

Jagdish Chandra Vs Corporation of Calcutta

Court: Calcutta High Court

Date of Decision: April 15, 1953

Acts Referred: Calcutta Municipal Act, 1923 " Section 407, 407(1), 422

Citation: AIR 1953 Cal 706 : (1953) 1 CALLT 168 : 57 CWN 839 : (1955) 1 ILR (Cal) 288

Hon'ble Judges: Sen, J; Mitter, J

Bench: Division Bench

Advocate: A.K. Sen, N.K. Basu and Pashupati Ghosh, for the Appellant; Sunil Kumar Basu, for the Respondent

Judgement

Mitter, J.

This Rule was directed against the petitioner's conviction u/s 407 read with Section 488, Calcutta Municipal Act, 1923, for

having sold adulterated mustard oil. The prosecution case was based upon an analysis of a sample of the oil concerned disclosing " a saponification

value of 177.8. The petitioner's defence was that the oil was pure.

2. The validity of the conviction depends upon the construction to be placed upon the relative words of two Government Notifications, numbered

respectively 735 P. H. and 736 P. H., both dated 20-3-1928, issued in exercise of the power conferred by Section 422 of the Act.

3. The material part of Section 407 of the Act is in these terms:

407 (1) No person shall directly or indirectly, himself or by any other person on his behalf, sell, expose or hawk about for sale, or manufacture or

store for sale, any of the following articles, namely,

.....

(e) mustard oil,

.....

unless the following conditions are fulfilled, namely,

.....

(v) in the case of mustard oil -- it shall be derived exclusively from mustard seed;

It is clear from the section that what is prohibited is the sale etc. of mustard oil which is not derived exclusively from mustard seed. Section 422 is

as follows:

The Provincial Government may declare the normal constituents of any article of food or any drug and may determine, by rules in this behalf, what

deficiency in any of these constituents, or what addition of extraneous matter or proportion of water in a sample of any article of food or drug,

shall, for the purposes of this Act, raise a presumption until the contrary is proved that the article of food or drug is not genuine or is injurious to

health; and a public analyst shall have regard to such rules in certifying the result of an analysis under this Act.

This section thus empowers Government (i) to declare the normal constituents of any article of food, and (ii) to determine, by rules in this behalf,

what deficiency in any of these constituents shall raise a presumption until the contrary is proved that the article of food is not genuine. It also

provides that a public analyst shall have regard to such rules in certifying the result of an analysis under the Act.

4. The material portions of Notification No. 735 P.H. are as follows:

In exercise of the power conferred by Section 422, Calcutta Municipal Act, 1923 (Bengal Act 3 of 1923), the Government of Bengal (Ministry of

Local Self-Government) are pleased to declare that the normal constituents of the articles of food named below are those specified against each

such article, namely:

Mustard oil is the fixed oil express or extracted from mustard seed and shall have a saponification value of not less than 169 and not more than

175 and an iodine value of not less than 96 and not more than 104.

Rule 7 of Notification No. 733 P.H. is in these terms:

7. Mustard oil.-

(a) where in a sample of mustard oil the saponification value is less than 169 or more than 175 it shall be presumed, until the contrary is proved for

the purposes of the Act, that the mustard oil is not genuine by reason of the addition thereto of extraneous oil.

(b) Where in a sample of mustard oil the iodine value is less than 96 or more than 104 it shall be presumed, until the contrary is proved for the

purpose of the Act, that the mustard oil is not genuine by reason of the addition thereto of extraneous oil.

It is clear from the language of Section 422 that it is a certain quantum of deficiency in any of the normal constituents of mustard oil that raises a

presumption that the oil is not genuine. That being so, unless the constituents are declared or known, the question of a deficiency does not arise.

Section 407 provides that no one is to sell mustard oil unless it is derived exclusively from mustard seed. The question to be decided is whether the

first-named Notification can be said to declare the normal constituents of mustard oil which is derived exclusively from mustard seed. If the words

used in the Notification cannot be read as declaring the normal constituents of mustard oil, it would follow that the Notification is not in conformity

with what is laid down in Section 422. It cannot be disputed that the saponification value or the iodine value of mustard oil must vary with the

quality of mustard seed. The variation as to saponification and/or iodine value, within certain limits, is not necessarily dependant upon the addition

of extraneous oil. If that be correct, it cannot be said that Notification No. 735 P.H. in fact declares the normal constituents of mustard oil by

prescribing the limits of its saponification and iodine values. The learned Junior Standing Counsel on behalf of the Corporation argued that although

the Notification did not in terms declare the normal constituents of mustard oil, the same could be deduced from the limits of saponification and/or

iodine values, as the case may be, which are set out in the Notification. In our view, the Notification concerned prescribes standards for mustard

oil in terms of chemical reactions and does not prescribe the normal constituents of mustard oil.

