

Tulsiram

Vs

State of Madhya Pradesh

Special Leave Petition (Criminal) No. 3038 of 1983

(O. Chinnappa Reddy, V. Khalid JJ)

11.10.1984

ORDER

O. CHINNAPPA REDDY, J. -

1. On August 17, 1979 the Food Inspector, Sorar, purchased 375 grams of soyabean oil from the shop of the petitioner, Tulsiram. The soyabean oil purchased was divided into three parts; each part was filled in a bottle; each bottle was sealed; and, one of the bottles was sent to the Public Analyst, Raipur for analysis. The Public Analyst found that the sample was adulterated as it contained traces of cotton seed oil. On November 29, 1979 a complaint was filed on the basis of the report of the Public Analyst, in the court of the Judicial First Class Magistrate, Balod. On December 17, 1979, a copy of the report of the Public Analyst was forwarded to the petitioner as required by Rule 9-A of Prevention of Food Adulteration Rules. The accused-petitioner however made no application to the Trial Court to have one of the samples sent to the Central Food Laboratory for further analysis. He was content merely to deny offence. After due trial he was convicted by the Magistrate on September 8, 1982, under Section 16(1)(a)(i) of the Prevention of Food Adulteration Act and sentenced to suffer rigorous imprisonment for six months and to pay a fine of Rs. 1000. The appeal preferred by the petitioner to the Sessions Judge, Durg and the revision petition preferred thereafter to the High Court of Madhya Pradesh were rejected. The petitioner now seeks special leave to appeal to this Court under Article 136 of the Constitution.

2. The learned counsel for the petitioner urged before us that Rule 9-A of the Prevention of Food Adulteration Rules, which has been substituted for Rule 9(i) in 1977, now prescribes that the Local (Health) Authority shall immediately after the institution of the prosecution forward a copy of the report to the Public Analyst by registered post or by hand to the person from whom the sample was taken by the Food Inspector, that the word 'immediately' occurring in Rule 9-A showed that it brooked no delay and that as there was a delay of 18 days, in the present case, in forwarding the report to the petitioner, the prosecution was vitiated and the petitioner was entitled to be acquitted. He argued that the scheme of the Act was changed by the amendments introduced in 1976 and that in consonance with the revised scheme of the Act, the rules were also amended. He invited our attention to the departure in the language of the present Rule 9-A from the language of old Rule 9(i). The learned counsel also argued that cotton seed oil was more nutritive and consumable than soyabean oil and, therefore, a person mixing cotton seed oil with soyabean oil could not be said to have adulterated soyabean oil. He invited our attention to *Dalchand v. Municipal Corporation, Bhopal* (AIR 1983 SC 303 : (1984) 2 SCC 486 : 1984 SCC (Cri) 311 : 1983 Cri LJ 448); *Kashmiri Lal v. State of Haryana* ((1981) 2 FAC 167 (P&H)); *Kanda Swami v. Food Inspector* ((1982) 1 FAC 322); *State of Maharashtra v. Tukaram Babu Rao Mane* ((1982) 1 FAC 398); *Perumal v. Kumbakonam Municipality* ((1982) 2 FAC 106) and *Food Inspector v. Prabhakaran* ((1983) 1 FAC

84). We have considered all of them and we do not think it necessary to launch into a discussion of the cases, one by one. We would rather refer to and construe the relevant statutory provisions and rules ourselves. Suffice to say here that we do not agree with the submissions of the learned counsel.

3. It is true, in 1976 important changes were made in some of the procedural provisions of the Prevention of Food Adulteration Act. We are concerned in this case with some of the change made in Sections 11 and 13 of the Act and the new Rules made as a consequence. Before the 1976 amendment, Section 11 required the Food Inspector taking a sample for analysis to separate the sample into three parts, seal or fasten up each part and to deliver one of the parts to the person from whom the sample was taken, send another part for analysis to the Public Analyst and retain the third part for production in case legal proceedings were taken or for analysis by the Director of the Central Food Laboratory under sub-section (2) of Section 13 as the case might be. Sub-section (1) of old Section 13 (as it stood before 1976) required the Public Analyst to deliver to the Food Inspector a report of the analysis of any article of food submitted to him for such analysis. Sub-section (2) enabled the accused vendor, after the institution of the prosecution under the Act, to apply to the Court to send the part given to him or the part retained with the Food Inspector for Production in case of legal proceedings, to the Director of the Central Food Laboratory for a certificate specifying the result of the analysis to be made by him. The certificate issued by the Director of the Central Food laboratory was to supersede the report given by the Public Analyst and was to be final and conclusive evidence of the facts stated therein. Rule 9(j) of the 1955 Rules prescribed that it shall be the duty of the Food Inspector to send by registered post, a copy of the Public Analyst to the person from whom the sample was taken within ten days of the receipt of the said report.

