

THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

CRIMINAL PETITION Nos.14581 & 14711 OF 2016

ORDER:

These two criminal petitions are filed by one and the same petitioners on the same grounds. Therefore, I find it is appropriate to decide both the matters by common order.

These criminal petitions, under Section 482 of the Code of Criminal Procedure, 1973 (for short, 'Cr.P.C.'), are filed to quash the proceedings in C.C. Nos. 38 and 43 of 2016 pending before the I Metropolitan Magistrate (Municipal), Chudi Bazar, Hyderabad, for the offence punishable under Section 3(1) (zz) (iii) (xii), 26(2)(i) of Food Safety & Standards Act, 2006 (for short 'the Act, 2006) read with Regulations 2.3.6 and 2.3.1 of Food Safety & Standards (Contaminants Toxins and Residues) Regulations 2011 (for short 'the regulations') punishable under Section 59 (ii) of the Act, 2006, on various grounds. Before advertng to the grounds raised in the petition, it is apposite to advert to the complaints filed against the petitioners by the second respondent, for the above offences.

On 18.02.2016 at about 11.40 P.M. and 1.00 P.M. the Food Safety Officer along with FSDO, Office Subordinate visited M/s.D.J. Exports Pvt., Ltd., New Fruit Merchant, Gaddiannaram, Kothapet, Hyderabad, where the first petitioner was present and conducting the business, he himself disclosed that he is proprietor of the fruit shop, then the Food Safety Inspector disclosed his identity and the purpose of his visit to

the shop and then called one Nagesh S/o. Maruthi Appa. The Food Safety Officer inspected the fruits, such as Apple, Banana and other stock of Red Globe gape and Fuji China Apple three cartons each, FBO disclosed that Red Globe Grapes and Fuji China Apple fruits, which are kept the same for human consumption, “unsuspicious adulteration”. Then the Food Safety Officer purchased 8 Apples and paid its cost Rs.224/- and also purchased two plastic trays of Red Globe Grapes, paid its value Rs.250/- to the FBO, obtained cash receipt and acknowledge their signatures. The intention of purchasing Fuji China Apples and Red Globe Grapes is to send them to the Food Analyst for analysis. Then the FBO was served notice U/S VA and obtained acknowledgement. Then the purchased Fuji China Apples divided into four parts containing 2 Nos. and Red Globe Grapes divided into 4 parts and placed in a clean and dry empty bottles fitted the caps tightly tied with thread, sealed properly labeled as Nos.SDO/09193/2016 and SDO/09194/2016 and pasted to each sample container around from bottom to top of the sample part, then obtained signatures of FBO and witnesses in such a manner that both covers the paper slip and the ground paper then each sample part which covers the knots, the threads with the specimen impression seal. As the mediator expressed his inability to draft the panchanama, the Food Safety Inspector himself drafted the panchanama in English read over the contents and explained in Telugu and Hindi, after their satisfaction, obtained signature of the first petitioner. One part of the sample along with copy of Memorandum in Form No.VI

bearing the specimen impression seal is used to seal the samples were handed over to the Food Analyst and another copy of memorandum form No.VI sealed cover handed over to the Food Analyst. The remaining parts of samples were handed over to the SDO, Hyderabad, for safe custody under proper acknowledgement.

The Food Analyst opened in his opinion vide F.A. report No.1119/ 2015-16 dated 03.03.2016 the sample of Fuji China Apples contains "**paraffin wax**" as coating and F.A. report 1120/2015-16 dated 03.03.2016 the sample of Red globe grape contains "**Ethophon**" (as pesticidal residue). Thus, there is a violation of regulations 2.3.6 and 2.3.1 of the Regulations. Hence they are unsafe.