5. Both Section 422 of the Act and Rule 7 of Notification No. 736 P.H. provide for a presumption against the genuineness of mustard oil in case

of a certain deficiency in any of its normal constituents. That being the case, the relative provisions should be strictly construed, and unless the

conditions mentioned in Section 422 are fulfilled, there can be no presumption that the oil concerned is not genuine. The fact that the Notification

provides for limits both in the case of saponification value and the iodine value shows that the quality of mustard oil must depend upon the quality of

mustard seed. Section 407 does not prohibit the manufacture or sale of mustard oil provided, it is derived exclusively from mustard seed. That

being so, unless Government declares the normal constituents of mustard oil, & a certain deficiency is shown to exist in any such constituent, no

presumption can arise that the oil is not genuine.

6. There is another aspect of the matter. Section 407 (1) (v) provides:

(v) in the case of mustard oil -- it shall be derived exclusively from mustard seed;

There is no further limitation. Notification No. 735 P.H., however, imposes a limitation upon the use of mustard seed by requiring that it should be

such as to produce mustard oil having a saponification value between 169 and 175 and an iodine value between 96 and 104. There can be no

doubt that the Notification cannot take away a person's right to manufacture or vend mustard oil which is derived exclusively from mustard seed,

irrespective of the quality of the seed. The Notification by prescribing a kind of mustard oil which has a particular saponification value as also a

particular iodine value seeks to limit a person's right to sell mustard oil derived exclusively from mustard seed. That being so, the alleged

declaration by Notification No. 733 P.H. would appear to me to offend against Section 407 of the Act.

7. In the case before us, the petitioner called one Om Prokash, Oil Expert to the U. P. Government, Head of Oil Section, H. B. Technological

Institute and Officer-in-charge, Central Laboratory, Government of India. This witness deposed as follows:

There are different specifications of mustard oil. Different States have got their own specifications and Government of India have got their

specifications of mustard oils. These specifications are for pure mustard oil. In my opinion the saponification value of pure mustard oil can go up to

178. The Government of India's specification of the Department of Industries and Supply, the specification for mustard oil has been laid down 173

as the maximum limit of saponification value.

According to this witness, the saponification" value of 177.8 found in the sample concerned is within the maximum limit of saponification value

recognised by the Department of Industries and Supply, Government of India. There was, of course, no test as to iodine value of the sample. The

petitioner also relied upon the following extract from a letter addressed by the Government of Bengal to the Deputy Director of Agricultural

Marketing:

I would inform you that the standards of purity of mustard oil as prescribed under Bengal Food Adulteration Act are not accepted as fixed and

rigid standards by the West Bengal Public Health Laboratory and have not been so accepted for many years. Samples of mustard oil giving the

saponification value of even 177.0 or iodine value of 106.0 are not declared as adulterated simply because of the high saponification and iodine

values, but if special tests, e.g..... confirm the presence of adulterant. Under the new Pure Food Act this point will be made clear.

All authorities on oil seem to be agreed that mustard oil from mustard seeds of different kinds and/or grown in different parts of India would give

different saponification and iodine values. It is also not disputed that mustard seeds grown in U. P. give a high saponification value. It is said that the

mustard oil concerned was produced from seeds grown in U. P.

8. In our view, the first of the two Notifications does not declare what the normal constituents of mustard oil are. There is, therefore, no room for

any presumption, merely on the basis of the saponification value of the oil concerned, that there was adulteration. There was no evidence that the

oil concerned was not derived exclusively from mustard seed. That being so, the petitioner's conviction must be set aside.

9. In the result, this Rule is made absolute. The fine, if paid, must be refunded.

Sen, J.

10. The petitioner Jagadish Chandra Jain and a firm Messrs. Jagannath Ramchand were prosecuted before the Municipal Magistrate, Calcutta, on

a charge u/s 407/488, Calcutta Municipal Act, 1923, for having stored for sale, and selling, adulterated mustard oil on 11-7-1949. A sample of

the oil was taken by a Food Inspector, S. B. Nath, and sent to the Public Analyst of the Corporation of Calcutta. The Public Analyst gave the

opinion that the sample was a sample of mustard oil adulterated with other oils, and he based his opinion on the data found by him, viz.,

Baudouin's test gave a negative result but saponification value was 177.8.

