

CASE NO.:
Appeal (crl.) 38 of 2001

PETITIONER:
State of Gujarat & another

RESPONDENT:
Shaileshbhai Mansukhlal Shah & another

DATE OF JUDGMENT: 30/05/2007

BENCH:
R.V. RAVEENDRAN & LOKESHWAR SINGH PANTA

JUDGMENT:
J U D G E M E N T

RAVEENDRAN, J.

1. This appeal by special leave is by the State of Gujarat against the judgment dated 7.10.1999 passed by the Gujarat High Court in Special Criminal Application No. 803 of 1998.

2. The Food Inspector, Rajkot launched a prosecution against the respondents in respect of offences under Sections 7(i) and (v) of the Prevention of Food Adulteration Act, 1954 ("Act" for short) punishable under Section 16 of the said Act. During the pendency of the said proceedings, the first respondent made an application under Section 13(2) of the Act to get a second analysis of sample of the article of food kept with the Local (Health) Authority, by the Central Food Laboratory. The learned Judicial Magistrate allowed the said application on 8.5.1996 and directed the respondents to deposit the fee prescribed under Rule 4(6) of the Prevention of Food Adulteration Rules, 1955 ('Rules' for short) for issue of Certificate by the Central Food Laboratory. The respondents neither deposited the said amount nor challenged the said direction for deposit of the fee. Nearly one year later, the respondents raised an objection that having regard to the provisions of the Act and the Rules, they were not required to deposit any fee for the second analysis. The learned Additional Chief Judicial Magistrate, Gondal, rejected the said objection by order dated 18.9.1997. The Sessions Court, in revision, affirmed that order.

3. The revisional order was challenged by the respondents before the Gujarat High Court in Special Criminal Application No. 803 of 1998. The High Court, by its order dated 7.10.1999, allowed the application, set aside the orders of the learned Magistrate and Additional Sessions Judge and held that it is the obligation of the State or Local Authority to subject the sample to analysis under section 13(2) and there was no obligation on the accused to bear or pay the fee for the second analysis. It followed the decision of a learned Single Judge of the Kerala High Court in George Kutty Vs. State of Kerala 1991(1) PFAC 133, and held that the right to have a second analysis was a privilege subject to payment of fee under the old section 13(2) of the Act, and that stood converted to an unconditional legal right of the accused under the new section 13(2), substituted by Act 34 of 1976. As a consequence, the learned Magistrate was directed to take appropriate steps in the matter, without requiring any payment by the accused.

4. The said order of the High Court is challenged by the State in this appeal. It is contended that the amendment to section 13(2) in the year 1976 did not affect the liability of the accused to pay the fee prescribed under Rule 4(6). It is submitted that the decision of the Kerala High Court in George Kutty (supra) relied on by the High Court, was not followed by the

other High Courts. Reliance is placed on the decision of the Madhya Pradesh High Court in Rajendra Kumar Vs. State of M.P. [1994 (2) PFAC 56] and decision of the Madras High Court in Mohd. Saif Vs. Local Health Authority, Melur Municipality [1996 (1) PFAC 20]. On the contentions urged, the question that arises for our consideration is :

"Where the accused, not being satisfied with correctness/accuracy of the report of the Public Analyst, exercises his right under section 13(2) of the Act to have a second part of the sample analysed by the Central Food Laboratory, whether he is bound to pay the fee prescribed under Rule 4(6) of the Rules ?"

5. When a Food Inspector takes a sample of food for analysis, section 11 requires him to divide the sample into three parts and send one part of the sample to the Public Analyst and the remaining two parts to the Local (Health) Authority. Section 13(1) requires the Public Analyst to deliver a report of the result of the analysis of the said food sample to the Local (Health) Authority. Sub-section (2) of section 13 confers a valuable right on the accused to have another part of the sample of food analysed by the Central Food Laboratory, for a second opinion. Sub-sections (2), (2A), (2B), and (3) of section 13 which are relevant are extracted below:

"13. Report of Public Analyst : (1) : xxxxx

(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 persons 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 14A, 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.