A copy of Food Analyst reports sent to the FBO under Rule 2.4.2 (6) of the Act, 2006 to avail opportunity to refer to the referral Food Laboratory, Kolkata, in Form No.VIII, by paying sample fee Rs.1000/- by way of demand draft. The FBO failed to avail the said opportunity. Thereupon, submitted a proposal to the Food Safety Commissioner for sanction of written consent order. The said samples were found to be sub-standard and thereby committed the offence under Section 3(1) (zz) (xii), 26(2)(i) of the Act, 2006 read with Regulations 2.3.6 and 2.3.1 of the Regulations punishable under Section 59(ii) of the Act, 2006, since the Fuji China Apples and Red Globe Grapes are unsafe for human consumption. Hence, launched the prosecution in pursuance of Orders RC No.914/ FASS-3/2016 dated

29.06.2016 and RC No.915/ FASS-3/2016 dated 14.06.2016 and lodged the complaint and the cognizance of the case was taken by the court and registered as C.C. No.38 and 43 of 2016.

Challenging the prosecution, these criminal petitions under Section 482 Cr.P.C. are filed to quash the proceedings on various grounds, which are identical in both the petitions except changing the name of fruit in both the matters. The following grounds are raised before this court.

A) The petitioner is a company consisting of its family members dealing with sale of imported grapes, pomegranates and other fresh fruits from all continents Newzealand, South Africa, Chile, Peru and from other Southern hemisphere and USA, China, Europe are from Northern hemisphere. The petitioner company is very aligned to the food safety work with 100 farmers in Maharashtra run plant protection programs for super markets in Germany in Europe, Taiwan and China in Asia. For imports petitioners company deal with very high quality standards grower pack houses in all regions. All the fruit is inspected at the port on arrival and petitioners company have not had a single rejection of their shipment through FSSAI till date. The petitioner company handles 7500 MT of exports of fresh fruits annually and it is a most reputed family organization in the industry.

B) The Central Government issued a notification dated 28.02.2008 amending the Prevention of Food Adulteration Rules. Amended Rule-42 Sub-Rule zzz (25) as follows:

"Coated with wax (give name of wax):

The Rule 2.3.6 relates to sale of fresh fruits and vegetables. It states that fresh fruits may be coated with bees wax or shellac wax at level not exceeding good manufacturing practices under proper label declarations as provided in 2.4.5 (44) of food Safety & Standards (Packaging & Labeling) Regulations 2011."

Thus coating of wax is not prohibited. Thereby the petitioners did commit no offence, but launched prosecution by the second respondent without any basis. On this ground alone, the proceedings are liable to be quashed.

C) It is further contended that the fresh apples were subjected to analysis at the time of entry on 29.01.2016 and the same were cleared. Clause 2.3.6 does not disclose that any test would be conducted for any other wax. The test should be in relation to the levels of the wax that are contained in the proviso but not with regard to the nature of the wax. The other forms of wax may accidentally come in touch with the fruits in the course of transport and therefore the test cannot be conducted in relation to the nature of wax. The report is silent with regard to the particulars and therefore, the same cannot be relied upon and on the strength of such report the proceedings shall not be continued against the petitioners.

D) The entire proceedings are fabricated and panchanama has been brought into existence for the purpose of this case and the apples which were subjected to testing do not belong to the petitioners. Therefore, the proceedings against them cannot be continued. Finally, it is contended that the petitioners did

commit no offence, since there is no logic of applying insecticides to the fruit at the point of sales neither Parafin Oil based wax nor any other wax, when there are permissible food based waxes under Government notification. The petitioners are importers of the fruits in packed condition and thereby they did apply any coating of wax and not liable for punishment for any of the offence and prayed to quash the proceedings.

During hearing, Sri C.Raghu, learned counsel for the petitioners, would contend that the fruits are not unsafe food as defined under Sections 3(1) (zz) (iii) (xii) and 26(2)(i) of the Act read with Regulations 2.3.6 and 2.3.1 of the Regulations punishable under Section 59(ii) of the Act and that the second respondent failed to comply Section 26 (2) of the Act, so also Section 42(2) and (3) of the Act. There are no allegations in the entire complaint that the petitioners had knowledge about the wax coating apple and ethephon contained in Red Globe Grapes and in the absence of such allegations as required under Section 27(3) of the Act, the petitioners cannot be proceeded for the offence in a criminal court. Finally, it is contended that the third petitioner alone is liable not the petitioners 1 and 2, who are the accused in the complaint.

