

IN THE HIGH COURT OF MADHYA PRADESH

AT INDORE

BEFORE

HON'BLE SHRI JUSTICE VIVEK RUSIA

ON THE 20th OF OCTOBER, 2023

MISC. CRIMINAL CASE No. 36435 of 2019

BETWEEN:-

HINDUSTAN COCA COLA BEVERAGES PVT. LTD.

RAJKUMAR TINKER

.....PETITIONERS

(BY SHRI SATISH CHANDRA BAGADIYA – LEARNED SENIOR COUNSEL ALONG WITH SHRI RAMESH KUMAR SABOO – ADVOCATE AND SHRI ROHIT SABOO – ADVOCATE.)

AND

THE STATE OF MADHYA PRADESH, THROUGH SMT. NIRMALA SOMKUWAR, FOOD SAFETY OFFICER, FOOD & DRUGS ADMINISTRATION, DISTRICT DEWAS (MADHYA PRADESH)

.....RESPONDENT

(BY SHRI KUSHAL GOYAL – ADVOCATE.)

Heard & reserved on 09.10.2023
Order passed on 20.10.2023

This petition coming on for orders this day, the court passed the following:

ORDER

Petitioners have filed the present petition under Section 482 of Code of Criminal Procedure, 1973 (herein after referred to as the Code) seeking quashment of order dated 20.08.2014 (Annexure P/5) passed by the Learned Judicial Magistrate First Class, Tonk Khurd, District Dewas (M.P.) in a Criminal (Complaint) Case No.569 of 2014 (Food Safety Officer v. Dulhe Singh S/o Ram Singh Choudhary & eight others).

2. In short, facts of the case are, as under: -

2.1 On 24.03.2013, Food Safety Officer, Food & Drugs Administration, Dewas, District Dewas (M.P.) took sample of “Mazza Mango Drink” from Shree Vaishnavi Restaurant, Free Ganj Square, Ward No.2, Tonk Khurd, District Dewas (M.P.) on suspicion of its adulteration; and for its analysis. The Officer issued Form No.V-A dated 24.03.2013 (Annexure P/1) to Accused No.1 – Proprietor of Shree Vaishnavi Restaurant. A sample was sent to Food Analyst, State Food Testing Laboratory, Bhopal for analysis on 25.03.2013; and after due examination, the Food Analyst vide its Report No.FTL/CM/R-1178/1178 dated 08.04.2013 (Annexure P/2) opined that the said sample is unsafe for consumption due to fungus growth formation on neck and mouth of bottle and also on product’s surface.

2.2 The Deputy Director & Designated Officer, Food & Drugs Administration, Dewas, after recording its *prima facie* satisfaction, found of violation of Sections 51, 52, 58 and 59 of Food Safety & Standard Act, 2006 (herein after referred to as the Act) and in exercise of powers conferred under Section 36 (3) (e) of the Act granted approval vide sanction order dated 22.03.2014 (Annexure P/3) for filing a

complaint before the Judicial Magistrate First Class, Tonk Khurd, District Dewas, by authorizing Smt. Nirmala Somkunwar, Food Safety Officer, Food & Drugs Administration, Dewas. It is a joint complaint in respect of various products i.e. Tea, Sub-standard Mirinda Orange Flavored Sweetened Carbonated Beverages and Mazza Mango Drink against all the accused persons.

2.3 After the aforesaid authorization, on 22.03.2014 the Food Safety Officer has filed a joint complaint against eight accused persons including the present petitioners (Annexure P/4).

2.4 Vide order dated 20.08.2014 (Annexure P/5) Judicial Magistrate First Class, Tonk Khurd, District Dewas (M.P.) directed for issuance of summons against absconding accused persons in this case. Thereafter, summons were served to the petitioners. The petitioner No.2 filed an application dated 19.08.2019 (Annexure P/6) under Section 70 (2) of the Code before the learned Magistrate for recalling of non-bailable warrants issued against them; and vide order dated 19.08.2019 (Annexure P/7), the said application was allowed by Judicial Magistrate First Class, Tonk Khurd, District Dewas (M.P.) and the arrest warrants issued against the petitioners were recalled.

