

(2016) 05 MP CK 0021

MADHYA PRADESH HIGH COURT (INDORE BENCH)

Case No: M.Cr.C. No. 10611 of 2015.

Manik Hiru Jhangiani - Applicant
@HASH State of Madhya Pradesh
- Non-Applicant

APPELLANT

Vs

RESPONDENT

Date of Decision: May 13, 2016

Acts Referred:

- Food Safety and Standards Act, 2006 - Section 42, Section 52, Section 89, Section 97
- Prevention of Food Adulteration Act, 1954 - Section 16(1)(a)(ii), Section 2(ix)(k), Section 7

Citation: (2016) 2 JabLJ 211

Hon'ble Judges: Shri Jarat Kumar Jain, J.

Bench: Single Bench

Advocate: Shri S.K. Vyas, Learned Senior Counsel with Shri Kamal Shankar and Shri Atul Shridharan, learned Counsel, for the Applicant; Ms. Mini Ravindran, learned Govt. Advocate, for the Non-Applicant/State

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Shri Jarat Kumar Jain, J. - This application under Section 482 of the Code of Criminal Procedure [for short "the Code"] has been filed for quashing the proceedings in Criminal Case No. 15830/2011 pending before the Special Judicial Magistrate, Indore.

2. The facts giving rise to this application are that the applicant is a Director of M/s. Bharti Retail Limited (in brief "the Company"). The company is engaged in the business of operating retail stores under the name and style "Easy Day" having its outlet at many places throughout the country. On 29.11.2010, Food Inspector visited retail shop situated at Malhar Mega Mall, Indore and took samples of "butter

coconut biscuit" and "mix fruit biscuit" and the same were sent to Public Analyst for chemical examination. As per the report dated 04.01.2011, samples were misbranded. Hence, Food Inspector filed a complaint against the applicant-Manik Hiru, Sandeep Singh, Indrajeet Walia and Ranjan Bharti Mittal. Learned Magistrate took cognizance on 12.08.2011 and issued bailable warrant against accused persons including applicant. Being aggrieved the applicant has filed this application. In the application it is made clear that earlier co-accused Indrajeet Walia has filed the application under Section 482 of the Code (M.Cr.C. No. 993/12) for quashing the proceedings on other grounds. However, this Court vide order dated 18.12.2014 has dismissed the same and the Hon"ble Apex Court declined to grant special leave to appeal.

3. This application is filed on two grounds :-

(i) Applicant being a Director cannot be prosecuted without arraigning of a company as an accused and there is no averment in the complaint that the applicant is in-charge of, and responsible to the company for conduct of the business of the company.

(ii) The Section 52 of FSSA came into force on 29.07.2010. This provision has overriding effect on PFA Act. Thus, the prosecution under PFA Act after 29.07.2010 is not competent.

4. The first ground that the company has not arraigned as an accused and the necessary averments about the applicant are missing, therefore, the applicant being a Director cannot be prosecuted. This objection has been raised by the co-accused Indrajeet Walia in the earlier application M.Cr.C.No.993/2012 and this Court after considering the submissions vide order dated 18.12.2014 rejected the objection, which reads as under :-

"In this respect, record of the lower Court is perused. It transpires that after lifting samples from the store of the Company, a letter was written to the Company regarding details of nominee under Section 17(2) of the Act. However, the food inspector did not find, the papers were filed in time, therefore, all the Directors of the Company were arraigned as an accused, admittedly without including the Company as accused. This aspect can be taken into consideration by the learned Magistrate at the time of hearing of the case. Under Section 482 of Cr.P.C., this issue cannot be decided. Unless the lower Court decides the issue according to the principles laid down by Hon"ble Supreme Court and this Court in various cases, then only matter can be examined by this Court under Section 482 of Cr.P.C. The issue involves many factual and legal issues and unless evidence is recorded in this regard, no inference can be drawn. Therefore, the applicant is at liberty to raise these objections/issues before the lower Court."

5. Now, it is not proper to consider the ground raised by the applicant whose case is similar to the case of co-accused Indrajeet Walia and keeping view that against the

order of this Court Indrajeet Walia filed SLP before Hon"ble Apex Court and the same has been dismissed.