Whereas the Public Prosecutor for the State of Telangana contended that the petitioners 1 and 2 are the Manager and licensee respectively and petitioner No.3 is a limited company. Petitioners 1 and 2 are looking after the day-to-day affairs of the Company of petitioner No.3. Therefore, all the petitioners are

liable to be prosecuted. The alleged contravention of Sections 26(2) and 42(2) and (3) of the Act are not pleaded in the entire petition. But for the first time it was raised during hearing and in the absence of any ground urged in the petition, based on the argument, the proceedings cannot be quashed. The test applied for finding out the contamination is in accordance with the procedure under the Regulations. Failure to find out what type of wax is used by testing is not a ground, since the regulation No.2.3.6 is specified a test for analysis and such test was conducted by the analyst, no further details need be disclosed in the test report, which is prescribed proforma in the regulations. On this ground the proceedings cannot be quashed. Apart from that the inherent power of this Court under Section 482 Cr.P.C. is limited and when the complaint disclosed a specific allegation on its face value taking in its entirety constitutes *prima facie* offence, the court cannot quash the proceedings and prayed to dismiss the petition.

Considering rival contentions, perusing the material available on record, the following points are arose for consideration,

- 1) Whether the petitioners 1 and 2 are liable to be proceeded in a criminal court for the offence under Section 3(1) (zz) (iii) (xii), 26(2)(i) of Food Safety & Standards Act, 2006 read with Regulations 2.3.6 and 2.3.1 of Food Safety & Standards (Contaminants Toxins and Residues) Regulations 2011 punishable under Section 59(ii) of Food Safety & Standards Act, 2006 as petitioner No.3 is a private company limited.

2) Whether the tests conducted by the Food Analyst are the prescribed tests under the Regulations? If not, whether the proceedings are liable to be quashed in C.C. Nos.38 and 43 of 2016?

3) whether the second respondent complied the requirement under Section 42 (2) of the Act? If not the alleged non compliance is sufficient to quash the entire proceedings in the absence of proof of any prejudice that caused to the petitioners or depriving them to any right, being the dealers, the proceedings are liable to be quashed?

POINT No.1:

The second respondent lodged a complaint before the I Class Metropolitan Magistrate (Municipal), Chudi Bazar, Hyderabad, against these petitioners. Petitioner No.1 is the Manager, who is dealing with day-to-day affairs of the business transactions of the company of petitioner No.3. Petitioner No.2 is a licensee, who is dealing business of petitioner No.3. When the Petitioner No.3/company is the importer dealing with the sale of apples and grapes, which are allegedly unsafe, Officials and Directors of the Company including licensee, who are dealing with business transaction of the Company are vicariously liable as held by the Apex Court in **STANDARD CHARTERED BANK v. STATE OF MAHARASHTRA**¹ wherein the Apex Court discussed about the vicarious liability of the Directors of Company, who arrayed as accused along with whole-time Director and Executive Director, who were authorized signatories of cheque. When there is an assertion in complaint

¹ AIR 2016 SC 1750

that both the Directors were in charge of day to day affairs of company and all of them had with active connivance, mischievously and intentionally issued cheque, the complaint cannot be quashed.

In the present case, there is a specific allegation in the complaint that the petitioners 1 and 2 being the Manager and Licencee, who are transacting business of sale of fruits, which are unsafe for human consumption, are liable for punishment. Therefore, basing on the contention of the petitioners that they are not liable for punishment since there is no vicarious liability, this court cannot quash the proceedings at this stage.

POINT No.2:

One of the contentions raised in ground No.4 in Crl.P.No.14581 of 2016 is that coating of wax is permissible under Food Adulteration Rules as amended by Government notification dated 28.02.2008, but the Food Adulteration Act was already repealed and the present offence committed by the petitioner is under the provisions of Food Safety and Standards Act.

Clause 2.3.6 of the Regulations relates to sale of fresh fruits and vegetables. It states that fresh fruits may be coated with bees wax or shellac wax at level not exceeding good manufacturing practices under proper label declarations as provided in clause 2.4.5 (44) of Food Safety & Standards (Packaging & Labeling) Regulations 2011.

