(1976) 09 BOM CK 0032

Bombay High Court

Case No: Criminal Revision Application No. 295 of 1975

Hanmant Kallappa Bhandare		APPELLANT
	Vs	
The Food Inspector, Poona Municipal Corporation		RESPONDENT

Date of Decision: Sept. 2, 1976

Acts Referred:

- Constitution of India, 1950 - Article 276
- Government of India Act, 1935 - Section 142A
- Prevention of Food Adulteration Act, 1954 - Section 11, 16

Citation: (1977) 79 BOMLR 181 : (1977) MhLj 1

Hon'ble Judges: Shah, J; Chandurkar, J

Bench: Division Bench

Final Decision: Allowed

Judgement

Shah, J.

This Criminal Revision Application came up for hearing before the learned single Judge (Joshi J.). On behalf of the accused, reliance was placed on the decision of the Supreme Court in the case of Rajaldas Gurunamal Pamanani Vs. The State of Maharashtra, , and it was contended that in view of the interpretation laid down by the Supreme Court on the provisions of Rule 22 of the Prevention of Food Adulteration Rules, 1955 (hereinafter referred to as "the Rules") that the said Rule was mandatory, and as in the facts of this case, there was admittedly a breach of the said Rule committed by the authorities, the conviction could not be sustained. The learned single Judge was of the view that the judgment of the Supreme Court is distinguishable and would not apply to a case where the article of food is cereals or pulsea, and the mere fact that the lessor quantity than the one prescribed was sent to the public analyst for analysis would not vitiate the conviction. However, the learned Judge found that in other similar matters, following the decision of the Supreme Court, the accused were acquitted on the ground that there was violation

of the mandatory provisions of Rule 22. As the learned Judge was unable to agree with the view taken in the two other cases one decided by Naik J. in Subhashchandra Fulchand Lunkad v. The State of Maharashtra (1975) Criminal Revision Application No. 49 of 1975 and the other decided by Hajarnavis J. in Lilachand Khemchand Pahuja v. The State of Maharashtra (1975) Criminal Revision Application No. 1 of 1975 and as he was of the view that as some of the important provisions of the law and the Rules have not been touched directly or indirectly by the Supreme Court in Pamnani''s case, it was necessary to refer the matter to a larger Bench. This is how the matter has come up before us.

2. The facts, in so far as they are material and which are no longer is dispute before us, are that on March 29, 1973, the complainant Food Inspector visited the grocery shop run by accused, under the name and style of "Shri Balaji Merchants" at Poona. In "the presence of the Panchas he purchased 600 grams of bajri for the purpose of analysis, and after observing the other necessary formalities, one of the samples which contained one-third of the quantity purchased, viz., 200 grams, was forwarded to the public analyst, who found it to contain argot and as such adulterated. After receipt of the report and after obtaining the requisite sanction, the petitioner came to be prosecuted before the Judicial Magistrate, First Class, Poona Municipal Corporation, Poona, for the offence u/s 16(1)(a)(i) of the Prevention of Food Adulteration Act, 1954, who found him guilty and sentenced him to suffer rigorous imprisonment for six months with a fine of Rs. 1000, in default to suffer simple imprisonment for throe months more. On appeal by the accused, both the conviction and sentence came to be confirmed by the Additional Sessions Judge, Poona. Aggrieved by this decision, the petitioner has preferred this Criminal Revision Application.

3. Rule 22 of the said Rules provides for the quantity of sample to be sent to the public analyst and it gives a table regarding the specific quantity of sample of food to be sent to the public analyst or Director for analysis. In the first column, the particular article of food is mentioned, whilst against each of these items, the approximate quantity to be supplied to the public analyst is mentioned. It is not disputed before us that the article of food in this case, viz. bajri, is covered by entry No. 19 which refers to "pulses, cereals and the like", and the quantity proscribed for the purpose of sending the same to the public analyst for analysis is "250 grams". In the present case, admittedly the sample sent to the public analyst consisted of only 200 grams. The question that falls for our consideration is whether the provisions of Rule 22 are directory or mandatory. If they are directory, as contended by Mr. Agarwal, the learned Counsel appearing for the Municipal Corporation, in view of the report of the public analyst, it will have to be held that the accused has committed the offence.

4. Rule 22 was required to be considered by the Supreme Court in Pamnani''s case cited supra, although with regard to a different item of food, viz. "Compounded

Asafoetida" which find a place in entry No. 20 of Rule 22. The quantity prescribed for this item of food under the said Rule is 200 grams. In that case after following the necessary formalities, the food inspector made three packets of 100 grams each and sent one of the packets to the public analyst, and the report of the public analyst was to the effect that the alcoholic content in the Asafoetida was 3.77 per cent, whereas 5 pr cent, was the required quantity under the Act, as stated in A-04 in Appendix B to the Rules. In para. 17 of the judgment, the learned Chief Justice observed (p. 191):

The appellant also contended that samples were not taken in accordance with the provisions of the Act and the rules thereunder. Rule 22 states that in the case of Asafoetida the approximate quantity to be supplied for analysis is 100 grams and in the case of compounded Asafoetida 200 grams. The Public Analyst did not have the quantities mentioned in the Rules for analysis. The appellant rightly contends that non-compliance with the quantity to be supplied caused not only infraction of the provisions but also injustice. The quantities mentioned are required for correct analysis. Shortage in quantity for analysis is not permitted by the statute.

