

Hindustan Food Products India Vs State of M.P. and Another

Court: Madhya Pradesh High Court (Gwalior Bench)

Date of Decision: Feb. 4, 2008

Acts Referred: Criminal Procedure Code, 1973 (CrPC) â€” Section 313, 391, 482
Prevention of Food Adulteration Act, 1954 â€” Section 16, 17, 7

Citation: (2008) CriLJ 2724 : (2008) ILR (MP) 1313 : (2008) 3 MPHT 203 : (2008) 2 MPJR 158 : (2008) 2 MPLJ 63 : (2008) 2 RCR(Criminal) 825

Hon'ble Judges: B.M. Gupta, J

Bench: Single Bench

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

B.M. Gupta, J.

These two petitions(M.Cr.C.508/08 and M.Cr.C.509/08) are filed for invoking the inherent powers of this Court u/s 482 of Cr.P.C. for setting

aside the two orders dt.7.1.2008 passed by Special Judge, Sheopur, in two different criminal appeals No. 161/05 and 160/05, whereby the

learned Judge has rejected the applications filed on behalf of the petitioner u/s 391 of Cr.P.C. rejecting his prayer to decide the appeals

considering the nomination order as an additional evidence in the case.

The brief facts, which have been admitted by both the parties during the course of arguments are that the petitioner has been convicted for the

offence punishable u/s 7/16 of the Food Adulteration Act, 1954 (hereinafter referred to as ""the Act"") in two different criminal trials. Feeling

aggrieved, he has filed two criminal appeals which are pending in the Court of Special Judge, Sheopur at Criminal Appeals No. 161/05 and

160/05. During pendency, in both the appeals, two separate applications u/s 391 of Cr.P.C. along with Section 17(2) of the Act have been filed

on behalf of the petitioner praying therein that one Asif Ali had been nominated u/s 17(2) of the Act, by the firm of the petitioner and the same had

been communicated to and acknowledged by the Local (Health) Authority (Authority in short) vide its order dt.30th August, 1991. That

nomination order was given by the petitioner to his advocate to use the same for the necessary purpose, but the advocate concerned could not file

the appropriate applications during trials. The nomination order is a material document to be considered for just decision of the criminal case

pending against the petitioner. Hence, the same ought to be taken on record as an additional evidence for consideration. These applications have

been rejected by the learned Judge vide impugned orders mainly on the grounds,

(i). That, before the trial, the Food Inspector could have been apprised with regard to the fact of nomination u/s 17 of the Act.

(ii). That, this fact has also not been mentioned by the petitioner at the time of his statement recorded u/s 313 of Cr.P.C.

(iii). That, in case the application is allowed, nominee will also be required to be provided an opportunity of hearing and as such the trial will start

from its initial stage.

Shri K.B. Chaturvedi, the learned Senior Advocate assisted by Shri Yogesh Chaturvedi, Advocate, appearing on behalf of the petitioner, has

submitted that the petitioner is a partner of the firm Hindustan Food Products India, who is manufacturing Gwala Ghee. It is alleged that the

samples collected of this ghee from its dealers were found below standard. As the ghee was found purchased from the firm of the petitioner, he has

also been arrayed as an accused alongwith others. He has further submitted that as provided by Section 17 of the Act, manager Asif Ali has been

nominated and on communication the same has been acknowledged vide aforementioned order dated 30.8.91 by the Authority. No written reply

either in court below or in this Court countering the fact of nomination has been filed by respondent. Thus, this fact was very much in the notice of

Food Inspector or the same could have been known by him. Once the fact of nominee is admitted, as per the provision of Section 17, a nominee

alone and none else could have been prosecuted, unless the complainant has specifically alleged in complaint against any other person related to

the company that he is also incharge and responsible to the company for its conduct of business and also the alleged act has been committed with

the consent or connivance or its attributable to any neglect on the part of that other person including director, secretary and others. Instead of the

nominee, the petitioner has been prosecuted in the capacity of a partner of the firm and that too without any specific averment as aforementioned.

On account of the mistake of the advocate of the trial Court, by not highlighting the fact of nomination during trial, the petitioner should not be

penalized. Causing delay in the trial cannot be a ground for rejecting of such an application. In support of all his contentions, he has cited following

judgments/orders.

1. State of Gujarat Vs. Mohanlal Jitmalji Porwal and Another, .

R. Banerjee and others Vs. H.D. Dubey and others, .

K.B. Dadi v. Food Inspector and Ors. 2003 FAJ 125.

Yogesh Chanddra and Anr. v. State of M.P. 2005 (1) M.P.L.J.282.

Order passed by this Court in M.Cr.C.1308/05 (R.N. Tata v. State of M.P.) decided on 6.10.06.

Shri B.D. Mahore, for the State, while drawing attention at paragraph 8 of the complaint and paragraphs 2,4 and 30 of the judgment dt.23rd

November 2005 passed by C.J.M., Sheopur in Criminal Case No. 10/93 has submitted that the ghee in question was purchased through a bill

from the firm of the petitioner. During trial, this fact was not disclosed by him that some nominee has been nominated and acknowledged by the

Authority. He has further submitted that as provided by Section 17(4) of the Act, nominee as well as the director both can be prosecuted. In

support, he has drawn attention at State (Delhi Admn.) Vs. I.K. Nangia and Another, .