4. It is obvious that Section 13(2) was intended to secure to the accused vendor the right to have the report of the Public Analyst tested if he so wanted, by obtaining the final and conclusive report of the Director of the Central Food Laboratory. In order to enable the accused vendor to exercise this right it was necessary to first make available to him the report of the Public Analyst. so Rule 9(j) provided that a copy of the report of the Public Analyst should be sent to the person from whom the sample was taken within ten days of the receipt of the report by the Food Inspector. The mention of ten days as the period within which the Food Inspector was to send the report of the Public Analyst to the person from whom the sample was taken led to considerable controversy whether Rule 9(j) was mandatory or directory. Some High Courts took the view that Rule 9(j) was mandatory and that failure to strictly comply with the rule was fatal to be prosecution. The matter was finally set at rest by this Court in *Dalchand v. Municipal Corporation, Bhopal* (AIR 1983 SC 303 : (1984) 2 SCC 486 : 1984 SCC (Cri) 311 : 1983 Cri LJ 448) where it was held that Rule 9(j) was directory. It was observed : [SCC para 1 pp. 486-87: SCC (Cri) pp. 311-12]

There are no ready tests or invariable formulate to determine whether a provision is mandatory or directory. The broad purpose of the Statute is important. The object of the particular provision must be considered. The link between the two is most important. The weighing of the consequence of holding a provision to be mandatory or directory is vital and, more often than not, determinative of the very question whether the provision is mandatory or directory. Where the design of the statute is the avoidance or prevention of public mischief, but the enforcement of a particular provision literally to its letter will tend to defeat that design, the provision must be held to be directory, so that proof of prejudice in addition to non-compliance of the provisions is necessary to invalidate the act complained of. It is well to remember that quite often many rules, though couched in language which appears to be imperative, are no more than mere instructions to those entrusted with the task of discharging statutory duties for public benefit. The negligence of those to whom public duties are

entrusted cannot by statutory interpretation be allowed to promote public mischief and cause public inconvenience and defeat the main object of the statute. It is as well to realise that every prescription of a period within which an act must be done, is not the prescription of a period of limitation with painful consequences if the act is not done within that period. Rule 9(j) of the Prevention of Food Adulteration Act, as it then stood, merely instructed the Food Inspector to send by registered post copy of the Public Analyst's report to the person from whom the sample was taken within 10 days of the receipt of the report. Quite obviously the period of 10 days was not a period of limitation within which an action was to be initiated or on the expiry of which a vested right accrued. The period of 10 days was prescribed with a view to expedition and with the object of giving sufficient time to the person from whom the sample was taken to make such arrangements as he might like to challenge the report of the Public Analyst, for example, by making a request to the Magistrate to send the other sample to the Director of the Central Food Laboratory for analysis. Where the effect of noncompliance with the rule was such as to wholly deprive the right of the person to challenge the Public Analyst's report by obtaining the report of the Director of the Central Food Laboratory, there might be just cause for complaint, as prejudice would then be writ large. where no prejudice was caused there could be no cause for complaint. I am clearly of the view that Rule 9(j) of the Prevention of food Adulteration Rules was directory and not mandatory.