It would thus be clear from the said observations in the said judgment that in the view of the Supreme Court, the provisions of Rule 22 are mandatory and admit of no exceptions.

5. The learned single Judge in his referring judgment seems to have observed that the attention of the Supreme Court was not drawn to some of the provisions of the Act. In particular, he has referred to the provisions of Section 11(2) of the Act, which, in his opinion, indicate that the table in Rule 22 has to be liberally construed. The learned Judge also has pointed out in his judgment that as per the Rule 22, the quantity to be supplied is "approximate". The third aspect which, according to the learned Judge, has to be taken into account is the question of likely prejudice to be caused to the accused by reason of liberal construction being put on Rule 22. We are afraid that in view of the clear pronouncement of the Supreme Court, it is not possible for the High Court to take a different view merely on the ground that certain aspects of the matter and certain provisions have not been considered by the Supreme Court while laying down the law. Paragraph 17 which has been quoted by us in extenso would clearly imply that the whole of Rule 22 was before their Lordships of the Supreme Court for their consideration. The question of prejudice also seems to have been taken note of, for it has been clearly observed that "non-compliance with the quantity to be supplied caused not only infraction of the provisions but also injustice". It is further made clear in the judgment that "shortage in quantity for analysis is not permitted by the statute". Having regard to these clear observations, it would not be possible for us to take a different view merely because the Supreme Court did not specifically refer to some of the aspects mentioned by the learned Judge in his referring judgment. It may also be pointed out that the provisions of Rule 22 regarding "the approximate quantity to be supplied" were

present to the mind of the Supreme Court as this is in terms referred to in para. 17 of the judgment. With respect, we are bound by the interpretation put on the provisions of Rule 22 by the Supreme Court, and in view of the admitted position in this case that a lesser quantity was sent to the public analyst for analysis, the accused is entitled to an acquittal.

6. A similar situation regarding binding nature of the decision of the Supreme Court arose before the Supreme Court in an appeal from a decision of a division Bench of this Court in the case of Municipal Committee of Malkapur v. Ballabhdas Mathuradas [1967] Bom. 443 S.C:69 Bom. L.R. 723. It was held that:

a suit for recovery of the tax in excess of the limits prescribed in Section 142A of the Government of India Act, 1935, does not lie in view of the remedies provided by Sections 83, 84 and 85 of the C.P. and Berar Municipalities Act, 1022 and the bar to any other proceedings in Section 85 of the Act.

In taking this view, the division Bench did not follow an earlier decision of the Supreme Court in the case of Bharat Kala Bhandar Ltd. Vs. Municipal Committee, Dhamangaon, , mainly on the ground that the relevant provisions were not brought to the notice of the Court. In B.K. Bhandars case; the Supreme Court had held that the suit did lie. However, as stated above, the division Bench did not follow the said decision on the ground that some of the relevant provisions and the rules were not brought to the notice of the Supreme Court. The matter was carried to the Supreme Court and the decision of the Supreme Court is reported in B.M. Lakhani v. Malkapur Municipality''. While reversing the view taken by the division Bench that a suit for refund of tax paid to the Municipality was not maintainable, the Court observed that the question was concluded by the judgment of the Supreme Court in B.K. Bhandar''s case; and since the Municipality had no authority to levy the tax in excess of the rate permitted by the Constitution, the assessment proceedings levying tax in excess of the permissible limit were invalid, and a suit for refund of tax in excess of the amount permitted by Article 276 was maintainable. The Supreme Court observed, "the decision (in B.K. Bhandar''s case) was binding on the High Court and the High Court could not ignore it because they thought that relevant provisions wore not brought to the notice of the Court." On the argument of the learned Counsel for the prosecution we are faced with the same situation, and it would not be possible for its to disregard or distinguish the decision of the Supreme Court in Pamnani''s case on the ground that some of the relevant provisions and aspects of the matter do not seem to have been considered as intended on behalf of the prosecution.

7. Under the circumstances, the matter is no longer open for discussion. As Rule 22 has been pronounced by the Supreme Court to be mandatory, and as in this case, admittedly lesser quantity was sent to the public analyst, it must be held that the accused are entitled to acquittal on this ground alone. The non-observance of Rule 22 would vitiate the prosecution and the report of the public analyst Would have no

evidentiary value. In view we have taken, it is unnecessary to deal with other submissions made on behalf of the accused.

8. In the result, the revision application is allowed and the order of conviction and sentence passed by the learned Magistrate is quashed and set aside. Fine, if paid, to be refunded. Bail bond cancelled.

9. Rule made absolute.