Under Clause 2.3.6 of the Regulations, Parafin wax test is required and the analyst conducted two tests for Parafin wax and synthetic food colour and issued a report in Form No.B. The method applied by the analyst is D.G.H.S., Parafin wax should be negative, but found positive. Similarly in synthetic test, it should be absent, and found absent. Therefore, the analyst opined that coating of apple with parafin wax is violation of clause 2.3.6 of the Regulations and it is unsafe. When the Regulations specified certain standards for sale of fruits for human consumption, finding such Parafin wax, subject to proof of other requirement during trial before the court. But the contention that the test under clause 2.3.6 of the Regulations does not disclose any test for any other wax and that coating with wax specifying the name of wax is permissible under the Food Safety and Standards Rules referred to supra, but Food Adulteration Act and Rules framed thereunder are repealed after this enactment, thereby prohibition of coating of fruits with wax which is unsafe for human consumption is an offence. Therefore, permissibility of coating of wax under Rule 42 sub rule zzz (25) of the amended rules by notification dated 28.02.2008 is of no assistance to the petitioners to contend that they did commit no offence. Therefore, I find that it is not a ground to quash the proceedings in C.C. No.14581 of 2016.

In CrI.P.No.14711 of 2016 the fruits analysed is Red Globe Grapes and the analyst issued a report in Form-B prescribed under clause 2.3.1 of the Regulations. The test to find Ethephon is HPLC method and it should be negative, but the result is

positive. He also conducted test for calcium carbide synthetic food colour, method complied by DGHS and it should be negative and should be absent, the result is in accordance with norms. Thus, Ethephon should be negative as per clause 2.3.1 of regulations and when it is found positive, it is unsafe for human consumption.

The main contention of the counsel for the petitioner is that Ethephon test is not prescribed test for testing grapes and it is for pineapple and drawn the attention of this court to the regulations issued by the Ministry of Health and Family Welfare (Food Safety and Standards Authority of India) New Delhi dated 01.08.2011. Chapter 2 deals with Contaminants, Toxins and Residues, wherein clause 2.1.1 prescribed various tests for various food items are prescribed. Ethephon test in Sl.No.67 of Column 1 is for pineapple, coffee, tomato and mango mentioned in columnNo.3, and permissible limits are mentioned in Column No.4.

The grapes are not included in Sl.No.67. The test conducted by the Food Analyst on grapes is impermissible under notification referred to supra. Therefore, no validity can be attached to such test conducted on Red Globe Grapes and finding that Ethephon is present in the fruits is contrary to the Regulations. On this ground, the conclusion arrived by the analyst that Red Globe Grapes are not fit for human consumption cannot be sustained and thereby the very basis for prosecution i.e., finding grapes as contaminated with Ethephon

is not based on a test prescribed under Regulations. Consequently, the proceedings against the petitioner in C.C. No.43 of 2016, which is subject matter of CrI.P. No.14711 of 2016 shall not be continued as I find existence of no ground to proceed against the petitioners for the offence punishable under Section 3(1)(zz) (iii) (xii), 26(2)(i) of the Act read with Regulation 2.3.1 of the Regulations 2011.

POINT No.3:

The last contention raised by the counsel for the petitioner is that the second respondent failed to comply Sections 26(2) and 42(2) of the Act, section 22(2) of the Act which deals with responsibility of the Food Business Operator. The petitioners are the Food Business Operators and clause (2) of Section 26 of the Act, specifically says that no Food Business Operator shall himself or by any person on his behalf manufacture, store, sell or distribute any article of food—

(i) which is unsafe; or

(ii) which is misbranded or sub-standard or contains extraneous matter; or

(iii) for which a licence is required, except in accordance with the conditions of the licence; or

(iv) which is for the time being prohibited by the Food Authority or the Central Government or the State Government in the interest of public health; or

(v) in contravention of any other provision of this Act or of any rule or regulation made thereunder.

