

## A CRITIQUE OF TWO RECENT JUDGMENTS OF THE GAUHATI HIGH COURT

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The theoretical and practical aspects of precedents is the staple of all training programmes in the North Eastern Judicial Officers' Training Institute. Recently at the end of one such programme a pointed question as to the binding character of two recent Judgments of the Gauhati High Court was raised. An answer was given but it appeared that the answer was not satisfactory. The immediate provocation for this essay is to attempt a better answer.

Sibnath Singh Vs. State of Assam decided on 10.4.2001, reported in (2002) IGLR 234 and Nikhil Ch. Saha Vs. State of Assam decided on 16.8.2001, reported in 2001 (3) GLT 56 are the two Judgments considered in this essay. First, the common features of the two Judgments :-

Both are judgments in Criminal Revision arising out of cases under the Prevention of Food Adulteration Act, 1954 (the PFA Act hereinafter) whereby convictions under Section 7/16 of the PFA Act returned by the two Courts below were set aside by the High Court and the two accused were acquitted. Both the Judgments provide examples how inadequacy of preparation and submission by Counsel led to wrong use or non use of law and binding precedents. Both the Judgments are judgments per incuriam. Sibnath Singh (Supra) being the first in point of time may be taken up first.

Sibnath (Supra) is a case relating to sale of "Bundiya Laddu". The Public Analyst in his report opined that the sample of "Bundiya Laddu" contained non permitted coal tar colour metanil yellow. From para 4 and 5 of the judgment (as reported) it appears that the only point urged in support of the Criminal Revision was violation of the provision of section 13(2) of the PFA Act and the failure of the two Courts below to appreciate such

violations. According to the submission of Counsel it is mandatory to serve the report of the Public analyst on the accused.

Having held that the provision is directory and not mandatory the Court in latter part of paragraph 7 of the judgment observed that prosecution failed to prove service of the report in effect holding that section 13(2) requires service. In the judgment there is no mention of any counter submission on behalf of the State. Had the State placed Ratanlal Agarwala Vs State of Assam (1993)I GLR 118, a decision of a three Judge Bench of the High Court para 7 of the judgment in Sibnath (Supra) would not have been that long. Incidentally Ratanlal (Supra) overruled a Division Bench Judgment reported in State of Assam Vs Anukul Ch. Dey (1985) IGLR 521 and a single Judge decision reported in State of Assam Vs. Gauri Shankar Agarwalla and others (1989)1 GLR 251 on the legal requirements of section 13(2) of the PFA Act by pointing out that Sec. 13 (2) of the PFA Act and Rule 9A of the PFA Rules use the expression “forward” and not “serve” or “deliver”. The three Judge Bench approved the following from 1986 Cri.L.J 719 :

*“..... Non –compliance with or defective compliance, as long as there is no serious prejudice caused to the accused, cannot vitiate the prosecution or lead to acquittal. Courts cannot assume prejudice without any factual foundation or data.*

*Finding regarding prejudice depends on the conduct of the accused also. Merely because there has been non-compliance with or defective compliance, it would not be open to the accused to sit back, refrain from moving the Court to send one of the sample in the custody of the Local (Health) Authority to the Director of Central Food Laboratory for analysis and thereafter contend that there has been non-compliance with or defective compliance and therefore prejudice must be presumed. Prejudice is not a matter of presumption but one of fact to be established by the accused. 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 Section 13(2) of the Act or R 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 provisions of law.” And said “With respect, we are in agreement with the above enunciation of law.”*

It is unfortunate that despite so much publicity about courts being computerized even to-day we have not been able to put information technology to good use to obviate production of judgments per incuriam. On the facts of Sibnath (Supra) had Ratanlal (Supra), a binding precedent been placed the submission of the petitioner would certainly have been rejected. Sibnath (Supra) is definitely not a precedent to be followed by courts in later cases on the question of law under Section 13(2) of the PFA Act. The Judgment could have ended on the point referred above. However there are further observations towards the end of the Judgment. It is not known whether those were the result of any arguments made by counsels.

The first observation is as follows :

“ ..... I am constrained to make the observation that in the said report of the Public Analyst (Ex 7), there is no whispering that the food article i.e the sample is “Bundiya Ladoo” is an adulterated food within the meaning of section 2 of the Act of 1954 except the opinion that the sample

contains non permitted coal tar colour metanil yellow.....”.

Assuming the above is in response to counsel’s submission it is a fair presumption that provisions of Section 13(1) of the PFA Act requiring the Public Analyst to submit in the report “the result of the analysis”, of section 13(5) providing that the report (Ex7) in the case at hand may be used as evidence of facts stated therein, of Rule 7(3) of the Prevention of Food Adulteration Rules, 1955, (PFA Rules hereinafter) of Rules 23,26,28 and 29 of the PFA rules and finally the provisions of section 2 (i-a) (j) were either not placed or not pressed before the court. These provisions would go to show that it is for the court to decide on the facts stated in the Report whether an article of food is adulterated or not and that on the facts stated in Ex7 the sample of “Bundiya Ladoo” is undoubtedly adulterated under section 2 (i-a) (j) of the PFA Act.