11. The accused pleaded not guilty, and took the defence that the oil was pure mustard oil. For rebutting the presumption arising from the

saponification value of the sample being above 175, the defence examined Sri Om Prakash, oil expert to the U. P. Government, and the witness

stated that in his opinion, saponification value of pure mustard oil could go up to 178, that different States had slightly different specifications for

pure mustard oil, and that the Department of Industries and Supply, Government of India, had laid down 178 as the maximum limit of

saponification value of pure mustard oil. In view of the evidence of the above witness for the defence, the learned Municipal Magistrate considered

that the presumption referred to in the rules made by the Government of Bengal and raised by the saponification value being 177.8 had been

rebutted, and so he acquitted the accused.

12. There was an appeal by Government against the acquittal, and this Court allowed the appeal, pointing out that in respect of a prosecution

under the Calcutta Municipal Act, the presumption raised by the Act and the rules made thereunder could not be rebutted by evidence that

according to the specifications prescribed by another State the sample of mustard oil could not be held to be adulterated, or by the opinion of an

expert that pure mustard oil could have saponification value as high as 178, but that the accused must prove that the particular sample of mustard

oil was pure. The case was remanded with the direction that the accused should be given an opportunity to produce further evidence to rebut the

presumption and that they might apply for action u/s 425, Calcutta Municipal Act, 1923.

13. When the case went back for retrial, the accused applied u/s 425 of the Act to have the sample in the custody of the Corporation sent to the

Director of Public Health for analysis and for ascertaining adulterants if any. The sample in the custody of the Corporation was accordingly sent to

the Director of Public Health who in due course submitted a report that the saponification value of the sample was 175.75 and the iodine value

106.6 and that the sample was a sample of adulterated mustard oil. The Director of Public Health did not, however, make any test for ascertaining

adulterants, as such instruction was not given in due time by the Magistrate through oversight by his office. The defence also proved some

correspondence between the U. P. Government and the Government of Bengal in 1936 relating to the standard specified for mustard oil, and

between two Departments of the Government, West Bengal in 1948 relating to the standard prescribed for mustard oil under the Bengal Food

Adulteration Act, which is the same as the standard prescribed under the Calcutta Municipal Act.

14. The learned Magistrate held that such correspondence was inadequate for the purpose of rebutting the presumption arising in the case against

the accused. Strictly speaking, such correspondence was not admissible as evidence. The Magistrate pointed out that the result of the analysis by

the Director of Public Health supported the conclusion of the Corporation Public Analyst, and so he convicted the petitioner Jagadish Chandra

Jain, who had actually sold the oil to the Food Inspector, u/s 407/488, Calcutta Municipal Act, 1923, and sentenced him to pay a fine of Rs. 200.

though he acquitted the firm under the idea that a firm was not a person and could not therefore be prosecuted.

15. Against such conviction the petitioner has filed this application. In the application the grounds taken are mainly that the learned Magistrate was

wrong in holding that the presumption of adulteration, arising from the result of analysis of the samples taken with the rules under the Calcutta

Municipal Act, had not been sufficiently rebutted; and that the accused petitioner was prejudiced by the fact that the sample of oil sent to the

Director of Public Health was not tested for the presence of adulterants, owing to the failure of the Court officers to convey complete instructions

to the Director in the first instance. At the hearing of the application, however, a point of law going to the root of the case has been urged for the

first time, viz., that the rule or notification made by the Government providing that a presumption of adulteration shall be made when the

saponification value falls outside the range 169-175 or when the iodine value is outside the range 96-104, is itself "ultra vires" the Calcutta

Municipal Act.

16. Section 407 of the Act, in so far as it relates to mustard; oil, is as follows: (Here his Lordship quoted the material portions of Section 407 (1)

the text of which is already given in para. 3). Section 422 of the Act runs as follows: (For text of Section 422 see para. 3). In exercise of the

power conferred by Section 422 of the Act, the Government made and published Notification No, 735 P.H. dated 20-3-1928, declaring (or

purporting to declare) the normal constituents of certain articles of food, viz., milk, dahi, chhana, khoa, ghee, butter, mustard oil, cocoanut oil,

wheat flour, atta and tea; and Notification No. 736 P.H. of "the same date consisting of rules providing in respect of each of the above articles of

food, what deficiency in its constituents, or addition of extraneous matter, or proportion of water therein shall raise a presumption until the contrary

is proved that the article of food is not genuine or is injurious to health. In respect of mustard oil, Notification No. 735 P.H. is as follows: (for text,

see para. 4), And Notification No. 736 P.H. is as follows: (for text, see para. 4).

