The Khadya Peya Vikarate Malak Sangh

Vs

The Chief Officer, Sangli Municipal Council and Another

Civil Appeal No. 1936 of 1972

(Y.V. Chandrachud, P.K. Goswami, Syed M. Fazal Ali JJ)

19.11.1976

JUDGMENT

FAZAL ALI, J. –

1. This appeal by special leave is directed against the judgment of the High Court of Bombay dated August 2/3, 1971, by which the plaintiff's suit for declaration and injunction has been dismissed.

2. The plaintiff is an association of hoteliers and restaurant keepers doing business within the local limits of Sangli Municipality in the State of Maharashtra. Under the provisions of the Prevention of Food Adulteration Act, 1954 - hereinafter referred to as 'the Act' - and the rules farmed thereunder by the Maharashtra Government the members of the plaintiff association were required to take a licence for the business conducted by them. The municipality insisted that the members of the plaintiff-association should pay two sets of fees - one under item 1 and another under items 3 to 8 of Appendix (1) to the schedule. These fees were demanded by the municipality on the ground that the members were both manufacturers and retail dealers and were, therefore, liable to pay fees in both these capacities. The Appendix (1) to the schedule was a part of the rules framed by the Maharashtra Government under Section 24 of the Act. The plaintiff, however, contended that the members of the plaintiff-association were not liable to pay two fees as they were essentially retail dealers and would have to pay fees under items 3 to 8 of the appendix because they could not be said to be either wholesale dealers or manufacturers. The plaintiff also claimed a declaration that the municipality had no right to charge two fees from the plaintiff and also prayed for an injunction restraining the municipality from doing so. There was a prayer for refund of Rs. 3990 being the excess amount realised by the municipality from the plaintiff. The suit was resisted by the municipality on the ground that under the rules farmed by the Maharashtra Government, the municipality was legally entitled to levy two sets of fees from the plaintiff as indicated above. The suit was dismissed by the trial Court of the Joint Civil Judge, Junior Division, Sangli, who held that the plaintiff was not entitled to the declaration sought for and neither to the refund as the municipality was fully justified in realising the two sets of fees from the plaintiff. Against this decision the plaintiff went up in appeal to the Extra Assistant Judge, Sangli who by his judgment dated August 27, 1970 reversed the judgment of the trial Court and decreed the plaintiff's suit holding that the plaintiff was entitled to the declaration sought for as the municipality was not entitled to realise two sets of fees under Appendix (1) referred to above. The learned Judge also passed a decree for refund of Rs. 3990 in favour of the plaintiff. The Sangli Municipality went up in second appeal to the High Court of Bombay which ultimately succeeded and the High Court, agreeing with the view taken by the trial Court, dismissed the plaintiff's suit. Thereafter the plaintiff obtained special leave from this Court and hence this appeal.

3. As seen above, the facts of this case lie within a very narrow compass and the point involved is a pure question of law which depends upon the interpretation of certain provisions of the Act and the Rules made by the Maharashtra Government. Before, however, analysing the provisions of the Act and the Rules made thereunder it may be necessary to state a few admitted facts. It is not disputed that the appellant is an association of hoteliers and restaurant-keepers who are engaged in preparing eatables and other articles of food and selling the same to their customer. It is also not disputed that by and large, the members of the plaintiff-association prepare the articles in a part of the premises where the hotel or restaurant is situated and after preparing the eatables they sell the same to the customers visiting those places. There was some controversy on the question as to the import and ambit of the word "manufacture", but counsel for the appellant did not dispute seriously, and rightly, that for the purpose of this case the preparation of the articles of food would be included within the ambit of the term "manufacture". In these circumstances, therefore, we need not dilate on this point any further.

4. Mr. V. M. Tarkunde, learned counsel for the appellant, submitted that as the main business of the members of the plaintiff-association was retail sale of the articles prepared by them, they were essentially retail sellers and they could be charged fees only in this capacity. It is thus contended that the case of the appellant would clearly fall within the ambit of items 3 to 8 of Appendix (1). It was vehemently argued that by no stretch of imagination could the association's members be charged fees as manufacturers or wholesale dealers in view of the nature of their trading activity. The plaintiff also placed reliance on a communication by the Director of Health to the Municipal Council expressing his opinion that the municipality was not justified in realising two sets of fees from the plaintiff's members and that they were liable to pay fees only under items 3 to 8 of Appendix (1). This, however, was merely an opinion of an officer and would not carry any weight when we are interpreting the statutory provisions of the Act and the Rules.