Samples of decided cases on adulteration under section 2 (i-a) (j) of the PFA Act may not be out of place here.

On 31<sup>st</sup> May 1963 Dhian Singh sold coloured sweets to the Food Inspector. In the resultant case Dhian Singh Vs. Municipal Board, Saharanpur A.I.R 1970 S.C 318 in the Judgment dated 31.7.1969 a three Judge Bench of the Supreme Court considered a Public Analyst’s report relating to a sample of coloured sweets reading thus :

*“ Test for the presence of coal-tar dye :- Positive coal-tar dye identified :- Metanil yellow (colour index No.138)..... Yellow unit coloured with a coal-tar dye namely, Metanil yellow (colour index 138), which is not one of the coal-tar dye permitted for use in food-stuffs under rule 28 of the Prevention of Food Adulteration Rules, 1955”.*

Like the Report Ex 7 in Sibnath (Supra) no mention of the word adulteration is there in the Report before the Supreme Court. Dhian Singh’s conviction was not set aside in the Supreme Court because of such a Report.

On September 1, 1965 Ram Dayal a sweetmeat seller sold coloured “Laddus” to the Food Inspector. He fought upto the Supreme Court to extricate himself from the mesh of PFA Act 1954. The Public Analyst

there indicated use of “colour-unpermitted without even naming the colour unlike in this case. He did not succeed. The case, a three Judge decision dated 7.10.1969 is reported in A.I.R 1970 S.C 366 Ram Dayal Vs. Municipal Corporation of Delhi.

On March 15, 1967 Jai Narain sold “Patisa’ to the Food Inspector. The Public Analyst found “Unpermitted Coal-tar dye”. The resultant case in the Supreme Court is reported in A.I.R 1972 S.C 2607 Jai Narain Vs Municipal Corporation of Delhi. The three Judge Bench of the Supreme Court in the judgment dated 23.8.1972 upheld the conviction even without any mention of the name of the colour in the Report. Adulteration was held to be under section 2(i) (j) of the PFA Act.

Lastly “Boondi Ladoos” coloured with prohibited coal-tar dye as in Sibnath (Supra) reached the Supreme Court in 1947-1997 FAC 1200 Ram Lakhan Vs State of U.P and the conviction with reduced sentence was upheld in a two Judge Bench decision of Supreme Court by a short order dated 25<sup>th</sup> March 1997.

Nearer home a Division Bench of the Gauhati High Court dealt with a case of “Arhar Dal” coloured with “metanil yellow”. Operative part of the Public Analyst Report quoted in extenso in the Judgment in that case reads thus : “ I further certify that I have caused to be analysed the aforementioned samples, and declare the result of my analysis to be as follows : Physical- Arhar dahl coloured yellow. Coal-tar dye “Metanil yellow”, present in the dahl and am of the opinion that the same is a sample of arhar dahl coloured with “Metanil yellow” which is prohibited.” This Division Bench Judgment dated 3.1.1984 is reported in the State of Assam Vs. Bhawarilal Kundalia and another (1984) IGLR 177. Sale in that case was dated 12.5.1973 that is before the 1976 amendment of the PFA Act. The Division Bench on the Report such as above did not find any legal difficulty in holding the sample to be adulterated within section 2(i) (j) of the PFA Act extant at the relevant time.

In 1975 Gauhati High Court itself had an occasion to deal with a case of “Bundiya” coloured with “Metanil yellow”. Like here there also the Public Analyst gave his opinion that “the sample of bundiya was coloured with “Metanil yellow” which is prohibited. In that case reported in 1976 Cri.L,J 149 Chandrika Prasad Rai Vs State of Assam the High Court did not

find anything to complain about a similar Public Analyst's Report and upheld the conviction returned by the two courts below.

Lastly Sibnath (Supra) seems to have called in aid the Explanation added at the end of clause 2(i-a) (m) to hold the sample of "Bundiya Ladoo" to be not adulterated. No further comment is necessary except to say that the explanation itself explicitly states that it is applicable to primary food. Primary food has been defined in Section 2 (xii-a) of the PFA Act and "Bundiya Ladoo" does not fall within that definition. Thus Sibnath (Supra) is a judgment per incuriam and may not be followed as a precedent in later cases.

