The Food Inspector Vs M.V. Alu and Another

Court: High Court Of Kerala

Date of Decision: Jan. 22, 1991

Acts Referred: Cinematograph Act, 1918 â€" Section 5A
Constitution of India, 1950 â€" Article 226
Criminal Procedure Code, 1973 (CrPC) â€" Section 482
Penal Code, 1860 (IPC) â€" Section 292, 76, 78, 79
Prevention of Food Adulteration Act, 1954 â€" Section 10(7), 11(1), 16(1), 17, 17(1)
Prevention of Food Adulteration Rules, 1955 â€" Rule 22A, 44, 47

Citation: (1991) CriLJ 2174 : (1991) 2 ILR (Ker) 639

Hon'ble Judges: S. Padmanabhan, J

Bench: Single Bench

Advocate: Chincy Gopakumar, P.P, for the Appellant; M.N. Sukumaran Nair, for the Respondent

Judgement

S. Padmanabhan, J.
Appellant is the Food Inspector. In S. T. No. 36 of 1988 before the Chief Judicial Magistrate, Palakkad, he

prosecuted three persons. Third accused is the manufacturer. Second accused is the dealer and the first accused is the salesman of the second

accused. First accused was absconding and the case against him was split up. The sample involved is Roja Sugandha Supari powder. Ext. P. 19

certificate from the Central Food Laboratory and Ext. P-17 report of the public analyst, which was superseded by Ext. P-19, are to the effect that

the sample is adulterated because it contains saccharine, which is a prohibited item. Second accused was tried for having dealt with and sold the

adulterated food item and that too without licence and the third accused was tried for its manufacture and distribution. All accused were acquitted.

Grounds of acquittal included violations of Sections. 10(7) and 11. The Magistrate was also of the opinion that there cannot be any question of

adulteration since saccharine is a permitted item and no standard is fixed for supari. Lastly, the Magistrate relied on a declaration obtained by the

third accused from this court in O.P. No. 4619 of 1985 that he can add saccharine in the supari manufactured by him.

2. Finding that there is non-compliance of Section 10(7) is imaginary and fanciful. The subsection is only intended as a safeguard to ensure fairness

of the action taken by the Food Inspector. What he is obliged to do is only to call one or more independent persons to be present and attest when

he takes action. If independent persons were available and even then the Food Inspector did not want their presence or attestation, it could be said

that he violated Section 10(7). If independent persons available did not care to oblige him in spite of his ''call'', he cannot be said to have violated

Section 10(7). The duty is only to make an earnest attempt in getting independent witnesses. If that earnest attempt did not succeed on account of

refusal of independent persons, it cannot be said that Section 10(7) is violated. In such a contingency, nothing prevents the uncorroborated

evidence of the Food Inspector being accepted, if found acceptable. In this case, over and above the Food Inspector and his peon, an

independent witness, P.W. 2, was present and his signature was also taken. All of them gave evidence. That is why I said that the finding of non-

compliance of Section 10(7) is imaginary and fanciful.

3. Finding that Section 11(1)(b) was violated is also equally untenable. The duty under that provision is in the matter of sampling. Except in special

cases provided under the Act, the sample will have to be divided into three parts and they will have to be marked and sealed or fastened in the

manner possible. The only special case is that provided under Rule 22-A, which says that when food is in sealed containers having identical label

declaration, the contents of one or more containers shall be treated to be part of the sample. In this case, the sample purchased was kept in three

packets having identical label declarations. Each large packet contained inside it fifty small packets, which also contained identical label

declarations. What the Food Inspector did was to sample each large packet in a separate bottle without opening them or the small packets kept

inside. I fail to understand how it will be violation of Section 11(1)(b), even if it is conceded that the large packets or the small packets inside did

not contain identical label declaration.

4. Section 11(1)(b) was found to have been violated only in the sense that the accused was prejudiced by the inaction of the Food Inspector in not

opening the packets and mixing the powder to make the sample homogenous so that the result of analysis will be that of a representative sample.

u/s 11(1)(b), independently or read with relevant provisions in the Rules, the Food Inspector is not obliged to resort to the process of mixing. It

only obliges him to divide the sample into three parts. The division can be in the manner as the circumstances of each case warrant. Rule 22-A is

only an enabling provision to treat the contents of one or more containers as part of the sample. It is not having the effect that in other cases there

should be opening and mixing. Even then, in some cases, mixing or churning could be held necessary in order to make the sample homogenous and

representative, so that there is no possibility of any prejudice. Say for example, in the case of milk or curd, there is the possibility of the fat contents

being in the upper lair if no churning or mixing is had and the sample may not be representative. Even in such cases, the sale to the Food Inspector

will be just like sale to anybody else and if churning or mixing is necessary, that will have to be done by the vendor, who effects the sale. The

position may be different if it is a case of the Food Inspector compulsorily taking the sample. None of these questions may arise in this case, where

the food item was kept in packets to be sold as such. The contents of each packet were intended to be sold as such and there is no question of

opening or mixing. Therefore, there is no violation of Section 11(1)(b) also. The sample must be held to be adulterated.

