naturally present in the product, this can however be checked through inspection of the manufacturing premises. Further, it is also observed that, no prosecution can be launched against the manufacturers of Noodles/Pasta on account of presence of MSG/Glutamic Acid, unless, it is ascertained by the department that Monosodium Glutamate flavor

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NC: 2023:KHC-K:8196 enhancer (INS E-621) was deliberately added during the course of manufacture without required declaration, on the label as indicated above. Further, a clarification notification was also issued dated 29.09.2018, wherein, in paragraph Nos.3 and 4, it is observed as under:

"3. Thus adjudication proceedings launched against any FBO for the offence of MSG/"No added MSG", on the label without determining whether MSG was added during the manufacturing process would be inconsistent with the orders issued by the FSSAI.

4. Commissioners of Food Safety, States/UTS are, therefore, advised the wherever adjudication proceedings have been initiated against FBOs for the presence of the claim "No MSG/No added MSG" without ascertaining the stage at which the MSG was added to the product need to be examined and action taken in terms of FSSAI's Orders dated 31st March, 2016."

16. The clarification notification was issued by the Joint Director holding that, adjudication proceedings

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NC: 2023:KHC-K:8196 launched against any FBO for the offence MSG" on the label without determining whether MSG was added during the manufacturing process would be inconsistent with the orders issued by the FSSAI. Hence, it is evident that without ascertaining the addition of MSG during manufacturing process, the prosecution cannot be initiated. It is also evident that MSG is commonly available, in several common foods, such as milk, spices, wheat, vegetables, etc. and there is no analytical method to determine whether MSG was added to the product during its manufacture or it was naturally present in the product. Hence, the directions were issued to the effect that, it can be done only by inspection of the manufacturing unit, to ascertain whether, MSG was added during the course of manufacture or not. Admittedly, in the instant case, respondent No.2 has not visited manufacturing unit and inspected to ascertain whether MSG was added or not. But, only on the testof the report of Food Analyst, the prosecution is launched. The orders

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NC: 2023:KHC-K:8196 dated 29.12.2015 which specifies that such prosecution is inconsistent with the order of FSSAI (Food Safety and Standards Authority of India). Hence, the prosecution itself is illegal.

17. The counsel for petitioner relied upon the decision reported in 2018 part-1 Crimes 150 (MP), in case of ITC Limited V. State of Madhya Pradesh and others, wherein, the High Court held that, the prosecution was improper. The facts and circumstances cited in the aforesaid decision and in the present case are one and the same and in the aforesaid decision the prosecution was launched on the ground of packaging material contains `no MSG added'. This issue was dealt in detail and it is also held that, the prosecution was improper. A similar view is also taken in the following decisions relied upon by the learned counsel for the petitioner and matter was clarified further, in case of

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NC: 2023:KHC-K:8196 ITC Limited V Food Safety Inspector Department of Food Safety and another reported in WP No. 207484/2014 judgment dated 23.07.2021.

18. Hence, the prosecution in the present case itself is misconceived and unwarranted, without ascertaining whether MSG was added during the course of manufacture of the products, as no inspection was made in the manufacturing unit by the complainant. Further, the competent authority has not accorded an opportunity to file an appeal under Section 46(4) of the Act and without giving sufficient opportunity, the competent authority imposed fine of Rs.10,000/- against petitioner, which amounts to violation of principles of natural justice.

19. Under these circumstances, the entire prosecution was misconceived and the complainant could have directed petitioner to remove the printing of MSG, but, he proceeded to prosecute and imposed fine, which is unwarranted. The complainant has not ascertained

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NC: 2023:KHC-K:8196 regarding actual adding MSG or No added MSG, at the time of manufacture of products by inspection and without ascertaining as per the order of FSSAI that MSG was added or No added MSG, at the time of manufacture by physical inspection of the manufacturing premises, prosecution is bad under law.

On perusal of the material available on record, it appears that, the chances of an ultimate conviction is bleak and remote and therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the Court may while taking into consideration the special facts of a case also quash the proceedings. This similar ratio is laid down in the case of Madhavrao Jiwaji Rao Scindia & Others vs. Sambhajirao Chandrojirao Angre reported in 1988 (1) SCC 692.

Hence, the petition needs to be allowed and accordingly, I proceed to pass the following:

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NC: 2023:KHC-K:8196 ORDER The petition is allowed. The impugned order passed by the Additional District Magistrate cum Adjudicating Authority in C.C.No.316/203/54/2015-16 dated 29.12.2015, stands quashed against accused No.1.

Sd/-

JUDGE NE