5. On the other hand, Mr. D. V. Patel appearing for the respondent municipal council submitted that the trading activity of the appellant's members had two separate capacities - one as manufacturers and another as retail dealers, and therefore, the municipality was entitled to realize fees on both these counts. It was further argued by Mr. Patel that if the municipality was not allowed to realise fees from the appellant's members as manufacturers, the Food Inspector appointed by the municipality would have no jurisdiction to inspect the premises and check the articles manufactured by them for the purpose of sale.

6. We have given our anxious and careful consideration to the arguments of both the parties and we are clearly of the opinion that the argument of learned counsel for the appellant is well founded and must prevail. To begin with, the Rules framed by the Maharashtra Government which were published in the Maharashtra Government Gazette dated April 26, 1962 as amended upto date, define "manufacturer" thus :

> 'manufacturer' means a person engaged in manufacturing any article of food for the purpose of trade;
>
> "Retail dealer" is defined thus :
>
> 'retail dealer' means a dealer in any article of food, other than a wholesale dealer;
>
> "Wholesale dealer" has been defined as the person engaged in the business of sale or storage for sale or distribution of any article of food for the purpose of resale.

Appendix (1) runs thus :

(See Appendix on facing page)##

There cannot be the slightest doubt that the word "manufacturer" as defined in clause (d) of Rule 2 had been used in the widest possible sense so as to include not only manufacture through a laboratory process but also preparation of an article of food. In our opinion, however liberally the word "manufacture" may be construed, it will not include the trading activity of persons, the dominant nature of which is to supply articles of food prepared or produced by them to their customers. In other words, where the bulk of food articles sold by the restaurant-keepers are prepared by them in what may be reasonably called a part of the premises of the restaurant where the articles are sold, the preparation or manufacture of those articles is incidental or ancillary to the retail sale, the dominant purpose of the trading activity being sale of food articles by retail. We, therefore, think that the words "wholesale dealer" or "manufacture" in item 1 of Appendix (1) will not apply to hoteliers and restaurant-keepers whose main business is to conduct retail sale of their articles prepared by them in what may be termed a part of the same premises.

Schedule of Licence Fees chargeable under Section 24(2) of Prevention of Food Adulteration Act, 1954, for licensing certain trades.

Appendix (1) Fees for the grant or renewal of a licence [See Rule 5(3) and (4A)]---------- ---------- S. Category Fresh Renewal of No. Licence Licence 1 2 3 4-- ---------- Rs. Rs. 1. Wholesale dealer or manufacturer or both [other than those covered by Appendix (2)] .. 30 20 2. Hawker or itinerant vendor or both .. 3 1 3. Retail dealer with annual turnover upto Rs. 1000 .. 3 1 4. Retail dealer with annual turnover exceeding Rs. 1000 but not exceeding Rs. 5,000 .. 5 2 5. Retail dealer with annual turnover exceeding Rs. 5000 but not exceeding Rs. 10,000 .. 10 3 6. Retail dealer with annual turnover exceeding Rs. 10,000 but not exceeding Rs. 15,000 .. 15 5 7. Retail dealer with annual turnover exceeding Rs. 15,000 but not exceeding Rs. 25,000 .. 20 10 8. Retail dealer with annual turnover exceeding Rs. 25,000 .. 25 15 ----------##

7. It was, however, argued by Mr. Patel that if this view is taken, it would debar the Food Inspector from inspecting the premises where the articles of food are prepared and checking the same inasmuch as under the conditions of the licence, the Food Inspector has to maintain certain standards and norms and comply with certain conditions in the process of preparation of the articles. We are, however, unable to find any provision in the Act which in any way prevents the Food Inspector from making his routine inspection and check of persons whether licensed or not. This will be clear from an analysis of the various provisions of the Act which we shall show presently. It seems to us that the Food Inspector being a creature of the parent statute, namely, the Prevention of Food Adulteration Act, 1954 being referred to as 'the Act' has got an independent statutory status, whose duties and functions are defined by the Act itself. The powers of the Food Inspector are derived from and flow from the statute itself. It is a different matter that under the Rules framed by the Government of a State the Food Inspector may be entrusted with certain additional duties but that does not take away the statutory powers possessed by the Food Inspector. To begin with, Section 2(xi) of the Act defines "premises" thus :

> 'Premises include any shop, stall, or place where any article of food is sold or manufactured or stored for sale;.

