

(2016) 10 AHC CK 0036

ALLAHABAD HIGH COURT

Case No: Criminal Misc. Application Nos. 12161 and 12162 of 2009

Ajit Singh

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision: Oct. 3, 2016**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 482
- Prevention of Food Adulteration Act, 1954 - Section 16, Section 7

Citation: (2017) 98 ACrC 550 : (2016) 10 ADJ 13**Hon'ble Judges:** Mrs. Vijay Lakshmi, J.**Bench:** Single Bench**Advocate:** Govt. Advocate, for the Opposite Party; Samit Gopal, Advocate, for the Applicant**Final Decision:** Allowed

Judgement

Mrs. Vijay Lakshmi, J. - Heard Sri G.S. Chaturvedi, learned Senior Counsel assisted by Sri Samit Gopal, learned counsel for the applicants and learned A.G.A. Perused the records.

2. As all these three applications involve a common issue and the applicant company in all these applications i.e. Hindustan Unilever Ltd. is also the same, all are being disposed of by this common order.

3. By means of application No.12161/2009, the applicants have challenged the legality of the summoning order dated 20.12.2008, passed by the Additional Chief Judicial Magistrate 1st Ghaziabad in Criminal Complaint Case No. 6724/2008, titled as State of U.P., through Food Inspector Ghaziabad v. Shri Ajit Singh & Anr, under Section 7/16 of the Prevention of Food Adulteration Act, 1954, P.S. Kavi Nagar District-Ghaziabad and the entire proceedings of the aforesaid complaint case.

4. By means of application No.12162/2009, the applicants have challenged the legality of the summoning order **dated 12.12.2008, passed by the Additional Chief Judicial Magistrate 1st Ghaziabad in Criminal Complaint Case No. 6735/2008, titled as State of U.P. through, Food Inspector Ghaziabad v. Shri Ajit Singh & Anr**, under Section 7/16 of the Prevention of Food Adulteration Act, 1954, P.S. Kavi Nagar District-Ghaziabad and the entire proceedings of the aforesaid complaint case.

5. By means of application No.9255/2006, the applicant has questioned the legality and correctness of the summoning order dated 23.12.2005, passed by the Additional Chief Judicial Magistrate, Jhansi in Criminal Complaint No. 3991/2005, State of U.P. v. Shri Ashok Jain, under Section 16 of Prevention of Food Adulteration Act, 1954 and has prayed to quash the entire proceedings of the aforesaid complaint case including the impugned summoning order.

6. Brief facts relating to application No.12161/2009, are that the applicant no.1, Mr. Ajit Singh was working as Depot Manager, running a Depot in the name of Logistics India, C-234, Bulandshahar, Industrial Area, Lal Kuan, Ghaziabad, selling Vanilla Gold, Frozen Dessert (Kwality Walls) a product manufactured by the applicant no.2, M/s Hindustan Unilever Limited.

7. On 04.10.2008, the Food Inspector, Ghaziabad took a sample of the Vanilla Gold, Frozen Dessert (Kwality Walls), Batch No.09/2008 from the vendor (Depot Manager) (applicant no.1) and after issuing the notice in form VI and going through the formalities, the samples of the seized product was sent to the Public Analyst for chemical analysis on the same date i.e. 04.10.2008.

8. On 12.11.2008, the Public Analyst submitted his report and in the opinion of Public Analyst, the sample was found to be substandard (adulterated) due to the reason that the sample was not conforming with the standards prescribed for frozen deserts inasmuch as total solids, fat, proteins and volume weight ratio were found to be 33.7%, 4.0%, 2.8% and 370.88 against the prescribed minimum of 36%, 10%, 3.5% and 525 respectively.

9. Pursuant to the report of the Public Analyst, the Chief Medical Officer, Ghaziabad accorded sanction for institution of prosecution on 04.12.20018. Thereafter, a complaint was filed by the respondent no.2, the Food Inspector under Section 16 (1) (a) (i) of the Prevention of Food Adulteration Act, 1954, (hereinafter referred to as the "Act") before the Court of Additional Chief Judicial Magistrate 1st and the learned Additional Chief Judicial Magistrate after taking cognizance, summoned the applicants.

10. Application No.12162/2009, has also been filed by the same applicants with averments that on 04.10.2008, the Food Inspector, Ghaziabad took a sample of "Butter Scotch" Frozen Desert (Kwality Walls) B No.09/2008 (1) C 5F from the vendor (Depot Manager)/ applicant no.1 Mr. Ajit Singh and after giving notice in Form VI to

applicant no.1 on the same day and dividing the samples into three parts and packing them in three separate containers, sent one sample to the Public Analyst for chemical analysis.

11. On 12.11.2008, the Public Analyst submitted his report and in the opinion of public analyst, the sample was found to be substandard (adulterated) on the ground that the sample was not conforming the standards prescribed for frozen deserts inasmuch as total solids, fat & volume weight ratio were found to be 33.79%, 4.98%, 2.8% and 260.4 against the prescribed minimum of 36%, 10% and 525 respectively.