17. Mr. Ghosh appearing for the petitioner first took the point that in respect of mustard oil Section 407 contains the complete law and that

Government cannot make a rule or notification u/s 422 laying down further provisions relating to the same; and that Government may make rules in

respect of such articles of food as milk, butter, ghee, etc.. in respect of which Section 407 itself provides that the Government may prescribe

conditions they must fulfil or declare the constituents thereof. This argument, however, cannot be accepted. Section 422 gives the power in general

terms to the Government to declare the normal constituents of any article of food or drug, and there is nothing to show that this power is limited to

such items in Section 407 as contain a provision for the prescribing conditions or constituents. In respect of such items the Government may make

special orders within the terms of the respective clauses of Section 407; but this does not affect the power of the Government to make orders u/s

422 in respect of any article of food or drug.

18. Mr. Ghosh has next urged that Section 422 empowers the Government to declare the normal constituents of an article of food or drug,

whereas Notification No. 735 P. H. prescribes standards of chemical reactions which mustard oil for instance must satisfy, and does not declare

the normal constituents of the same, and is therefore ultra vires; that similarly, the second part of Section 422 enables the Government to provide

by rules what deficiency in the prescribed constituents or what addition of extraneous matter shall raise a presumption that the article is not genuine,

whereas Notification No. 736 P.H. provides for the raising of such presumption when the "mustard oil sample gives chemical reactions outside the

prescribed range, and it is, therefore, also "ultra vires". Mr. Ashok Sen, appearing for the Corporation has urged that though apparently the

notifications prescribe standards for mustard: oil in terms of chemical reactions, the notifications properly understood really prescribe the normal

constituents of the same and provide for the raising of the presumption when there is deficiency of the normal constituents or addition of extraneous

matter. To appreciate this argument, it is necessary to consider the chemical reactions concerned.

19. Saponification means the decomposition of fats and oils by the action of alkalies like caustic soda or caustic potash into soap and glycerine;

and the saponification value of a fat or oil is the no. of milligrams of potassium hydroxide (caustic potash) neutralised during saponification of 1

gram of the fat or oil; it is a measure of the mean molecular weight of the fatty acids in the fat or oil. The iodine value of a fat or oil is the amount of

iodine that it will absorb expressed as a percentage of the molecular weight of the fat or oil; it is a measure of the unsaturated fatty acids present in

a fat or oil, as saturated fatty acids absorb no iodine. (See Public Health Laboratory Practice, by Stewart and Boyd). Different fats and oils have

widely different saponification values and iodine values, and these values are indices not only of the purity of a particular oil or fat, but also of the

nature and constitution of the oil or fat. So when it is prescribed; that mustard oil shall have a saponification value between 169 and 175, and

iodine value between 96 and 104, it may be said that this means that mustard oil shall contain such fatty acids as give a saponification value of 169-

175, and such amount of unsaturated fatty acids as give an iodine value of 96-104, and values outside the above ranges would indicate deficiency

of the fatty acids which are the constituents of mustard oil and addition of some extraneous oil containing fatty acids with different values. It is

urged, therefore, that the Notifications are within the terms of Section 422 of the Act.

20. There can be hardly any doubt that the authorities who drafted the disputed notifications thought on the above lines. But it is necessary that an

order or a rule made under a statutory provision should strictly comply with the terms of that provision. In respect of mustard oil, the two

notifications do not directly comply with the terms of Section 422; they directly prescribe the specification or standard to which a sample of

mustard oil must conform. It may be said that in respect of mustard oil Notification No. 735 P.H. is directly in terms of Section 407(1)(vii), which

provides that an edible oil or edible fat must conform to the specification or standard prescribed for the same. Now mustard oil is an edible oil, and

if there had been no separate provision for mustard oil in Clauses (e) and (v) of Section 407(1), the specification or standard for mustard oil might

be validly prescribed u/s 407(1)(vii). But in view of the separate provision for mustard oil, butter and ghee in other clauses, it must be held that the

term "edible oil and edible fat" in Clause (vii) excludes mustard oil, butter and ghee, and while for butter and ghee, conditions they must fulfil may