A perusal of this definition would manifestly reveal that "premises" include any place where any article of food is sold or manufactured or stored irrespective of the question whether the manufacturer of the seller is licensed or not. The word "premises" does not certain any limitation so as to confine it only to those premises which are licensed. Section 7 of the Act contains an express prohibition preventing any person from manufacture or sale of any adulterated article of food. The relevant provision of Section 7 runs thus :

No person shall himself or by any person on his behalf manufacture for sale, or store, sell or distribute -

(i) any adulterated food;

(ii) any misbranded food;

(iii) any article of food for the sale of which a licence is prescribed, except in accordance with the conditions of the licence;

(iv) any article of food the sale of which is for the time being prohibited by the Food (Health) Authority in the interest of public health;

(v) any article of food in contravention of any other provision of this Act or of any rule made thereunder; or

(vi) any adulterant.

This provision also does not contain any restriction or limitation and takes within its fold any person whether licensed or not who manufactures, stores or sells any adulterated food. Clause (iii) of Section 7 no doubt makes sale of any article of food without a licence an offence but clause (i) is independent of clause (iii). Clause (iv) of Section 7 authorises the Food (Health) Authority to prohibit the sale of any article of food in the interest of public health. Section 9 of the Act is the provision for appointment of Food Inspectors and may be extracted thus :

9. Food Inspectors. - (1) The Central Government or the State Government may, by notification in the Official Gazette, appoint such persons as it thinks fit, having the prescribed qualifications to be Food Inspectors for such local areas as may be assigned to them by Central Government or the State Government, as the case may be :

Provided that no person who has any financial interest in the manufacture, import or sale of any article of food shall be appointed to be a food inspector under this section.

(2) Every Food Inspector shall be deemed to be a public servant within the meaning of Section 21 of the Indian Penal Code and shall be officially subordinate to such authority as the Government appointing him may specify in this behalf.

Section 10 of the Act contains the powers, duties and functions of the Food Inspectors. The relevant portion of this statutory provision may be extracted thus :

10. Powers of Food Inspectors. - (1) A food inspector shall have power -

(a) to take samples of any article of food from -

(i) any person selling such article;

(ii) any person who is in the course of conveying, delivering or preparing to deliver such article to a purchaser or consignee;

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(2) Any food inspector may enter and inspect any place where any article of food is manufactured, or stored for sale, or stored for the manufacture of any other article of food for sale, or exposed or exhibited for sale or where any adulterant is manufactured or kept, and take samples of such article of food or adulterant for analysis :

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(4) If any article intended for food appears to any food inspector to be adulterated or misbranded, he may seize and carry away of keep in the safe custody of the vendor such article in order that it may be dealt with as hereinafter provided and he shall, in either case, take a sample of such article and submit the same for analysis to public analyst :

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It would be seen that sub-sections (2) and (4) of Section 10 clearly empower the Food Inspector without any restriction or limitation to enter and inspect any place where any article of food is manufactured, or stored for sale, or exposed or exhibited for sale and inspect the article for the purpose of finding out whether or not the article is adulterated. Sub-section (4) of Section 10 empowers the Food Inspector even to seize any adulterated or misbranded article and carry away the same and keen it in safe custody. It is, therefore, clear whether an activity is licensed or not, the place where the activity is carried on is always subject to inspection by the Food Inspector under the provisions of Section 10. Section 16(1) clauses (c) and (d) particularly provide for penalties and punishment for any person who prevents a Food Inspector either from taking a sample or from exercising any power conferred on him by the Act. Thus it is plain that the question of a trader obtaining a licence or not has absolutely nothing to do with the statutory duties which a Food Inspector has to perform and any person whether he is licensed or not would be liable to penalties under the Act if he tries to prevent or interfere in the due discharge of the duties by the Food Inspector. Section 23 of the Act is the provision which empowers the Central Government to make rules in order to carry out the provisions of the Act. Clause (c) of Section 16(1) provides for laying down special provisions for imposing rigorous control over the production, distribution and sale of any article and clause (g) authorises the Central Government to define the conditions of sale or conditions for licence of sale of any article of food in the interest of public health. Section 24 of the Act is the provision which empowers the State Government to make rules for the purpose of giving effect to the provisions of the Act. Clause (a) of sub-section (2) of Section 24 empowers the State Government to define the powers and duties of the Food Health Authority. The section also contains provisions for levy of a fee. It is under this provision that the Maharashtra Rules were made by the Government. The Central Rules, namely, the Prevention of Food Adulteration Rules, 1955, framed under Section 23 of the Act also contain provisions defining the duties of a Food Inspector. The

relevant part of Rule 9 of the Central Rules may be extracted thus :