12. Pursuant to the report of the public Analyst, the Chef Medical Officer, Ghaziabad accorded sanction for prosecution on 15.12.2008 and subsequently a complaint was filed by the respondent no.2 i.e. Food Inspector, Ghaziabad for the offence under Section 16 (1) (a) (i) of the Act before the Court of Additional Chief Judicial Magistrate, 1st Ghaziabad. The Additional Chief Judicial Magistrate, 1st Ghaziabad vide order dated 12.12.2008, took cognizance and summoned the applicants to face trial under Section 16 (1) (a) (i) of the Act.

13. Brief facts of the case relating to application no.9255/2006 are that a complaint case No.3991/2005, was filed against the applicant Hindustan Lever Limited, a Company, marketing frozen deserts and against the seller Mr. Ashok Jain on the ground that on 21.10.2004, the Food Inspector, Jhansi, U.P. picked up a sample of Kwaliti Walls, Vanilla Frozen Desert from the premises of Chander Sales Agencies, Jhansi of which Mr. Ashok Jain was the proprietor. After issuing Form VI, the sample of the Kwaliti Walls, Vanilla Frozen Desert, was sent by the Food Inspector to the public analyst mentioning it as "Ice Cream" and not as Frozen Desert.

14. The public analyst vide his report dated 29.11.2004 gave his opinion that the sample was not conforming with the standard prescribed for frozen deserts inasmuch as the total solids, milk fat and protein weight ratio were found to be 31.45%, 6.55% and 3.27% which is less than the 36.0%, 10.0% and 3.5% respectively as prescribed minimum.

15. Thereafter, on 20.12.2005, a complaint was filed by the O.P. No.2, against M/s Chander Sales Agency through Shri Ashok Jain for violation of Section punishable under Section 16 of the Act, whereupon the Magistrate took cognizance and summoned the applicant vide impugned order dated 23.12.2005. All these summoning orders have been challenged by means of these three applications.

16. In the first two applications i.e. 12161 of 2009 and 12162 of 2009, affidavits have been exchanged between the parties. However, despite that notice issued to O.P. No.2, was returned after service, way back on 27.9.2006 and despite that this Court after waiting for long till 22.7.2015, as a last opportunity, granted a further time of three weeks to O.P. No.2 to file counter affidavit, no counter affidavit was filed by O.P. No.2.

17. Shri G.S. Chaturvedi, learned Senior Counsel appearing on behalf of the applicants in all the aforesaid three applications, has assailed the impugned orders, vehemently contending that the impugned summoning orders have been passed by the learned Magistrate without due application of mind and without considering that no offence is made out under any of the provisions of the "Act" against the applicants. Sri Chaturvedi has contended that the impugned orders in all the aforesaid cases, have been passed by the learned Magistrate in a most casual and perfunctory manner, all are contrary to law and are liable to be set aside.

18. While drawing the attention of this Court to Appendix B (A 11.02.07.02), of Prevention of Food Adulteration (Fourth Amendment Rules, 2005) learned counsel has vehemently argued that no standard was fixed at the time when the sample of frozen desert was taken by the Food Inspector. It is submitted that though the standard for frozen desert was fixed for the first time on 07.6.2005 vide notification No.G.S.R. 356 (E) dated 07.6.2005, wherein it was provided that the rules provided by the aforesaid notification shall come into force after six months from the date of their publication in the Official Gazettee. However, several corrigendum were issued by the Ministry of Health and Family Welfare from time to time, thereby extending the date of enforcement of Appendix B (A 11.02.07.02) i.e. the entry relating to the standard prescribed for Frozen Desert. While drawing the attention of this Court to the copies of the all the notifications, collectively annexed as Annexure-7 to the affidavit, learned Senior counsel has contended that a perusal of these applications clearly shows that at the time of submission of the report of public analyst, no standards were fixed for frozen desert.

19. Vide corrigendum dated 13.8.2008 it was provided that the Item No. A 11.02.07.02 (relating to frozen desert) shall come into force after three years and six months from the date of their publication in the official gazettee. Thereafter the time was again extended by Corrigendum dated 20.11.2008 which provided that Item No. A 11.02.07.02 shall come into force after three years and nine months from the date of their publication in the official gazettee. Once again by corrigendum dated 24.2.2009, the time for enforcement of rule prescribing standard for frozen desert was extended which provided that Item No. A 11.02.07.02 shall come into force after four years from the date of their publication in the official Gazettee.

20. The submission of Shri Chaturvedi is that when the (Prevention of Food Adulteration (Fourth Amendment) Rules, 2005) was not in force on the dates when sample was collected by Food Inspector, as it was to come into force after 3 years and nine months from the date of its publication in the Official Gazette and no standards with regard to "Frozen desert" were fixed at that time, how could the public analyst, give his opinion that the samples being found not conforming to the prescribed standards were adulterated. It is further submitted that in the counter affidavit filed by the Food Inspector, no where it is denied that the rules fixing prescribed standards with regard to frozen deserts, were not in force at the time

when the sample was collected. Thus, admittedly no prescribed standards about the Frozen Desert were existing at that time. In the absence of any prescribed standard, it cannot be said that the seized product, sent for analysis, was adulterated or sub-standard.