(2A) 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.

(2B) On receipt of the part or parts of the sample from the Local (Health) Authority under sub-section (2A), 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.

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

6. Rule 4 of the Rules relates to the analysis of food samples. The relevant portion of the said rule (as it stood at the relevant time) is extracted below:

"Analysis of food samples - (1) (a) Samples of food for analysis under

sub-section (2) of Section 13 of the Act shall be sent either through a Messenger or by registered post in a sealed packet, enclosed together with a memorandum in Form 1 in an outer cover addressed to the Director.

XXXXXXXXXX

(5) After test or analysis the certificate thereof shall be supplied forthwith to the sender in Form II.

(6) The fees payable in respect of such a certificate shall be Rs.200 per sample of food analysed.

XXXXXXXXXX"

Clause (6) of Rule 4 of the Rules as it originally stood prescribed a fee of Rs.40/-. The rule was amended twice, first with effect from 24.8.1995 substituting the figure of Rs. 200/- for Rs. 40/- and again with effect from 20.5.1999 substituting the figure of Rs. 1000/- for Rs. 200/-.

7. The procedure for getting a second analysis by the Central Food Laboratory, as laid down in sub-section (2), (2A) and 2(B) of section 13 can be summarised thus :

(i) On receipt of the report of the result of the analysis from the Public Analyst, the Local (Health) Authority is required to forward a copy of the result of the analysis by the Public Analyst to the person from whom the sample of article of food was taken (as also the vendor, if any, from whom such person purchased the article of food).

(ii) While so forwarding the report, the Local (Health) Authority is also required to inform the said persons (the accused) that if they so desire, either or both of them may make an application to the court within ten days from the date of receipt of the copy of the report, to get the second portion of the sample (kept by the Local (Health) Authority) analysed by the Central Food Laboratory.

(iii) When an application is made by such persons (accused), the court shall require the Local (Health) Authority to forward the parts of the sample kept by it; and the Local (Health) Authority shall forward the parts of the sample to the Court within five days from the date of receipt of requisition from the court.

(iv) On receipt of the sample from the Local (Health) Authority, the Court shall despatch one part of the sample to the Director of Central Food Laboratory.

(v) The Central Food Laboratory has to analyse the sample and send a report (certificate) in respect of the result of the analysis of such sample to the court.

Section 13 does not require payment of any fee to the Central Food Laboratory for the second analysis. Nor does it say that the complainant/State or Local (Health) Authority should bear the cost of second analysis. Nor does it say that when an accused makes an application for a second analysis by the Central Food Laboratory, such analysis shall be done free of cost. In fact section 13 does not deal with the fee part. Other provisions deal with the fee to be paid. Section 4 requires the Central Government to establish one or more Central Food Laboratories (or specify any Laboratory or Institute as a Central Food Laboratory) to carry out the functions entrusted to the Central Food Laboratory by the Act or the Rules made under the Act. Sub-section (2) of section 4 empowers the Central Government to make rules prescribing the procedure for submission of samples for analysis/tests to the Central Food Laboratory, the forms of the Laboratory's Reports and the fees payable in respect of such reports. Rule 4(6) of the Rules provides that a fee of Rs.200 (now Rs. 1000) should be

paid to the Central Food Laboratory for a certificate under Section 13(2) of the Act. Form-I of Appendix-A to the Rules makes it clear that when the court sends a requisition to the Director, Central Food Laboratory for analysis of the sample under sub-section 13(2) of the Act, the court is required to enclose a demand draft for the amount of fee for analysis. Section 13(2) when read with section 4(2)(b) and Rule 4, makes it clear that the analysis by the Central Food Laboratory is not free of cost, but subject to payment of the prescribed fee and that such fee should be paid in advance. The non-mention of fee in section 13 does not mean that the provision for payment of fee under section 4(2)(b) read with Rule 4(6) is negated or rendered obsolete. The question is who should bear and pay the prescribed fee?

8. The payment to Central Food Laboratory due under Rule 4(6) has to come from someone. Logically the choices are (a) the complainant (Food Inspector/State); (b) the Local (Health) Authority; (c) the Court; (d) the person who requires the second analysis by the Central Food Laboratory.