To appreciate the contentions of the parties, perusal of the relevant provisions of Section 17 of the Act are required, which are as under:

17. Offences by companies.-(1) Where an offence under this Act has been committed by a company(a)(i)the person, if any, who has been

nominated under subsection (2) to be in charge of, and responsible to, the company for the conduct of the business of the company (hereinafter in

this section referred to as the person responsible), or

(ii) where no person has been so nominated, every person who at the time the offence was committed was in charge of and was responsible to, the

company for the conduct of the business of the company; and

(b) the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act if he proves that the

offence was committed without his knowledge and that he exercised all due diligence to prevent the commission of such offence.

(2) Any company may, by order in writing, authorise any of its directors or managers (such manager being employed mainly in a managerial or

supervisory capacity) to exercise all such powers and take all such steps as may be necessary or expedient to prevent the commission by the

company of any offence under this Act and may give notice to the Authority in such form and in such manner as may be prescribed, that it has

nominated such director or manager as the person responsible, along with the written consent of such director or manager for being so nominated.

Explanation & (3)...

(4) Notwithstanding anything contained in the foregoing sub-sections, where an offence under this Act has been committed by a company and it is

proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director,

manager, secretary or other officer of the company, not being a person nominated under Sub-section (2) such director, manager, secretary or

other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.-For the purposes of this section

(a) "company" means anybody corporate and includes a firm or other association of individuals;

(b) "director" in relation to a firm, means a partner in the firm; and

(c) "manager" in relation to a company engaged in hotel industry, includes the person in charge of the catering department of any hotel managed or

run by it.

On perusal of the aforementioned provisions, it is very clear that the provisions of Section 17 of the Act are applicable to companies as well as to

the firms. In case of nomination, only a nominee alone with the company/firm is required to be prosecuted. But in exceptional cases, directors of a

company or partners of a firm or the other persons related to these concerns, can also be prosecuted, if the alleged offence appears to have been

committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, partner etc. The words

mentioned in Sub-section (4)-" shall also be deemed to be guilty" indicate that nominee and the company/firm will be primarily prosecuted, but

along with them in such cases director, partner or other persons related to the company/firm can also be prosecuted. These provisions do not

provide that in case a nominee is in existence, then excluding the nominee, a director or a partner or the other office bearer related to the

company/firm can only be prosecuted. For prosecuting a director or a partner, as the case may be, along with a nominee and company/firm, one

condition, however, is required that specific averments have been mentioned in the complaint by the complainant with regard to that director or

partner or other related responsible person, that the alleged act has been committed with the consent or connivance of, or is attributable to any

neglect on his part. In absence of such specific averments, he can not be prosecuted. In case, a nominee has not been duly appointed then, the

provision of Sub-section (1)(a)(ii) and Sub-section (4) of Section 17 of the Act will be applicable. As this contingency is not available in this case,

no observation is required with regard to it, at this stage.

In the case of R. Banerjee (supra) in para-4 Hon"ble Apex Court has explained the scheme of Section 17 in the following words:

para-4...The scheme of Sub-section (1) of Section 17 is, therefore, clear that the cases where a person has been nominated under Sub-sec. (2) of

Section 17, he alone can be proceeded against and punished for the crime in question. It is only where no such person has been nominated, that

every person who at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of its business can

be proceeded against and punished."... ""It is crystal clear from the scheme of Section 17 that where a company has committed an offence under

the Act, the person nominated under Sub-section (2) to be in charge of, and responsible to, the company for the conduct of its business shall be

proceeded against unless it is shown that the offence was committed with the consent/ connivance/negligence of any other Director, Manager,

Secretary or Officer of the company in which case the said person can also be proceeded against and punished for the commission of the said

offence. It is only where no person has been nominated under Sub-section (2) of Section 17 that every person, who at the time of the commission

of the offence was in charge of and was responsible to the company for the conduct of its business can be proceeded against and punished under

the law.

In this case of R. Benerjee (supra) the nomination was disputed, hence, while remanding the case to the trial court the Hon"ble Apex Court has

directed in para-12, that if the Magistrate comes to the conclusion that the nomination forms has been acknowledged by the competent Authority,

he shall drop the proceeding against the Director of the company other then the company and the nominated persons. In another case of Municipal

Corporation of Delhi v. Ram Kishan Rohtagi (supra) the Hon"ble Apex Court in para-15 has observed that:

15. So far as the Manager is concerned, we are satisfied that from the very nature of his duties it can be safely inferred that he would undoubtedly

be vicariously liable for the offence; vicarious liability being an incident of an offence under the Act. So far as the Directors are concerned, there is

not even a whisper nor a shred of evidence nor anything to show, apart from the presumption drawn by the complainant, that there is any act

committed by the Directors from which a reasonable inference can be drawn that they could also, be vicariously liable. In these circumstances,

therefore, we find ourselves in complete & agreement with the argument of the High Court that no case against the Directors (accused 4 to 7) has

been made out ex facie on the allegations made in the complaint and the proceedings against, them were rightly quashed.