5. As already mentioned by us, some High Courts has earlier taken the view that the Rule was mandatory and that non-compliance with the Rule was fatal to the prosecution. The working of the Act also revealed that often enough the accused vendor would adopt dilatory tactics by waiting till the last minute to exercise his right to apply to the court to send the sample to the Director of Central Food Laboratory. This statutory right could not be denied to the accused vendor even when made at the very last stages of the case. The result was not merely undue and unnecessary delay in the disposal of the case but fairly frequently, it would be discovered that the sample had disintegrated due to lapse of time, thus disabling the Director, Central Food Laboratory from analysing the sample. With a view to overcome the difficulties encountered in the working of the Act, Sections 11 and 13 were recast by the Amending Act of 1976 and new rules were made in 1977, new Rule 9-A replacing old Rule 9(j) Sub-section (1) of amended Section 11 and the whole of amended Section 13 may be usefully extracted here. Section 11 sub-section (1) is as follows :

When a food inspector takes a sample of food for analysis, he shall -

(a) give notice in writing then and there of his intention to have it so analysed to the person from whom he has taken the sample and to the person, if any, whose name, address and other particulars have been disclosed under Section 14-A.

(b) except in special cases provided by rules under him Act, divide the sample then and there into three parts and mark and seal or fasten up each part in such a manner as its nature permits and take the signature or thumb-impression of the person from whom the sample has been taken in such place and in such manner as may be prescribed :

Provided that where such person refuses to sign or put his thumb-impression the food inspector shall call upon one or more witnesses and take his or their signatures or thumb-impressions, as the case may be, in lieu of the signature or thumb-impression of such person;

(c) (i) send one of the parts for analysis to the public analyst under intimation to the

Local (Health) Authority; and

(ii) send the remaining two parts to the Local (Health) Authority for the purposes of sub-section (2) of this section and sub-section (2-A) and (2-E) of Section 13.

6. Section 13 is as follows :

(1) The public analyst shall deliver, in such form as may be prescribed, a report to the Local (Health) Authority of the result of the analysis of any article of food submitted to him for analysis.

(2) On receipt of the report of the result of the analysis under sub-section (1) to the effect that the article of food is adulterated, the Local (Health) Authority shall, after the institution of prosecution against the person from whom the sample of the article of food was taken and the person, if any, whose name, address and other particulars have been disclosed under Section 14-A, forward, in such manner as may be prescribed, a copy of the report of the result of the analysis to such person or persons, as the case may be, informing such person or persons that if it is so desired, either or both of them may make an application to the court within a period of ten days from the date of receipt of the copy of the report to get the sample of the article of food kept by the Local (Health) Authority analysed by the Central Food Laboratory.

(2-A) When an application is made to the court under sub-section (2), the court shall require the Local (Health) Authority to forward the part or parts of the sample kept by the said Authority and upon such requisition being made, the said Authority shall forward the part or parts of the sample to the court within a period of five days from the date of receipt of such requisition.

(2-B) On receipt of the part or parts of the sample from the Local (Health) Authority under sub-section (2-A), the court shall first ascertain that the mark and seal or fastening as provided in clause (b) of sub-section (1) of Section 11 are intact and the signature or thumb-impression, as the case may be, is not tampered with, and despatch the part or, as the case may be, one of the parts of the sample under its own seal to the Director of the Central Food Laboratory who shall thereupon send a certificate to the court in the prescribed form within one month from the date of receipt of the part of the sample specifying the result of the analysis.

(2-C) Where two parts of the sample have been sent to the court and only one part of the sample has been sent by the court to the Director of the Central Food Laboratory under subsection (2-B), the court shall, as soon as practicable, return the remaining part to the Local (Health) Authority and that Authority shall destroy that part after the certificate from the Director of the Central Food Laboratory has been received by the court :

Provided that where the part of the sample sent by the court to the Director of the Central Food Laboratory is lost or damaged, the court shall require the Local (Health) Authority to forward the part of the sample, if any, retained by it to the court and on receipt thereof, the court shall proceed in the manner provided in sub-section (2-B).

(2-D) Until the receipt of the certificate of the result of the analysis from the Director of the Central Food Laboratory, the court shall not continue with the proceedings pending before it in relation to the prosecution.

(2-E) If, after considering the report, if any, of the Food Inspector or otherwise, the Local (Health) Authority is of the opinion that the report delivered by the public analyst under subsection (1) is erroneous, the said Authority shall forward one of the parts of the sample kept by it to any other public analyst for analysis and if the report of the result of the analysis of that part of the sample by that other public analyst is to the effect that the article of food is adulterated, the provisions of subsection (2) to (2-D) shall, so far as may be, apply.