6. Learned Senior Counsel for the applicant, in regard to second ground submits that misbranding is punishable under Section 52 of the Food Safety Standard Act, 2006 (in brief "FSSA"). As per the notification S.O.1855 (E) dated 29.07.2010 Section 52 of the FSSA came into force on 29.07.2010 and Section 89 FSSA provides that there is overriding effect of this Act on Prevention of Food Adulteration Act, thus, after 29.07.2010 the Court cannot take cognizance under PFA Act. The alleged offence committed on 29.11.2010. Hence, the Court cannot take cognizance of offence under PFA Act. It is further submitted that the prosecution under Section 52 of FSSA is also not competent as procedure for launching prosecution as provided under Section 42 of FSSA has not been followed. For this purpose learned Senior Counsel placed reliance on the judgment of Allahabad High Court in the case of **M/s. Pepsico India Holidays (Pvt.) Ltd. v. State of U.P. reported in 2011 (2) Crimes 250.**

7. On the other hand learned Govt. Advocate submits that Section 97 of the FSSA provides repeal and saving clause. Govt. of India vide notification dated 04.08.2011 repealed the enactments and orders specified in the second schedule w.e.f. 05.08.2011. In second schedule Prevention of Food Adulteration Act is included, thus, this Act has been repealed w.e.f. 05.08.2011. Section 97(4) of FSSA provides that no Court shall take cognizance of an offence under the Repealed Act after expiry of a period of three years from the date of commencement of Act. Thus, the Court can take cognizance under repealed P.F.A. Act till 04.08.2013. Whereas the alleged offence of misbranding is committed on 29.11.2010, therefore, it is incorrect to say that on the date of offence P.F.A. Act has already been repealed, hence, the prosecution under the Prevention of Food Adulteration Act is not competent.

8. After hearing learned Counsel for the parties, perused the record.

9. It is useful to refer the relevant Sections of the FSSA and notifications issued thereunder. Section 97 reads as under :-

"97. Repeal and savings ♦ (1) With effect from such date as the Central Government may appoint in this behalf, the enactment and orders specified in the Second Schedule shall stand repealed :-

Provided that such repeal shall not affect:-

(1) the previous operations of the enactment and orders under repeal or anything duly done or suffered thereunder; or (ii) any right, privilege, obligation or liability acquired, accrued or incurred under any of the enactment or orders under repeal; or (iii) any penalty, forfeiture or punishment incurred in respect of any offences committed against the enactment and orders under repeal; or (iv) any investigation or remedy in respect of any such penalty, forfeiture or punishment, and any such investigation, legal proceedings or remedy may be instituted, continued or enforced

and any such penalty, forfeiture or punishment may be imposed, as if this Act had not been passed:

(2) If there is any other law for the time being in force in any State, corresponding to this Act, the same shall upon the commencement of this Act, stand repealed and in such case, the provisions of Section 6 of the General Clauses Act, 1937 (10 of 1937) shall apply as if such provisions of the State law had been repealed.

(3) Notwithstanding the repeal of the aforesaid enactment and orders, the licences issued under any such enactment or order, which are in force on the date of commencement of this Act, shall continue to be in force till the date of their expiry for all purposes, as if they had been issued under the provisions of this Act or the rules or regulations made thereunder.

(4) Notwithstanding anything contained in any other law for the time being in force, no court shall take cognizance of an offence under the repealed Act or orders after the expiry of a period of three years from the date of the commencement of this Act.

10. Government of India, Ministry of Health and Family Welfare Department on 04.08.2011 issued a notification which reads as under :-

"F. No. P-15025/41/2011-DFQC ♦ In exercise of powers conferred by sub-section (1) of section 97 of the Food Safety and Standards Act, 2006 (34 of 2006), the Central Government hereby repeals the enactment and orders in the Second Schedule of the Food Safety and Standards Act, 2006 and the Milk and Milk Products Regulation, 1992 with effect from 5th August, 2011."

11. Second Schedule of the Act, 2006 is as under :-

The Second Schedule (See Section 97)

(1) The Prevention of Food Adulteration Act, 1954 (37 of 1954)

(2) The Fruit Products Order, 1955

(3) The Meat Food Products Order, 1973

(4) The Vegetable Oil Products (Control) Order, 1947

(5) The Edible Oils Packaging (Regulation) Order, 1998

(6) The Solvent Extracted Oil, De oiled Meal and Edible Flour (Control) Order, 1967

(7) The Milk and Milk Products Order, 1992

(8) Any other order issued under the Essential Commodities Act, 1955 (10 of 1955) relating to food.

12. The Sub Section 1 of Section 97 provides that Central Government may appoint a date and w.e.f. that date the enactments and orders specified in the Second Schedule stand repealed. In exercise of this power Central Government by the

aforesaid notification dated 04.08.2011 repealed the enactment and orders specified in Second Schedule. The P.F.A. Act is in Second Schedule, therefore, this Act has been repealed w.e.f. 5.8.2011.