Thus, it is clear, that Section 26 of the Act is only prohibition against the food business operator for sale of such article of food prescribed thereunder in clause (i) to (v) of the Act. Here there is no contravention as contended by the counsel for the petitioner. But on the other hand the petitioner himself contravened by sale of unsafe food i.e. Fuji China Apple whereas Red Globe Grapes were not tested appropriately as per Regulations and thereby the conclusion of the analyst that Grapes are unsafe for human consumption is without any basis of proper test prescribed under Regulations. Thus, the Food Business Operator did commit no offence by sale of Red Globe Grapes, whereas selling Fuji China Apples coated with parafin wax, which is unsafe as per Regulations and it is a specific contravention under Section 26 of the Act.

The other contravention complained is non-compliance of Section 42(2) and (3) of the Act. Section 42 of the Act deals with Procedure for launching prosecution. Clause (2) of Section 42 of the Act says that the Food Analyst after receiving the sample from the Food Safety Officer shall analyse the sample and send the analysis report mentioning method of sampling and analysis within fourteen days to Designated Officer with a copy to Commissioner of Food Safety. Sub-section (3) further says that the Designated Officer after scrutiny of the report of Food Analyst shall decide as to whether the contravention is

punishable with imprisonment or fine only and in the case of contravention punishable with imprisonment, he shall send his recommendations within fourteen days to the Commissioner of Food Safety for sanctioning prosecution.

Here it appears that there is a delay in obtaining sanction from the Commissioner for Prosecution. The report of the analyst was received on 04.03.2016 but sanction was allegedly obtained on 14.06.2016 vide document No.13 filed along with complaint. No details are found regarding addressing letter to the Commissioner, in compliance of Section 42(3) of regulations for sanction of prosecution in compliance of Section 42(3) of the Act, but it was obtained with a delay. On account of such delay no prejudice was caused and he was not deprived of any opportunity to refer the food item to any other laboratory and mere delay in obtaining sanction would not vitiate the proceedings. The word 'prejudice' is not defined anywhere, but this Court in **GANGAIAHNAIDU RAMA KRISHNA AND OTHERS v. STATE OF A.P. REP. BY FOOD INSPECTOR DIVISION II GUNTUR AND OTHERS**² dealing with the prejudice that caused to the petitioner on account of failure to comply the procedure under the Act. At paragraph 10, this court placing reliance on the Judgment of the Apex Court in **STATE OF HARYANA V. UNIQUE FARMAID PRIVATE LIMITED**³ wherein it was held it is expedient to launch prosecution so that the right of the accused is not lost. At paragraph 12, it was held that the

² 2006(2) RCR (CRL.) 183

³ 2000 ACJ 87 (SC)

Prevention of Food Adulteration Act was enacted by the Parliament to prevent the adulteration of food. Food is one of the basic necessities for sustenance of life. Pure, fresh and healthy diet is most essential for the health of the people. It is no wonder to say that the community health is national wealth. Adulteration of food stuffs was so rampant, wide-spread and persistent and as there was need to take a drastic remedy in the form of a legislation, which is the need of the hour, to check this kind of anti-social evil, this Act was enacted. The Act has been enacted to correct and remedy the widespread evil of food adulteration to ensure the sale of wholesome food to the people. It is well settled that wherever possible, without unreasonable stressing and straining in all such statutes should be construed in a manner which would suppress the mischief, advance the remedy, promote its object, prevent its subtle evasion and foil its artful circulations. As per the various judgments of the Apex Court, this court opined that the provisions of the Act are required to be observed in the strict adherence to safeguard the interest of the consumers of the article of food. Stringent laws will have no meaning if the offenders get away on some or the other technicalities.

In the present case, no prejudice is shown on account of delay in launching the prosecution and the vendor cannot plead any defence that he was ignorant of the nature, substance or quality of the food sold by him or that the purchaser having purchased any article for analysis was not prejudiced by the sale. However the said vendor shall not be deemed to have

committed offence for adulteration or mis-branding an article of food if he proves that he purchased the article of food from the licensed manufacturer, distributor or dealer of any other manufacturer, distributor or dealer with a written warranty in the prescribed form and that the article of food while in his possession was properly stored and sold in the same state as he purchased it.

In the present case, no prejudice is shown on account of delay in launching prosecution, thereby non compliance of Section 42(2) of the Act is not a ground to quash the proceedings. On the other hand such ground was not raised in these two petitions and thereby without affording opportunity to the respondents to give reply to the same, the court cannot quash the proceedings on that ground as it is not based on any pleading in the petition.