8.1) The Food Inspector (who is the complainant), when he takes a sample of food for analysis is required to divide the sample into three parts and sent one part for analysis to the Public Analyst and the remaining two parts to the local health authority. The fee/cost of analysis by the public analyst is prescribed under the relevant state rules and is paid by the local authority concerned. The Food Inspector cannot require a second analysis by the Central Food Laboratory under section 13(2). He does not require a second analysis to prove the charge. The provision for second analysis is an option given to the accused and not the complainant. A request by the accused for second analysis is not a request by the complainant. The Act does not require the complainant to pay the fees for the second analysis. Therefore, the question of complainant paying the fee for the second analysis does not arise.

8.2) The Local (Health) Authority has three obligations with reference to the sample : (i) to keep two parts of the sample received from the Food Inspector; (ii) to inform the person from whom the sample was taken (and his vendor, if any, disclosed under section 14A) that if it is so desired, either or both of them may make an application to the court to get the sample of the article of food (kept by it) analysed by the Central Food Laboratory; (iii) to send the parts of the sample to the court, if so directed by the court under section 13(2A). The obligation of the Local (Health) Authority is only that of safe keeping of the samples and not to get the samples analysed. Therefore Local (Health) Authority cannot be required to pay the fees for the second analysis of the samples.

8.3) The court cannot obviously be asked to bear the cost of the second analysis or for that matter, any analysis. Its functions are adjudicatory. If the court is required to render some assistance of service free, it should be specifically provided in law. (For example section 363 of Cr.PC provides that when an accused is sentenced to imprisonment, a copy of the judgment shall be given to him free of cost).

8.4) In the absence of any specific provision, the cost of an analysis has to be borne by the person requesting for such analysis. The accused need not apply to have the sample analysed by Central Food Laboratory, as the report of the public analyst is already on the file. The accused has been given an option under section 13(2) to get a second analysis of the sample (that is analysis of second part of the sample by a Central laboratory) only if he so desires. This option will obviously be exercised, only when the accused is not satisfied with the Report of the Public Analyst and wants to assail it. As the second analysis by Central Food Laboratory is at the option of the accused, it necessarily follows that he should bear and pay the fee fixed for such analysis under the Rules, if he wants the second analysis.

9. We may now consider the decision of the Kerala High Court which takes a different view. The Kerala High Court has held that there is no

liability on the part of the accused to pay the fee for the second analysis, by comparing the wording of Section 13(2) with the old Section 13(2). Section 13(2) before its amendment, by Act 34 of 1976 read as follows:

"13(2). After the institution of a prosecution under this Act the accused vendor or the complainant may, on payment of the prescribed fee, make an application to the court for sending the part of the sample mentioned in sub-clause (i) or sub-clause (iii) of clause (c) of sub-section (1) of Section 11 to the Director of the Central Food Laboratory for a certificate; and on receipt of the application 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 may then despatch the part 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 sample, specifying the result of his analysis."

(Emphasis supplied)

The Kerala High Court was of the view that the specific provision for payment of prescribed fee by the person making the application for analysis, in the old section 13(2) having been omitted in the new Section 13(2), the legislative intent was that the person requiring the second analysis need not pay the fee for such analysis. We extract below the reasoning of the Kerala High Court :