21. Shri G.S. Chaturvedi, has vehemently argued that the learned Magistrate, without application of its mind to the fact that in absence of any prescribed standards to measure the weight and existence of milk solids, protein etc., in the seized product, the report submitted by the public analyst against the applicants is without any basis, mechanically took cognizance of the offences, and illegally summoned the applicants to face trial under Section 7/16 of the Act. Therefore, the impugned summoning orders are liable to be set-aside.

22. It is worth mentioning that O.P. No.1, the State has not filed any counter affidavit despite a considerable time granted to it for filing counter affidavit.

23. The O.P. No.2, i.e. Food Inspector, in reply to the aforesaid clear averment of applicant regarding the applicability of Rules to Frozen Desert, on the relevant date, has only stated this much in the counter affidavit filed by it, that this matter relates to records which may be replied at the time of argument. However, even during the arguments, no satisfactory reply was given by the learned A.G.A. representing the Food Inspector to contradict the aforesaid fact that at the time when the seized products were analysed by public analyst, no prescribed standards about the frozen deserts were in force. Learned A.G.A. has not disputed the fact that several corrigendum"s were issued from time to time by the Ministry of Health and Family Welfare (Department of Health) in G.S.R. No.356(E), dated 7th June, 2005 [Prevention of Food Adulteration (Fourth Amendment) Rules,2005] extending the time of enforcement of Item No. (A 11.02.07.02) relating to frozen deserts. Learned A.G.A. has also not disputed the fact that the seized product was a frozen desert and not "Ice Cream" as described in sample, sent to the public analyst in application no.9255 of 2006 for which separate standards have been prescribed.

24. Thus, there is absolutely no denial of the specific stand taken by the learned counsel for the applicants by the opposite parties in the counter affidavit that neither at the time when the product was seized and sent for analysis nor when the public analyst submitted its report, there existed any such rule prescribing standards for Frozen desert.

25. Having heard learned counsel for the parties on their rival submissions and perusing the record and the relevant rules, it is clearly evident that no such rule fixing any prescribed standard for Frozen dessert was in force at the time of analysis of the seized product i.e. Kwaliti Walls Frozen desert by the public analyst. Therefore, in the absence of any prescribed standard, it cannot be held that the seized product was substandard or adulterated.

26. The similar circumstances arose before the Hon"ble Apex Court in **Hindustan Lever Ltd. v. Food Inspector, (2006) 1 SCC (Cri) 288**, where the criminal proceedings were initiated on a complaint filed by the Food Inspector against the appellants after collecting the skimmed milk powder from a grocery shop alleging that the sample does not conform to the standard prescribed for "Skimmed Milk Powder" under the Food Adulteration Rules. However, later on it was found that on the date when the public analyst submitted its report, no standards were prescribed for "Skimmed Milk Powder", the Apex Court held that the prosecution of the appellant was not sustainable.

27. Similarly, in the case of *M.V. Krishnan Nambissan v. State of Kerala*, AIR 1966 SC 1676, the Hon"ble Apex Court held that if there was no standard of contents of buttermilk specified, it cannot be said that the appellant has committed any offence under Section 16 (1) (a) (i) and Section 7 of the Act.

28. Likewise, in the case of *Harish Kumar v. State of Punjab*, 1979 (2) FAC 105 (P&H), a sample of palm oil was purchased but at the time of purchase of the sample, no standard for palm oil had been fixed in the Act and the rules. The Id. judge of Punjab High Court held that as no standard of the palm oil had been prescribed under the Act and Rules, therefore, the seller could not be convicted. Accordingly, the proceedings pending against the seller before the trial court were quashed under Section 482 Cr.P.C.

29. In the case of *Premier Vegetable Products Ltd. v. State of U.P.* 1984 (1) FAC 138 (Allahabad)" also a sample of refined palm oil had been purchased at a time when no standard was prescribed for palm oil under the Act or Rules. The learned single judge of the Allahabad High Court quashed the proceedings which had been started against the seller in the court of the Magistrate, by invoking the power under section 482 Cr.P.C, on the ground that the proceedings could not be continued because no standard for refined palm oil were fixed and it was extremely difficult and impossible to hold in such a case whether there is any deficiency in the sample of such an oil. It was further held that in these circumstances no offence could be said to have been committed by the petitioner.

30. Keeping in view all the facts, circumstances and the issues involved in all the aforesaid three applications, in wake of the judicial pronouncements cited above, this court is of the considered view that as no standards had been fixed for frozen desert under the Act and the Rules at the time when the samples of Frozen Desert (Kwality Walls) were purchased by the Food Inspector or when those were analysed by the Public Analyst and as per the various corrigendums, issued from time to time, Rules were to come into force, at a later date i.e. from 06.6.2009, therefore, no prima-facie case is made out against the applicants.

31. In view of the above, all the impugned orders are liable to be quashed and all the three applications deserve to be allowed.

32. Accordingly, the application Nos. 12161/2009, 12162/2009 9255/2006 are allowed and the impugned orders dated 20.12.2008, 12.12.2008 and 23.12.2005 passed in the aforesaid cases are quashed.