be prescribed under the respective clauses of Section 407(1), for mustard oil we are thrown back on Section 422 and any rule or order made

thereunder must declare the normal constituents, and provide for raising of the presumption from a deficiency of such constituents or addition of

extraneous matter. Clearly Notifications 735 P.H. and 736 P.H. do not do so, at least directly, in respect of mustard oil. As regards 736 P.H., the

provision that when values are outside the prescribed range, the oil shall be presumed to be not genuine by reason of the addition of extraneous oil,

is contrary to the terms of Section 422 that Government may prescribe what addition of extraneous matter will raise a presumption as to the article

not being genuine. To follow the terms of Section 422, the rule might be put as follows: -- that when there is such addition of extraneous oil as

takes the saponification value and iodine value outside the prescribed ranges, the mustard oil shall be deemed to be not genuine. But. this would be

meaningless, because as soon as there is addition of any extraneous oil the mustard oil ceases to be genuine, and there is no need to raise a

presumption. This makes it clear that Notification No. 736 P.H. is not really in terms of Section 422, but that it independently provides that a

presumption against genuineness shall be made when a sample fails to give such values on chemical analysis as genuine mustard oil is known to

give. Similarly, though Notification No. 735 P.H. might be paraphrased as follows:-- that mustard oil shall contain such fatty acids as give a

saponification value of 169-175 and such amount of unsaturated fatty acids as give an iodine value of 96-104, it would still be logical to hold that

the notification really sets forth the chemical standard for pure mustard oil & does not declare the normal constituents of mustard oil. It must,

therefore, be held that the Notifications "in question are "ultra vires" Section 422, Calcutta Municipal Act, 1923.

21. Of the rulings cited before us, the question as to the validity of the notification as to mustard oil u/s 4, Bengal Food Adulteration Act, which

corresponds to Section 422, Calcutta Municipal Act, was not raised in --- Superintendent and Remembrancer of Legal Affairs Vs. Kshitish

Chandra Banerjee, , and the Court was concerned only with the question how the presumption arising u/s 4 taken with the Notification could be

rebutted. In -- Nowranga Lal Marwari Vs. Chairman, Midnapore Municipality, , the question was raised, but the question was not finally decided

because the case related to ghee, and the Court held that u/s 6, Food Adulteration Act (corresponding to Section 407, Calcutta Municipal Act,

1923) chemical standards might be prescribed as conditions which ghee must fulfil. Henderson J. observed, however, in that case that the part of

the notification prescribing standards of butyro-re-fractometer reading, saponification value and Reichert-Wollny value for ghee was ultra vires

Section 4 of the Act; and Khundkar J., though he refrained from deciding the question, still observed that it was not easy to understand how rules

laying down chemical standards come to be formulated u/s 4, under which Government might declare the normal constituents of any article of food,

and determine what deficiency in any of the constituents or what addition of extraneous matter would raise a presumption against genuineness.

22. In the case before us, the notifications u/s 422 having been held to be bad in respect of mustard oil, there remains only Clause (v) of Section

407 (1), and so the prosecution could succeed only if it were shown that the sample of mustard oil contained any extraneous oil. The test for

sesame oil, Baudown's test, gave a negative result, i.e., no trace of sesame oil was found. No test was made for any other extraneous oil. Hence it

must be held that there was no evidence to show that the sample of oil was adulterated; this application must therefore succeed and the conviction

of the petitioner u/s 407/488, Calcutta Municipal Act, 1923, and the sentence passed thereunder must be set aside.

23. It is no doubt regrettable that at a time when sale of adulterated mustard oil is a crying evil, the notification prescribing standards for

genuineness or otherwise of mustard oil have to be found "ultra vires". It has already been indicated how by a slight amendment of Section 407

(Section 462 of the new Act) it would be possible to prescribe validly the standard of purity in respect of mustard oil. It is to be noted, however,

that any standard laid down u/s 407 would be absolute, i.e., the same must be conformed to in all cases, and there would be liability to punishment

for failure to conform to the standards, even if a particular sample were derived exclusively from mustard seed. If it is intended to provide a

standard non-conformity into which would merely raise a presumption that the oil is not genuine, it would be necessary to amend Section 422

(Section 477 of the new Act) so as to empower the Government to lay down thereunder a standard of purity as well as to declare the normal

constituents of any article of food or drug. Until such amendment of the sections and issue of fresh rules and notifications thereunder, prosecutions

for adulterated mustard oil would be possible only by establishing that a particular sample thereof contains some extraneous oil)