Similar view has been taken by another Bench of this Court in the case of K.B. Dadi (supra). The observation in para-5 of the order of this Court

being relevant goes as under:

The initiation of criminal proceedings against the petitioner for and on behalf of Hindustan Lever Limited was not justified. In any case, the criminal

proceedings should have been initiated against the nominated person i.e. Anil Kulkarni. The continuance of the criminal proceedings against the

petitioner, under the circumstances, would amount to abuse of the process of the court.

In another case of Yogesh Chandra (supra) another Bench of this Court has observed in last five lines of para-3 that "even otherwise, the Manager,

(Production-Quality Control and Marketing) alone can be said to be the person responsible for breach of provisions of law and rule relating to

PFA Act. Petitioners Yogesh Chandra and Kishanlal being Chairman and Vice-Chairman of the company cannot be said to be responsible for

Production-Quality Control and Marketing of the Company.

In view of the above, the view expressed in para-6 hereinabove appears settled by various pronouncements of the Apex Court as well as by this

Court. The contention on behalf of the State, that this information has been given to the court on behalf of the petitioner/accused at a very late stage

of appeal and the petitioner could have informed the Food Inspector at the time of collecting the sample or filing of the complaint and even during

trial he could have informed the trial court. In this regard, this observation will not be an exaggeration that in such criminal trials such expectation

from the accused can not be extended to this extent, that at this fault on the part of an accused he is to be penalized for facing the trial or for

serving the sentence for which, legally he is not liable. In such cases, the Food Inspector/complainant can not escape from his liability to file the

complaint against a proper accused after due care and search made by him before trial. The Food Inspector can very well be expected to be

conversant with the provisions of Section 17 of the Act. In present case, he was prosecuting a partner of the firm. It was his duty to verify from the

office of the Authority and if required also from the petitioner/accused with regard to this fact of nomination. This fact is very much related with the

office of the Authority to which he is sub-ordinate. He could have very well obtained this information from its office. As highlighted in the case of

R.N. Tata v. State of M.P. bearing m.cr.c. No. 1308/05, this Court has observed-"with regard to the second contention, it is not a duty of the

accused to mention that who is the real person to be prosecuted. It is the responsibility of the prosecution to enquire/investigate and prosecute the

real person.

For appreciating next contention raised on behalf of the State and also on the basis of the same, the learned Judge has rejected the application, that

in case of acceptance of application the trial will start at its initial stage, the provision of Section 391 Cr.P.C. are required to be seen, which goes

as under:

391. Appellate Court may take further evidence or direct it to be taken.-(1) In dealing with any appeal under this Chapter, the Appellate Court, if it

thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a

Magistrate, or when the Appellate Court is a High Court, by a Court of Session or a Magistrate.

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and

such Court shall thereupon proceed to dispose of the appeal.

(3) The accused or his pleader shall have the right to be present when the additional evidence is taken.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXIII, as if it were an inquiry.

On perusal, it appears that if the court thinks necessary, the additional evidence can be taken at the appellate stage. Considering the

aforementioned status of the case in which the prosecution of the petitioner prima facie appears against the provisions of law, it appears

necessary to rectify the mistake even at the appellate stage. On the ground of delay, such prayer cannot be rejected. As observed by the Apex

Court in the case of State of Gujarat v. Mohanlal Jitmalji Porwal (supra), relevant observation of the court in para-5 goes as under:

The High Court rejected the prayer on the ground that it did not consider it ""expedient in the interests of justice to open a new vista of evidence"" in

view of the fact that the offence had taken place six years back. The mere fact that six years had elapsed, for which time-lag the prosecution was in

no way responsible, was no good ground for refusing to act in order to promote the interests of justice in an age when delays in the Court have

become a part of life and the order of the day.

The intention of the law can never be to prosecute and punish such a person who as per the provisions of law ought not to be prosecuted and

punished. On perusal of the complaint in both the cases, it is abundantly clear that no required averment containing the allegation against the

petitioner who is a partner in the firm has been mentioned. Nominee has not been prosecuted, even firm has also not been prosecuted. In such

circumstances, it was obligatory for the learned Judge to consider all these situations and to allow the applications, despite causing delay. In my

considered opinion, the learned Judge has committed an error in rejecting the applications. It appears an abuse of the process of the Court. After

allowing the applications, cases are required to be remanded for further consideration by the learned Judge in accordance with law including the

provision of Section 391 of Cr.P.C.

Consequently, the petitions are allowed. The impugned orders dated 7/1/2008 passed by learned Judge in Criminal Appeals No. 160/05 and

161/05 are set aside. In both the Criminal Appeals, the applications filed on behalf of the petitioner u/s 391 Cr.P.C. are allowed. It is directed that

the learned Judge will take further steps in the appeals in accordance with the provisions of Section 391 Cr.P.C.