5. But there is no ground for interference with the acquittal of the second accused. He was tried as if he is the dealer and he was dealing without a

licence. There is no evidence that he was the dealer in the shop. P.W. 1 or his peon had no information in that respect. Second accused was not

present when action was taken. The only evidence is that of the Executive Officer of the panchayat examined as P.W. 5. He only said that second

accused was given licence on his application on 8-3-1988. Action was taken on 20-11-1987. P.W. 5 did not say that second accused was the

dealer on that date or that he was dealing without licence. P.W. 2, the independent mahazar witness, said that the shop was run by the first

accused. Simply because the second accused applied for and obtained licence on 8-3-1988, there cannot be a presumption or inference that even

earlier he was dealing without licence. Criminality is a matter for proof and not to be inferred or presumed.

6. If so, the only question is whether the third accused is guilty. He is the Joint Managing Director of a private limited company, which

manufactured the food item. That fact is not in dispute. But the counsel said that u/s 17, when an offence is committed by a company, the persons

nominated to be in charge of and responsible to the company for the conduct of the business (person responsible) alone could be held liable. That

argument is not correct. There is no case for anybody that any such person was nominated. In such a case, u/s 17(1)(a)(ii), every person, who was

in charge of the company and responsible for the conduct of its business at the time when the offence was committed, could be penalised over and

above the company itself. Third accused had no case that he was not in charge of and responsible to the company when the offence was

committed. The fact that the company as such or the person responsible were not prosecuted cannot exonerate the third accused if he is otherwise

liable, he himself filed O. P. No. 4619 of 1985 before this court as the manufacturer representing the company for a declaration that he is entitled

to manufacture this item using saccharine. Now in appeal before this court for the first time he cannot turn round and say that he was not the person

in charge of and responsible to the company. While questioned u/s 313, what he said was that the court granted him permission to use saccharine.

7. In O.P. No. 4619 of 1985, the third accused obtained interim stay against his prosecution for manufacturing supari using saccharine. Ultimately,

on 7-7-1987, the original petition was allowed granting the declaration that he can use saccharine. But in Writ Appeal No. 44 of 1983, the

decision was reversed and the original petition was dismissed on 22-11-1990. Action was taken by the appellant on 20-11-1987 when the

decision of the single bench in the original petition was in force. Therefore, it was argued, on the basis of Sections. 76 78 and 79 of the Indian

Penal Code, that the prosecution cannot stand as against the third accused. According to the counsel, even though the declaration granted by the

court was reversed in appeal, the immunity on the basis of the wrong decision and the interim order is available till the time the decision was

reversed. I am not in a position to agree to such a legal proposition, which may lead to absurd results. Interim orders passed without considering

the rights of parties or merits of the cases have life only till the petition is decided or the proceeding in which it was issued is finally disposed of. An

appealable decision will merge in and will be superseded by the appellate decision. No rights will flow from an interim order or an appealable

decision when the matter is finally disposed of by a higher court unless these orders and judgments are upheld.

8. Section 78 of the Penal Code takes away the criminality of an act done in good faith in pursuance of or which is warranted by the judgment or

order of a court which believed to have jurisdiction if the act was done when the judgment or order remained in force even if the court actually did

not have jurisdiction. That provision is not intended to meet a situation like this. A wrong interpretation of a penal provision by a competent court,

which was corrected by the appellate forum, cannot give immunity from the offence even for the period during which the judgment or order was in

force. Otherwise the absurd position will be that one can go on committing crimes of a similar nature with immunity under the cover of the judgment

or order, which later becomes nonest. The section covers only bona fide acts done in good faith pursuant to or warranted by the judgment or

order. Commission of a crime under a penal statute cannot be said to be an act done in pursuance of or warranted by a judgment or order.

Sections 76 and 79 also cannot have any application. Both the sections only protect acts done in good faith by reason of mistake of fact and not

by reason of mistake of law. Justification by law is the essence of the sections. Section 79 is complementary to Section 76. Section 76 deals with

cases where a person is assumed to be bound by law to do the act, whereas u/s 79, he is assumed to be justified by law in doing the act. It is

everbody"s business to know the law even though everybody may not know the law. Ignorance of law is no excuse, though bona fide mistake on

facts as to what the law is may be relevant in certain specified contingencies. Even in such cases, the question will be whether the claim of right was

honestly and bona fide held by the accused. No such question arises in this case.

9. Decision in Raj Kapoor Vs. Laxman, said that Section 79 of the Penal Code makes an offence a non-offence only when the offending act is

actually justified by law or is bona fide believed by mistake of fact to be justified. That was a case coming under the Cinematograph ""Act. On an

application made and pursued in good faith, sanction for public exhibition was given by the statutory authorities. It was in such a situation that the

court said that at least on the bona fide belief that the certificate is justificatory there is exoneration from prosecution u/s 292 of the Penal Code. On

the facts of that case, in the light of Section 5-A of the Cinematograph Act, the action in exhibiting the film on the basis of the clearance certificate

was found exculpatory in view of Section 79 of the Penal Code. Whether a particular film is obscene involves a mixed question of fact and law. By

applying the provisions of law, the statutory authorities gave the certificate on examining the film that it is not obscene. On the belief of the

certificate, the film was bona fide exhibited. That case has no analogy here. The decision of the statutory authority that the film is not obscene could

be taken as one on a factual question justifying the bona fide belief in exhibiting the film.