"After 1976 amendment the Local (Health) Authority has the obligation, under section 13(2), to forward a copy of the report of the Public Analyst to the accused and to inform him that he may make an application to the court to get the other sample analysed by the Director of Central Food Laboratory. Before 1976 amendment, either the complainant or the accused could have applied for sending the other part of the sample to the Central Food Laboratory. Neither the food inspector nor the local authority had any obligation, before 1976 amendment, to inform the accused that he could exercise his option under section 13(2) after 1973 amendment would thus show that it is the obligation of the State or local authority to subject the sample to analysis. Such analysis would be made by the Public Analyst first, and if the accused needs, such analysis must be arranged to be made at the Central food Laboratory. The only difference is that in the analysis to be made by the Public Analyst the accused has no part to play, whereas the Director of Central Food Laboratory cannot be asked to analyse the sample if the accused does not want it. In other words, if the accused expresses his desire to have the sample analysed by a superior expert, law provides that it must be got done. This right or option is not conditional on the accused remitting the expenses needed for analysing the sample. The result of such analysis by the Director of Central Food Laboratory is binding on the prosecution in the same way as it is binding on the accused because the certificate of the Director of Central Food Laboratory will supersede the report of the Public Analyst. Such certificate is not an item of defence evidence, as it takes the place of the report of the Public Analyst. In the absence of any clear statutory insistence an accused cannot be asked to bear the expenses to bring in a document having greater probative value and a substitution for the earlier document of the prosecution. Hence, the deletion of the words "on payment of the prescribed fee" from section 13(2) coupled with the other changes, conveys the message that it is no longer obligatory for the accused to bear the expenses for such analysis."

(emphasis supplied)

The Kerala High Court got over Rule 4(6) by stating that the said rule was made when the original Section 13(2) was in force and after Section 13(2) was substituted in 1976, the said sub-rule became obsolete.

10. On a careful reading of section 13(2) as it exists now, and the old section 13(2), we are of the view that the old provision is of no assistance to

interpret the new provision. If section 13(2) as it originally stood had been retained, by merely omitting the words "on payment of prescribed fee", with a consequential change in Rule 4 by deleting clause (6) thereof, it might have been possible to take the view that no fee was payable by the applicant for second analysis. But that is not the position. Section 13(2) has undergone a complete change, by substitution in entirety, by section 13(2)(2A) to 2(E). Further, Rule 4(6) has continued in the statute book. Not only Rule 4(6) has continued, but it has been consciously amended in 1995 and again in 1998 increasing the fee. There is a clear provision in the Act for payment of fee, when section 4(2)(b) is read with Rule 4(6). Rule 4(6) cannot be ignored as obsolete, as has been done by the Kerala High Court, in the absence of clear irreconcilability with section 13(2) or any other provision of the Act.

11. When a statutory provision is substituted, the new provision has to be read and construed with reference to its wording and not with reference to the wording of the old provision. Old section 13(2) and new section 13(2) to (2F) are different. Old section 13(2) enabled the accused as also the complainant to make an application to the court for sending a second part of the sample to the Central Food Laboratory. Under the new section 13(2), a complainant does not have such right, but on the other hand, the right is given only to the person from whom the sample was taken as also his vendor, if any. Secondly, under the new section an obligation is cast on the Local (Health) Authority to inform the person from whom the sample has been taken (and his vendor, if any) that they can make an application to the court, within 10 days of receipt of the Public Analyst's report, for getting a second part of the sample analysed by the Central Food Laboratory. Old section 13(2) did not contain such a provision. Lastly, the provision that "the accused or the complainant may on payment of the prescribed fee, make an application" in old section 13(2) meant that payment of the prescribed fee was a condition precedent for making an application to the court for second analysis. The omission of the words 'on payment of the prescribed fee' in the new section 13(2), in context, only means that payment is no longer a condition precedent for making an application for second analysis. Under the new section 13(2), the applicant can make the payment, after the application is allowed by the court. The sample however will be sent by the court to the Central Food Laboratory only on deposit of the prescribed fee. The omission to refer to the fee in section 13(2) is obviously because it was provided in Rule 4(6) made in exercise of power conferred under section 4(2)(b). If the legislative intent was to exempt the applicant for second analysis from any payment, the section would have stated that such analysis was free. The decision of the Kerala High Court is clearly erroneous. The view of the High Courts of Madhya Pradesh and Madras that the applicant has to pay the fee for the second analysis, in view of Rule 4(6) providing for such fee and the absence of any provision exempting the applicant from paying the fee, is correct.

14. We, therefore, allow this appeal and set-aside the impugned judgement of the High Court and restore the order of the Revisional Court, affirming the order of the learned Magistrate directing the respondents to remit the fee for the second analysis under section 13(2) of the Act.