2.5 Hence, the petitioners have filed the present petition under Section 482 of the Code before this Court seeking quashment of order dated 20.08.2014 (Annexure P/5).

3. Shri Satish Chandra Bagadiya, learned Senior Counsel appearing for the petitioners argued that on 20.08.2014 on a routine inspection, learned Magistrate discovered that a large bunch of unattended files are lying in which the summons have not been served, hence directed by passing a common order dated 20.08.2014 for issuance of process in all the cases, without applying his mind to facts of

individual cases. Therefore, learned Magistrate has wrongly taken a cognizance in this matter, without applying his mind. Hence, the impugned order by which cognizance has been taken, is liable to be set aside.

4. Shri Bagadiya further submitted that sampling was done on 24.03.2013. As per *panchnama*, date of manufacture printed in the bottle of Mazza Mango Drink is “02.02.2012”, with further caution that it is “best before six months” i.e. 01.08.2012. Therefore, the product was kept by the seller – accused for sale even after expiry of date of use, for which the petitioners cannot be held responsible. The petitioners are the manufacturer of the said product. They distributed this product to the Stockists and Retailers by specifically mentioning its date of manufacture as well as the period under which it is permissible for use. It was the duty of Accused No.1 to remove the said goods from the shelf of the Restaurant, after expiry of last date for the use of the product. Therefore, the petitioner No.2 has wrongly been arrayed as an accused, merely because of the manufacturer. The said product has not been found of sub-standard.

5. It is further submitted that Section 77 of the Act prescribes the limitation for taking cognizance in matter i.e. one year from the date of commission of an offence. In the present case, sampling was conducted on 24.03.2013 and complaint was filed on 22.03.2014, therefore, it is time barred and filed beyond the period of one year.

6. It is further submitted that the prosecution has been launched, without any recommendation and sanction of Commissioner of Food Safety, as required under Section 36 (3) (d) of the Act. The Designated Officer himself / herself has granted sanction to launch prosecution against the petitioners for an offence punishable

with fine and imprisonment under Section 59 of the Act. Hence, on this ground, the complaint is liable to be quashed against the petitioners.

7. In support of his contentions, Learned Senior Counsel placed reliance on a judgment dated **01.10.2014** passed by a Division Bench of this Court at Gwalior Bench in case of **Sambhagiye Nagrik Upbhokta v. Union of India & others, Writ Petition No.7677 of 2012 (PIL)**; and it is submitted that Mr. Chaturbhuj Meena, who was working as Food Analyst, at that time, was not having qualification of Food Analyst and experience of work in the State Laboratory, therefore, the report given by him cannot be relied on.

8. Per contra, Shri Kushal Goyal, learned counsel appearing for the respondent – State of Madhya Pradesh refuted that the petitioners have not given correct facts of this case. Section 30 (3) of the Act empowers the Commissioner to delegate his / her powers and function under this Act to any subordinate officer. Vide order dated 15.04.2013 (Annexure R/1), the Commissioner, Food Safety, Madhya Pradesh, Bhopal exercising his / her powers under Section 30 (3) of the Act had already empowered the Designated Officer, Food & Safety of every Districts of the Madhya Pradesh to grant prosecution under Section 30 (2) (e) of the Act. Therefore, the Designated Officer has rightly granted sanction and was having an authority to grant sanction. So far as the validity of sanction granted by the Designated Officer is concerned, once he / she has been delegated the powers to grant sanction in terms of Section 36 (3) (e) of the Act, therefore, there is no error on his / her part in granting the sanction for prosecution of the petitioners. Hence, this objection is not tenable.

9. So far the delay in taking cognizance in this matter is concerned, Shri Kushal Goyal submitted that cause of action in the present case arose upon

receiving of the Food Analyst Report on 08.04.2013, thereafter, sanction was received on 22.03.2014 and the complaint was filed on the same day. Therefore, the bar under this section will not apply.

