

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

MONDAY, THE 13TH JUNE 2005 / 23RD JYAISHTA 1927

Crl.Rev.Pet.No. 1249 of 1996(C)

ST.395/1990 of JUDL.MAGISTRATE OF FIRST CLASS, KOYILANDY
CRA.206/1991 of ADDL.SESIONS COURT, KOZHIKODE
.....

REVN. PETITIONER:

K.B.RAJAN, S/O.BHARATHAN,
PUZHAKKAL VEEDU,
NEAR CHERODE RLY. GATE,
VADAKARA.

BY ADV. SRI.P.V.KUNHIKRISHNAN

RESPONDENT:

FOOD INSPECTOR,
VADAKARA MUNICIPALITY,
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA.

BY ADV. SRI.ALAN PAPALI
SRI.M.P.PRABHANANDAN
BY PUBLIC PROSECUTOR (SRI.K. THAVAMONY)

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD
ON 13/06/2005, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:

K. HEMA, J.

Crl.R.P.No.1249 of 1996

Dated this the 13th day of June, 2005

O R D E R

The petitioner is the accused in S.T.No..395 of 1990 on the file of the Judicial Magistrate of First Class, Quilandy. He was convicted and sentenced to undergo simple imprisonment for six months and to pay a fine of Rs.1000 and in default to undergo simple imprisonment for one month under Section 2(i)(m) 7(i) read with Section 16(i)(a)(i) of the Prevention of Food Adulteration Act. The accused was found not guilty of offence under Rule 44(b) of the Prevention of Food Adulteration Rules. The petitioner filed appeal before the Sessions Court, Kozhikode and learned Addl.Sessions Judge, Kozhikode confirmed the conviction and sentence passed against the petitioner. Hence, this revision.

2. According to the prosecution, PW1, who was the Food Inspector, while working in Badagara Municipality, on 19.6.1978 at 5.10 p.m., purchased 765 M.Ls. of buffalo milk from petitioner. After complying with the formalities under the P.F.A. Act and Rules, the sample was sealed and packed in accordance with the provisions of the Act and Rules. On analysis of the sample, the article was found to be adulterated.

3. Learned counsel appearing for the petitioner submitted that he is raising only two grounds: (i) the violation of Section 13(2) of the P.F.A.

Act and (ii) violation of Rules 17 and 18 of the P.F.A. Rules. There is no dispute that the formalities under Section 13(2) of the Act are mandatory and notice has to be sent to the accused, as laid down in the said provision. In this case, PW4 gave evidence that notice was sent in the petitioner's address but it was returned undelivered. Again, a notice was issued in the correct address but it was also returned without being served. Learned counsel appearing for petitioner submitted that because of non-service of the notice under Section 13(2) of the P.F.A. Act, prejudice has been caused to petitioner. He could not prove his case by sending the sample to the Central Food Laboratory. Since it was too late, the delay in sending the sample to the Central Food Laboratory would make the sample unfit for analysis. He could not avail of the benefit under Section 13(2) of the Act. The fact that notice was not served on petitioner is not under dispute. But the question is whether mere non-service will be sufficient for acquittal.

4. The decision reported in ***Food Inspector v. Karingarappully Cp-op. M.S. Society (1986 KLT 174)*** gives an answer to the point. A Division Bench of this Court considered the question whether non-compliance of Section 13(2) vitiates the trial under all circumstances. It was considered as to when prejudice can be said to be caused to accused. It was held that the provision of law under Section 13(2) must be obeyed and it is not left to the sweet will and pleasure of the statutory authority whether to obey the provision or not. It was held as follows:

"The statutory authority has to discharge its functions as contemplated by law. Where there is a total denial of the right on account of the deliberate conduct of the statutory authority, where the effect of non-compliance with the provision is such as to wholly deprive the right of the accused to challenge the Public Analyst's report by obtaining the certificate of the Director of Central Food Laboratory, it may perhaps be possible to say that serious prejudice has been caused. Accused could very well apply to the court to send one of the samples to the Central Food Laboratory. If the Director of the Laboratory sends the certificate containing the result of analysis and his opinion, the certificate supersedes the Public Analyst's report; in that case, accused has exercised his right. If the Director of the Laboratory finds the sample (or samples, as the case may be) unfit for analysis and if such unfitness of the sample could be referable to the delay in making the application on account of non-compliance with or defective compliance of S.13(2) of the Act or Rule 9A of the Rules, it would mean that the accused has been deprived of his statutory right on account of the conduct of the statutory authority and prejudice has been caused to him. If he refrains from making any such application to the court to send the sample to the Central Food Laboratory, he cannot successfully contend that there has been prejudice, merely because of non-compliance or defective compliance with the provision of law."

5. On going through the dictum laid down in the decision cited above, I find that only in cases where the accused is deprived of his statutory right on account of the conduct of the statutory authority that the benefit can be claimed by the accused. But, if the accused refrains himself from making any application to court to send the sample to the Central Food Laboratory, he cannot successfully contend that there has been prejudice. In this case, petitioner has not made any attempt to send the sample to Central Food Laboratory and get it analysed. Having failed to do

so, applying the dictum laid down in the decision cited above, I find that petitioner has failed to prove the prejudice, if any, caused because of non-compliance of Section 13(2). Therefore, even if notice is not served on petitioner, he cannot claim an acquittal on the ground of section 13(2). The lower appellate court has, therefore, correctly answered this point against petitioner.

6. However, learned counsel appearing for petitioner submitted that he challenged the conviction on the ground that there is violation of Rules 17 and 18 of the P.F.A.Rules. It is dealt with in detail in the judgment of the trial court. It is argued that lower appellate court failed to consider this aspect. So, it was argued that failure to consider whether there is compliance of the provisions under Rule 17 and 18 by the Food Inspector is an illegality committed by the court below. No doubt, if a ground is raised that too on a mixed question of law and facts appellate court is bound to enter a finding on the same. Learned counsel appearing for the petitioner vehemently contended that evidence is lacking with respect to the compliance of Rule 17 and 18. Since the said provisions are mandatory, prosecution ought to have adduced evidence to prove compliance of Rules 17 and 18.

7. But postal receipts are not produced which will be the best evidence in this case to prove compliance of the relevant rules. Having failed to produce the postal documents to prove compliance of Rule 17 and 18, it was contended that petitioner is entitled for an acquittal. The

lower appellate court has not considered this question at all. The evidence is not analysed and no finding is entered on facts. This is a serious illegality and on this ground itself conviction and sentence are liable to be set aside. This being a revision, revisional court is not expected to enter a finding of fact for the first time in revision. The appellate court is expected to consider all rival contentions and enter a finding. On failure to do so, the conviction cannot be sustained.

8. I am satisfied that the case requires reconsideration by the lower appellate court. Learned counsel appearing for the petitioner submitted that incident happened 27 years back. Of course, the delay is a material factor but the law and the procedure have to be followed.

9. Therefore, the conviction and sentence are set aside and the matter is remanded to court below for fresh consideration and disposal on the only question whether there is compliance of Rules 17 and 18 in this case. The lower appellate court is directed to dispose of the matter after hearing both sides on this aspect alone, in accordance with law. Being an old case, the lower appellate court is directed to dispose of the case within one month from the date of receipt of a copy of this order.

Crl. Revision Petition is disposed of as above.

SD/-

K. HEMA, JUDGE.

K. HEMA, J.

Crl.R.P.1249 of 1996

ORDER

13.6.2005