13. Sub Section 2 of Section 97 provides that any other law which is not included in the Second Schedule and for the time being enforced in any State, the same shall upon commencement of this Act (FSSA) stand repealed. For the disposal of this petition this provision is not relevant.

14. Sub Section 3 and 4 of Section 97 are saving clause. Sub Section 3 saved the license issued under repealed enactments and orders till date of expiry whereas; Sub Section 4 provides that no Court shall take cognizance of offence under the Repealed Act or orders after expiry of a period of three years from the date of commencement of this Act (FSSA). It means even after commencement of this Act (FSSA) the Court can take cognizance of an offence under the Repealed Act after expiry of a period of three years from the date of commencement of the Act (FSSA).

15. Sub Section 3 of Section 1 of this Act provides that the Central Govt. may by notification in the official gazette, appoint, and dates may be appointed for different provisions of the Act and in reference in any such provision to the commencement of this Act shall be construed as a reference coming into force of that provision.

16. Central Govt. issued the notification S.O.1855(E) dated 29.07.2010, which reads as under :-

"In exercise of the powers conferred by sub-section (3) of Section 1 of the Food Safety and Standards Act, 2006 (34 of 2006), the Central Government hereby appoints the 29th day of July, 2010 as the day on which the provisions of Sections 19 to 21 (both inclusive), Section 23 to 29 (both inclusive), Sections 31 to 35 (both inclusive), Section 48 to 80 (both inclusive), Section 89, Section 94 to 98 (both inclusive) and Section 100 of the said Act, shall come into force."

17. Misbranding is punishable under Section 52 of FSSA. As per above referred notification this provision came into force w.e.f. 29th July, 2010. As per the provision of Sub Section 4 of Section 97 of the FSSA, no Court can take cognizance under Repealed Act after the expiry of a period of three years from the date of commencement of the Act. Section 52 of FSSA is commenced on 29.07.2010 and the PFA Act is repealed w.e.f. 05.08.2011. As per the provision under Section 97 (4) the Court can take cognizance under the Repealed Act i.e. Prevention of Food Adulteration Act till 28.07.2013 for the offence under Section 52 of FSSA (misbranding).

18. Now I have considered the effect of Section 89 of the FSSA which reads as under :-

"89. Overriding effect of this Act over all other food related laws ♦ The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained

in any other law for the time being in force or in any instrument having effect of virtue of any law other than this Act."

19. Section 89 speaks about the effect of provision of earlier Act and the present Act when there is any inconsistency between these two laws then the provisions of the FSSA have an overriding effect. In the present case Section 89 comes into play only when there is any inconsistency between the provisions of Section 52 of FSSA and Section 2(ix)(k) Rule 32, 7(ii) read with Section 16(1)(a)(ii) of PFA Act. However, no inconsistency between these two provisions have been pointed out.

20. Learned Senior Counsel placed heavy reliance on the judgment of Division Bench of Allahabad High Court in the case of M/s. Pepsico India Holdings Pvt. Ltd. (supra). In which it is held that;

"In view of the aforesaid crystal clear legal position and particular provisions under the FSSA we are in agreement with the arguments advanced by the petitioner's counsel that for adulteration of food or misbranding, after coming into force of the provisions of FSSA vide notification dated 29th July, 2010, the authorities can take action only under the FSSA as it postulates an overriding effects over all other food related law including the PFA Act."

21. The above decision has been delivered on 08.09.2010 thereafter Govt. of India, Ministry of Health and Family Welfare has issued notification on 4th August, 2011 in exercise of powers conferred by Sub Section 1 of Section 97 of the FSSA and repealed the enactments and orders in the Second Schedule of the FSSA w.e.f. 5th August, 2011. Therefore, in this judgment such notification could not be considered. In such circumstances, judgment of Allahabad is not helpful to the applicant.

22. There is specific provision under Section 97 of FSSA for repealing the PFA Act then it cannot be interpreted that after the commencement of Section 52 of FSSA i.e. 29.07.2010 the provisions for punishment under PFA Act deemed to be repealed. We have to keep in mind that as per Sub Section 4 of Section 97 of FSSA the Court is competent to take cognizance under the Repealed Act (in present case PFA Act) till 28.07.2013 for the offence of misbranding as discussed above. In the present case the alleged offence has been committed on 29.11.2010 and the Court has taken the cognizance on 12.08.2011, therefore, I am of the view that the Court has rightly took the cognizance for offence of misbranding under Section 2(ix)(k) Rule 32, 7(ii) read with Section 16(1)(a)(ii) of PFA Act, 1954.

23. No merit in this application. Therefore, it is hereby dismissed.

24. No order as to costs.