10. Normally, the question whether a particular act or omission will amount to an offence is a matter to be decided by the criminal court before

which the accused is tried. But the High Court may, in its inherent jurisdiction saved u/s 482 of the Code of Criminal Procedure, interfere in special

circumstances when prosecution is an abuse of the process of court in order to secure the ends of justice. A declaration of a general character, in

an original petition filed under Article 226 of the Constitution that a particular act or omission or a series of acts or omissions generally will not

amount to offence cannot be had especially when prosecutions are pending against the petitioner for such acts and omissions in competent courts.

Whether the acts or omissions are penal and whether they are established against the accused (petitioner) are matters to be decided by the criminal

court. The accused, who is having the right to defend himself on all aspects before the criminal court, cannot by-pass the i jurisdiction of the

criminal court by filing an| original petition before the High Court. That is what the Division Bench in effect held in the writ appeal. I have, therefore,

no doubt that no rights will flow from the interim order or the final decision rendered in O.P. No. 4619 of 1985.

11. The Act defines food very widely. In Pyarali K. Tejani Vs. Mahadeo Ramchandra Dange and Others, , Supreme Court said that supari is food

and use of saccharine in it is prohibited by the Act and is an offence. Learned single Judge took note of this decision, but distinguished it on the

ground of the newly added standard of saccharine in Appendix B Item A.07.10, which was not there when the Supreme Court rendered the

decision. The court then proceeded to find that when standard of saccharine is fixed, saccharine in conformity with the standard could be used in

any food item and it is not an offence. Third accused was, therefore, given the declaration sought for by him that he is entitled to use saccharine in

supari in conformity with the standard fixed. The appellate court vacated the judgment and held that such a declaration cannot be given and

criminality is a matter to be decided in individual cases when prosecution is launched.

12. Rule 47 was not brought to the notice of the learned Judge. Even before Rule 47 was amended in 1988, it provided that saccharine or any

other artificial sweetener shall not be added to any article of food except where it is permitted in accordance with the standards laid down in

Appendix B. Under the amended Rule 47, there is a total prohibition except as allowed by the proviso. Either before or after amendment, supari is

not an item in which saccharine was permitted. So also, there was then the prohibition in Rule 44(g) against user of any artificial sweetner except

where it is permitted in accordance with the standards laid down in Appendix B. It is true that the said rule (Rule 44(g)) was deleted on 15-4-

1988. But even then now there is the total prohibition in the amended Rule 47 subject to the proviso. The fact that no standard is fixed for supari is

no justification to add a prohibited item. Saccharine, even if it is in conformity with the standard, could be used only in permitted items. Evidently,

the offence is made out as against the third accused.

13. In Writ Appeal No. 44 of 1988, third accused, who was the respondent therein, complained that he was being harassed by prosecutions in

violation of the interim order given and final decision rendered by the single Bench and those prosecutions ended in conviction also. Pendency of

Criminal Appeal No. 425 of 1989 and Cri. RR.P. No. 536 of 1989 in the High Court against the convictions was also brought to the notice of the

Division Bench in an attempt to question the propriety of the prosecution and conviction while stay was in force. Though the Division Bench said

that these are matters to be considered in the criminal appeal or criminal revision, it observed that:

the court dealing with those matters would Certainly take into account and deal with the matter in the most sympathetical manner as possible

14. Counsel said that this observation is a direction for sympathy in the matter of sentence. I do not think so. Sentence is part of the judgment and

exercise of the sentencing discretion cannot be allowed to be influenced by anything other than the factual and legal situations of the case in relation

to the evidence and circumstances. In the exercise of sentencing discretion, no extraneous consideration or direction could prevail. The question of

conviction, acquittal or sentence was not a matter that came up for consideration by the Division Bench. The Division Bench cannot be taken to

have given any direction on matters on which it had no jurisdiction. Whatever is stated by the Division Bench regarding sympathy could be

considered only as obiter.

15. Original petition was filed and stay was obtained when the third accused was being prosecuted for manufacturing adulterated supari. Evidently

the original petition was a mala fide short-cut method adopted. I do not think that those facts could be taken as grounds for sympathy in the matter

of sentence. A minimum punishment is provided and I do not find any reason to award anything less.

Acquittal of the second accused is confirmed and the criminal appeal is dismissed to that extent. But the appeal as against the third accused is

allowed and his acquittal is set aside. Third accused is convicted u/s 16(1)(a)(i) of the Prevention of Food Adulteration Act and sentenced to

undergo simple imprisonment for six months and to pay a fine of Rs. 1,000/- with a default sentence of simple imprisonment for two more months.

Magistrate will take steps to execute the sentence.