(3) The certificate issued by the Director of the Central Food Laboratory under Sub-section (2-B) shall supersede the report given by the public analyst under sub-section (1).

(4) Where a certificate obtained from the Director of the Central Food Laboratory under sub-section (2-B) is produced in any proceeding under this Act, or under Section 272 to 276 of the Indian Penal Code (45 of 1860), it shall not be necessary in such proceeding to produce any part of the sample of food taken for analysis.

(5) Any document purporting to be a report signed by a public analyst, unless it has been superseded under sub-section (3), or any document purporting to be a certificate signed by the Director of the Central Food Laboratory, may be used as evidence of the facts stated therein in any proceeding under this Act or under Sections 272 to 276 of the Indian Penal Code (45 of 1860) :

Provided that any document purporting to be a certificate signed by the Director of the Central Food Laboratory [not being a certificate with respect to the analysis of the part of the sample of any article of food referred to in the proviso to subsection (1-A) of Section 16] shall be final and conclusive evidence of the facts stated therein.

Explanation. - In this section, and in clause (f) of subsection (1) of Section 16, "Director of the Central Food Laboratory" shall include the officer for the time being in charge of any Food Laboratory (by whatever designation he is known) recognised by the Central Government for the purposes of this section.

7. It will be noticed that amended Section 11 does not require a part of the sample to be given to the person from whom the sample was taken. While one part is required to be sent to the Public Analyst for analysis, the other two parts are required to be sent to the Local (Health) Authority. The amended Section 13 requires the Public Analyst to deliver to the Local (Health) Authority a report of the result of his analysis. section 13(2) requires the Local (Health) Authority to forward to the person from whom the sample was taken a copy of the report of the Public Analyst, if the report is to the effect that the article of food is adulterated. The report is to be forwarded in such manner as may be prescribed, after the institution of the prosecution. Thereafter the person from whom the sample was taken is given the right to apply to the court within ten days of the receipt by him of the copy of the Public Analyst's report to get the sample kept by the Local (Health) Authority analysed by the Central Food Laboratory. It is no longer open to the accused-vendor to wait till the very last minute to apply to the court to have the sample analysed by the Central Food Laboratory. If he

wants to exercise the statutory right of having the sample analysed by the Central Food Laboratory he has to exercise that right by applying to the court within ten days of receipt by him of the Public Analyst's report. It is also to be noticed that amended Section 13(2) does not prescribe any point of time before which the report of the Public Analyst is to be forwarded to the accused-vendor. But, the very basis of a prosecution for adulteration of food is the report of the Public Analyst that the article of food is adulterated. The accused is given the right to dispute the Public Analyst's report by applying to the court for an analysis by the Central Food Laboratory. If the report of the Central Food Laboratory is to the effect that the article of food is not adulterated the very basis of the prosecution will disappear. In such an event the further pursuit of the prosecution will be needless and the accused will have to be discharged or acquitted as the case may be. It is therefore to be assumed that the report of the Public Analyst is to be made available to the accused-vendor at the commencement of the prosecution, that is to say, before the prosecution starts leading evidence in the case, and in good and sufficient time to enable the accused to exercise his right of having the sample analysed by the Central Food Laboratory if he so desires it. We have seen that Section 13(2) provides that the Public Analyst's report, shall be forwarded to the person from whom the sample was taken 'in such manner as may be prescribed'. Now, Rule 9-A of the Rules as amended in 1977 which replaces Rule 9(j) of the old Rules prescribes the manner in which the Public Analyst's report may be forwarded to the person from whom the sample was taken. It reads as follows :

The Local (Health) Authority shall immediately after the institution of prosecution forward a copy of the report of the result of analysis in Form III delivered to him under sub-rule (3) or Rule 7, by registered post or by hand, as may be appropriate, to the person from whom the sample of the article was taken by the Food Inspector, and simultaneously also to the person, if any, whose name, address and other particulars have been disclosed under Section 14-A of the Act :

Provided that where the sample conforms to the provisions of the Act or the Rules made thereunder, and no prosecution is intended under sub-section (2), or no action is intended under sub-section (2-E) of Section 13 of the Act, the Local (Health) Authority shall intimate the result to the vendor from whom the sample has been taken and also to the person, whose name, address and other particulars have been disclosed under Section 14-A of the Act, within 10 days from the receipt of the report from the Public Analyst.