Learned counsel for the petitioner, while contending that when specific procedure is prescribed, the authorities are bound to follow the procedure prescribed under the provisions and drawn the attention of this court to the Judgment of the Apex Court in **J. JAYALALITHAA AND OTHERS v. STATE OF KARNATAKA AND OTHERS**⁴. At paragraph 34 of the said Judgment, it was held that where statutory requirements to do a certain thing in a certain way, the thing must be done in that way and not contrary to it at all. In other words, where a statute requires to do a certain thing in a certain way, the thing must be

⁴ (2014) 2 SCC 401

done in that way and not contrary to it at all. Other methods or mode of performance are impliedly and necessarily forbidden. The aforesaid settled legal proposition is based on a legal maxim "*Expressio unius est exclusio alterius*", meaning thereby that if a statute provides for a thing to be done in a particular way, then it has to be done in that manner and in no other manner and following any other course is not permissible. Learned counsel for the petitioners placed reliance on the Judgment of Allahabad High Court in **PEPSICO INDIA HOLDINGS (PVT) LTD., v. STATE OF UTTAR PRADESH**⁵ to contend that failure to comply Section 42(2) of the Act is fatal and the proceedings are liable for quashment.

The principle laid down in the above judgment regarding non compliance of provisions of Section 42 of the Act has no application to the present facts since the Judgment of the Allahabad High Court is not binding precedent except having persuasive value. In the facts of the Judgment, a specific plea regarding non-compliance of Section 42(2) of the Act was raised, but here no such plea was raised in the entire petition, however for the first time such contention was raised during argument, in such case it is not open to raise such plea for the first time and basing on such contention proceedings cannot be quashed. Moreover in **CENTRE FOR PUBLIC INTEREST LITIGATION v. UNION OF INDIA**⁶ the Apex Court highlighted chapter III and Section 18 dealing with the general principles of food safety and

⁵ LAWS (ALL)-2010-9-34

⁶ AIR 2014 SC 49

paramount importance of Section 21 and 24 of the Act and human rights under Article 12 of the International Covenant on Economics, Social and Cultural Rights, 1966 with reference to Article 21 of Constitution of India and held that the state has to take steps to improve all aspects of environmental and industrial hygiene, the prevention, treatment and control of epidemic, endemic, occupational and other diseases; the creation of conditions which would assure to a medical service and medical attention in the event of sickness.

Thus, in view of various principles referred above and need to protect the consumer of food, the complaint cannot be quashed purely on technical ground of non-compliance of Section 42(2) of the Act, which would amount to denial of a fundamental right to life guaranteed under Article 21 of the Constitution of India and Article 12 of the International Covenants on Economics, Social and Cultural Rights, 1966 ignoring various provisions of the Act. Therefore, in view of the law declared by the Apex court, based on such technical ground, it is difficult to quash the proceedings against the petitioner in CrI.P.No.14581 of 2016. But the proceedings in C.C. No.14711 of 2016 are liable to be quashed on the ground that the test conducted by the analyst is not prescribed under regulation 2.3.1 of Regulations. Accordingly, the point is decided.

In view of my foregoing discussion, I find no ground to proceed against the petitioners in C.C. No.43 of 2016, whereas I find existence of grounds to proceed against the petitioners in

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C.C. No.38 of 2016 for the offence punishable under Section 3(1) (zz) (iii) (xii), 26(2)(i) of the Act, 2006 pending before the I Metropolitan Magistrate (Municipal) Chudi Bazar, Hyderabad.

In the result, the criminal petition No.14711 of 2016 is allowed quashing the proceedings in C.C. No.43 of 2016 for the offence punishable under Section 3(1) (zz) (iii) (xii), 26(2)(i) of the Food Safety & Standards Act, 2006 pending on the file of before the I Metropolitan Magistrate (Municipal) Chudi Bazar, Hyderabad, while dismissing the CrI.P.No.14581 of 2016.

Miscellaneous petitions, if any, pending in these criminal petitions shall stand closed.

08-02-2017
BV

M. SATYANARAYANA MURTHY, J