> 9. Duties of Food Inspector. - It shall be the duty of the food inspector -
>
> (a) to inspect as frequently as may be prescribed by the Food (Health) Authority or the local authority all establishments licensed for the manufacture, storage or sale of an article of food within the area assigned to him;
>
> # * * * *##
>
> (f) to make such enquiries and inspections as may be necessary to detect the manufacture, storage of sale of articles of food in contravention of the Act or rules framed thereunder :
>
> # * * * *##
>
> (h) when so authorised by the health officer, having jurisdiction in the local area concerned or the Food (Health) Authority, to detain imported packages which he has reason to suspect contain food, the import or sale of which is prohibited;
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> # * * * *##

Thus it is clear that apart from the wide powers given to the Food Inspector by the statute itself, even the Central Rules framed by the Central Government confer additional powers on the Food Inspector. The Maharashtra Rules referred to above do not contain any provision which in any way runs counter to either the Central Rules framed by the Central Government or the provisions of the Act. The rules merely contain certain additional provisions regarding the conditions of licence and certain other additional duties to be performed by the Food Inspectors.

8. Thus an analysis of these provisions would plainly reveal that the Food Inspector does not derive his powers from the Rules regulating licence of a trader, but the fountain of his authority flows from the statutory provisions itself. There is no provision in the Rules which in any way prevents or interferes with the discharge of the duties of a Food Inspector. The power to inspect and check is a plenary power which has been conferred on the Food Inspector by the statute itself and no rule made by the Government can ever interfere with this power. In these circumstances, it is difficult to accede to the contention of Mr. Patel that unless the members of the plaintiff-association are licensed as manufacturers also, it will not be possible for the Food Inspector to inspect and check the premises where the articles are prepared. The Act is a social piece of legislation meant to control and curb adulteration of articles of food and being in the interest of public health it has to be liberally construed and no limitations can be inferred on the powers of the Food Inspector whose primary duty is to see that the adulterated articles are neither manufactured, nor stored, nor sold. For these reasons, therefore, the main contention of Mr. Patel on this score is overruled.

9. The contention of counsel for the respondent regarding powers of the Food Inspector may be tested from another angle of vision on the touchstone of practical reality. Suppose a particular State Government does not choose to frame any Rules at all under the provisions of the parent Act (the Prevention of Food Adulteration Act), can it be argued with any show of force that in such cases the Food Inspector would become absolutely powerless and wholly ineffective ? The answer must be in the negative, because it is manifest that the duties and functions of the Food Inspector spring from the parent statute and are not in any way corelated to the additional duties provided for in the Rules

which may be framed by the State Government. Thus even from this point of view, the argument put forward by the respondent fails.

10. Coming now to the Appendix (1) itself, it would appear that item 1 and items 3 to 8 postulate two different contingencies. Item 1 takes within its fold wholesale dealer or manufacturer or both. There is no mention of a retail dealer in this items. Thus before a trader falls within the purview of item 1 of Appendix (1), it must be shown that he is either a wholesale dealer or a manufacturer or both. We have already pointed out that where the dominant nature of the trading activity of a person is neither that of a manufacture nor as a wholesale dealer, but he is engaged in retail sale, item 1 would have no application. The mere fact that the trader prepares the articles for the purpose of selling the same to his customers would not make him either a wholesale dealer or a manufacturer. In the first place, the appellant's members cannot be wholesale dealers because there is nothing to show that they deal in articles for the purpose of resale. On the other hand, the nature of their trading activity is one of retail sale. In these circumstances the case of the appellant clearly falls within items 3 to 8 of Appendix (1). The High Court, was, therefore, in error in taking the view that the case of the appellant was covered both by item 1 as also items 3 to 8 of Appendix (1) and was, therefore, not justified in reversing the judgment of the Extra Assistant Judge.

11. On a consideration, therefore, of the facts and circumstances of the case, we are clearly of the opinion that in the instant case the members of plaintiff-association who are mostly restaurant-keepers conducting the business of retail sale, the preparation of the articles being merely an ancillary activity, are liable to pay the licence fee under items 3 to 8 of Appendix (1) and not under item 1 of the Appendix (1) to the schedule. The plaintiff is, therefore, entitled to the declaration sought for and is also entitled to the refund of Rs. 3990.

12. We, therefore, allow this appeal, set aside the judgment of the High Court, decree the plaintiff's suit and restore the judgment and decree of the Extra Assistant Judge. In the peculiar circumstances of this case, there will be no order as to costs.

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