10. It is further submitted that State Food Testing Laboratory, Bhopal is duly recognized by the Food Authority with registration No.60/W/FSSAI/21 and NABL Certificate No.TC/6829.

11. It is further submitted that even the Food Safety & Standard Authority of India had issued a clarification dated 05.07.2011 and clarified that existing Food Testing Laboratories which are testing food sample under PFA will continue to perform their function on food testing under Section 98 of the Act.

12. It is further submitted that so far as the competence of Shri Meena is concerned, the same has already been considered in **Miscellaneous Criminal Case No.5289 of 2012 (Mukesh Kumar Gupta v. The State of Madhya Pradesh & others)** decided on **17.04.2017** by giving a liberty to the accused to challenge the correctness of the certificate / declaration issued by Shri Meena in the trial. Therefore, effect of observation made by a Division Bench of this Court in case of **Sambhagiye Nagrik Upbhokta** (supra) has been taken care of.

13. Heard.

14. So far as the first and foremost contention of Shri Bagadiya, learned Senior Counsel, that cognizance against the petitioners has been taken by learned Judicial Magistrate First Class, Tonk Khurd, District Dewas vide order dated 20.08.2014 without application of mind, is liable to be rejected solely on the ground that this order dated 20.08.2014 is not an order by which the cognizance was taken. This order was passed during physical inspection of record room from 20.06.2014 to 27.06.2014 and various irregularities were found in the record room, hence orders

have been issued to serve all the pending warrants against absconding accused persons. In the present case, the complaint was filed by the Food Safety Officer on 22.03.2014. No order sheets from 22.03.2014 to 20.08.2014 have been brought on record to establish that when this complaint was not taken first time for taking cognizance. The Magistrate must have taken a cognizance prior to 20.08.2014, but the petitioners have not filed all the order sheets.

15. So far as the objection of the petitioners that the petitioner is only a manufacturer and Accused No.1 Dhulhe Singh, in-charge of Shree Vaishnavi Restaurant was solely responsible to keep the expired product in Restaurant for sale. The petitioners supplied the goods during its validity period and after expiry, Shri Dhulhe Singh, Proprietor of the Restaurant or the proprietor of the shop ought to have removed the expired product for which the complaint is filed against the petitioners under Section 59 of the Act which relates to punishment for unsafe food.

16. Relevant provision Section 59 (i) of the Act is reproduced below: -

“Section 59. Punishment for unsafe food. - Any person who, whether by himself or by any other person on his behalf, manufactures for sale or stores or sells or distributes or imports any article of food for human consumption which is unsafe, shall be punishable,-

(i) where such failure or contravention does not result in injury, with imprisonment for a term which may extend to six months and also with fine which may extend to three lakh rupees.”

17. In the present case, after expiry of safe period for use, the food product was not removed from shelf of the Restaurant, therefore, no injury was caused. The petitioners have not filed any document to show that when this product reached up to the retail shop / restaurant. The petitioners have not filed any documents, viz.

sale document, dispatch, invoice etc. to show the date when it was sold and / or dispatched from the manufacturing unit and reached to the stockist or distributor or retailer. Whether it was sold to retailer / Accused No.1 prior to expiry date or after, is a matter of evidence. From the shop, sampling of Mazza was taken on 24.03.2013, in which the date of its manufacturing was printed as “02.02.2012” with note that it is best before six months from the date of manufacture for use. There is no document with regard to the fact that produce was dispatched before 02.08.2012 from the manufacturing unit to the Distributor and thereafter to Accused No.1. At this stage, it cannot be said that only Accused No.1 was responsible for sale of unsafe food product i.e. “Mazza Mango Drink” and the fungal developed in the product while keeping in the shop of petitioners / Accused No.1 or it was there when it was dispatched from the manufacturing unit. At this stage, no such finding in this petition under Section 482 of the Code can be given.