The first thing to be noticed is that Rule 9-A carefully refrains from mentioning any definite limit of time such as that found in old Rule 9(j) which gave rise to the controversy whether the rule was mandatory or directory, and instead uses the general expression 'immediately'. The Local (Health) Authority is now required to forward to the person from whom the sample was taken in the manner prescribed, a copy of the report of the Public Analyst immediately after the institution of the prosecution. While prescribing the manner in which the report may be forwarded the opening words of Rule 9-A "The Local (Health) Authority shall (immediately) after the institution of prosecution forward" (bracket supplied), are borrowed verbatim from Section 13(2) with the word 'immediately' inserted in between. The rule-making authority could never have intended to amend the statute by superadding the word 'immediately' as indeed it was not competent to do. Rule 9-A has to be interpreted so as to keep it in tune with and within the bounds of Section 13(2). The departure from the previous rule by refraining from mentioning a definite period of time as was done in the old rule makes it evident that the expression 'immediately' is used to convey a sense of continuity rather than a sense of urgency. It is not to be understood to mean the very next instant, the very next hour, that very day or the very next day. It must be construed in its setting. It is no use turning to dictionaries.

Dictionaries give variegated meanings to words. What meaning is to be adopted depends on the context. Rule 9-A is made in the context of the amended Section 13(2) which provides for the forwarding of the Public Analyst's report to the person from whom the sample was taken after the institution of prosecution and enables that person to apply to the court to have analysed by the Central Food Laboratory the sample kept with the Local (Health) Authority. In the context the expression 'immediately' is only meant to convey 'reasonable dispatch and promptitude' and no more. The idea is to avoid dilatoriness on the part of officialdom and prevention of unnecessary harassment to the accused. But the idea is not to penalise the prosecution and to provide a technical defence. First to construe 'immediately' as meaning 'at once' or 'forthwith' and next to hold delay to be fatal to the prosecution would perhaps be to make Rule 9-A ultra vires Section 13(2). We do not think it is permissible to interpret Rule 9-A in such a way. The real question is, was the Public Analyst's report sent to the accused sufficiently early to enable him to properly defend himself by giving him an opportunity at the outset to apply to the court to send one of the samples to the Central Food Laboratory for analysis. If after receiving the Public Analyst's report he never sought to apply to the court to have the sample sent to the Central Food Laboratory, as in the present case, he may not be heard to complain of the delay in the receipt of the report by him, unless, of course, he is able to establish some other prejudice. Our conclusions on this question are : The expression 'immediately' in Rule 9-A is intended to convey a sense of continuity rather than urgency. What must be done is to forward the report at the earliest opportunity, so as to facilitate the exercise of the statutory right under Section 13(2) in good and sufficient time before the prosecution commences leading evidence. Non-compliance with Rule 9-A is not fatal. It is a question of prejudice. Applying these principles, we find no merit in the submissions based on Rule 9-A.

8. The second submission of the learned counsel, namely, that mixing cotton seed oil with soyabean oil cannot be considered to be adulteration of soyabean oil and therefore the petitioner was not liable to be convicted under Section 16(1)(a)(i) is equally without any merit. Section 16(1)(a)(i) makes a person liable to punishment if whether by himself or by any other person on his behalf, he imports into India or manufactures for sale, or stores, sells or distributes any article of food which is adulterated with the meaning of sub-clause (m) of clause (ia) of Section 2 or misbranded within the meaning of clause (ix) of that section or the sale of which is prohibited under any provision of this Act or any rule made thereunder or by an order of the Food (Health) Authority. It is therefore seen that the sale of an article of food the sale of which is prohibited by any rule made under the Act also renders the person selling the article of food liable to punishment under Section 16(1)(a)(i). Rule 44(e) prohibits the sale of a mixture of two or more edible oils as an edible oil. A mixture of soyabean oil and cotton seed oil cannot therefore, be sold as soyabean oil irrespective of whether the mixture has affected the soyabean oil injuriously or not. The special leave petition is therefore dismissed.

</html