18. Section 27 of the Act defines the liability of manufacturers, packers, wholesalers, distributors and sellers. The manufacturer or packer of an article of food shall be liable for such article of food if it does not meet the requirements of this Act and the Rules and Regulations made thereunder. The distributors, packers, wholesalers and sellers, sale the goods on behalf of the manufacturer. The petitioners- manufacturer after manufacturing its goods sold its product to wholesalers, who further sold to the distributor and then sellers further sale it to the consumer. The manufacturer is also a seller and it is his duty that unsafe food product should not be put to sale to consumers. All- packer, wholesaler, distributor and seller work on a contract with a manufacturer. Therefore, it is the duty of the manufacturer to see that none of its product is there in the store of wholesaler, distributor or seller and before its expiry date, it should be removed or should have

been recalled. Therefore, the manufacturer cannot shirk from its liability that it was seller who was selling unsafe product.

19. Vide notification dated 01.08.2011, Food Safety & Standard (Packaging and Labelling) Regulations, 2011 came into force with effect from 05.08.2011 and Regulation 1 of Regulation 1.2 thereof defines the words “Best before” and according to which, the food shall not be sold if at any stage, the product becomes unsafe. Regulation 10 of Food Safety & Standard (Packaging and Labelling) Regulations, 2011 defines the words “Use – by date” or “Recommended last consumption date” or “Expiry date” means the date which signifies the end of the estimated period under any stated storage conditions, after which the food probably will not have the quality and safety attributes normally expected by the consumers and the food shall not be sold.

20. So far as the time limit for launching the prosecution is concerned, although Section 77 of the Act says that no Court shall take cognizance of any offence under this Act, after expiry of one year from the date of commission of an offence, but as per proviso, the Commissioner of Food Safety may, for reasons to be recorded in writing, approve prosecution within an extended period up to three years.

21. In this case, after grant of approval, on next date, the complaint was filed before that report from the Food Analyst was received confirming that the product was unsafe, therefore, in absence of any report, no prosecution could be launched treating the food product ‘unsafe’ or ‘substandard’ etc. Therefore, the Commissioner has been authorized to grant sanction up to the period of three years.

22. The last submission in respect of validity of the sanction granted by Designated Officer is concerned, Section 36 (d) of the Act provides that the

Commissioner of Food Safety shall, by order, appoint the Designated Officer, who shall not be below the rank of a Sub Divisional Officer, to be in-charge of the food safety administration in such area and there shall be a Designated Officer for each district. The Designated Officer may make recommendation to the Commissioner of Food Safety for sanction to launch prosecution in case of contraventions punishable with imprisonment; and he himself can grant sanction to launch a prosecution in case of contraventions punishable with fine.

23. Learned Senior Counsel Shri Bagadiya, argued that the offence under Section 59 of the Act is punishable with imprisonment, therefore, the Designated Officer cannot grant sanction or launch prosecution. He had to make recommendations to the Commissioner of Food Safety for sanction to launch prosecution and such powers cannot be delegated to Designated Officer, by virtue of Sub Section (i) of Section 59 of the Act; and for launching prosecution, sanction from Commissioner, who is a higher officer than the Designated Officer, is required. Therefore, recommending authority or sanctioning authority cannot be the same.

24. This Court finds substance in the argument, where offence is punishable with imprisonment, the Designated Officer is required to make recommendation to the Commissioner for sanction to launch prosecution, but in this case the complaint has been filed under various sections alleging violation of the Act under which some of them are punishable with fine only and some of them are punishable with imprisonment; and power has been delegated to the Designated Officer by Commissioner, therefore, trial Court can examine this issue during the trial because the issue of validity of sanction is liable to be examined by the trial Court itself

during trial by framing a specific issue. At this stage, it cannot be held that petitioner No.2 would be punished for imprisonment also.

25. Therefore, in this view of the matter, Miscellaneous Criminal Case No.36435 of 2019 is dismissed.

(VIVEK RUSIA)
JUDGE

rcp