Nikhil Saha (Supra) may now be considered. In that case from the date of the original case which is case No. 839 C / 1991 it is easily assumed that the case is governed by the 1976 amendment extant since 1.4.1976. There were only 12 Sub-clauses of section 2 of the PFA Act and only after the amendment only after the amendment a new variety of adulteration under Sub-clause 2 (i-a) (m) has been enacted increasing the total to 13. In the Judgment Sub-clause 2 (i-a) (m) seems to have been mentioned only in passing. This will be evident from the following two sentences at para 4 of the judgment :

*" It is urged by Mr. Lahiri, learned Sr. Counsel that a reading of the definition clause contained in Sec. 2 (i-a) of the Act would exfacie go to show that in the facts of the present case, no question of any of the definitions contained in (d) to (m) of the Section 2 (i-a) of the Act can arise. Mr. Lahiri has taken me through the contents of the definitions contained in aforesaid Sub-clauses and having considered the same, I am inclined to agree with the learned counsel."*

Sub-clause 2(I-a) (m) is as follows :-

*"An article of food shall be deemed to be adulterated – (m) if the quality or purity of the article falls below the prescribed standard or its constituents are present in quantities not within*

*prescribed limits of variability but which does not render it injurious to health.”*

In exercise of powers under section 23 of the PFA Act, 1954, PFA Rules, 1955 were framed by the Central Government, Rule 5 of the PFA Rules reads thus :- “Standard of quality in the various articles of food specified in Appendix B to these rules are as specified therein”. In Appendix B item A. 18 inserted on 14<sup>th</sup> of July 1956 specifies standards of various cereals. Sub-item A.18.04 specifies the standard of Beson. This was first inserted on 9<sup>th</sup> Dec. 1958 and amend on 24<sup>th</sup> Oct. 1961, A.18.04 is as follows

“Beson means the product obtained by grinding dehusked Bengal gram (*Cicer arietinum*) and shall not contain any colouring matter or any other foreign ingredient. Beson shall conform to the following standard :

- (a) Total ash – Not more than 5 per cent
- (b) Ash insoluble in HCL – Not more than 0.5 per cent”

The report of the Public Analyst Ex. 10 in the case shows that upon analysis he found added powdered pea to the extent of 50% (approx). He opined that the sample of ‘Besan’ is adulterated. It appears that the learned Public Prosecutor could not persuade the Court not to concentrate, relying on submission of the petitioner’s counsel, on Sub-clause 2(i-a) (a), (b) and (c). Had the learned Public Prosecutor pressed before the Court Sub-clause 2(i-a) (m), Rule 5, and the standard A,18.04 quoted above it is quite probable that sample being patently not conforming to the standard A.18.04 containing as it did pea powder, a foreign ingredient would have been held to be adulterated in agreement with the two courts below. Once standard is prescribed for Besan no question of pea powder being cheaper or dearer, injurious or non injurious would arise. Pea powder is a “foreign ingredient” in Besan and as such the admixture sold as besan is adulterated.

The Court relying on the submission of the learned Sr. Counsel for the petitioner accepted 1964 (1) Cri. L.J 448 as a precedent in deciding Nikhil Saha (Supra). One may now examine the worth of 1964 (1) Cri.L.J 448 as a precedent. Validity of a precedent, as is well known, may be lost or attenuated by setting aside, overruling, by legislation, by the vice of per incuriam or subsilentio determination. The precedent under examination in

its body does not contain any information as to the date of sale. The date of the judgment is 22.10.1962. That means that the case was tried and the appeal in the High Court heard under the un amended PFA Act. At the relevant time there was no Sub-clause 2(i-a) (m). It is a matter of guess based on the notorious slow pace of disposal in our country that there may not have been the standard A.18.04 being of 9.12.1958 origin in existence at the relevant date when the precedent was born in 1962. That case of 1962 therefore of necessity turned on Sub-clause 2(i) (a), 2(i) (b) and 2(i) (c) and cannot be a precedent to decide a case in 2001 in the face of Sub-clause 2(I-a) (m) and the standard A.18.04. Unfortunately such submissions apparently were not made before the Court.

A few samples of decided cases other than 1964 (I) Cri.L.J. 448 relating to adulteration of Besan seem apposite.

In two reported cases the Supreme Court had an occasion to deal with adulteration of Besan. But in both of the cases Besan was insect infested and hence adulterated under section 2(i) (f) of the PFA, Act 1954. These two cases are reported in 1980 Cri.L.J 216 and 1983 Cri.L.J 855. In the first case the standards A.18.04 was also mentioned.

Bisheswar Das Vs State of Himachal Pradesh 1998 (I) PAC 372 decided on 21<sup>st</sup> July 1997 is a case of admixture of Beson with Kesari flour. The standard A.18.04 was considered and the court ruled – “ Besides, the words ‘and shall not contain any added colouring matter or any other foreign ingredient’ occurring in the definition of Beson given in item No. A.18.04 of Appendix B, referred to above are significant. The moment presence of any colouring matter or any other foreign ingredient is found in the sample of Beson the same would fall within the definition of the word adulterated within the ambit of section 2(I-a) of the Act since the same would not be conforming to the prescribed standard.

State of Himachal Pradesh Vs Sita Ram 2000(1) FAC 119 decided of 23<sup>rd</sup> June 1999 is a case of admixture of Beson with maize starch. The court considered the standard A.18.04 in Appendix B and ruled that “..... the correct proposition of law is that where standard for any food article has been prescribed by the statute, nothing can be added to or subtracted therefrom when it comes to decide whether an article of food is adulterated or not.”



In Dinesh Kumar Vs State of Himachal Pradesh 2000 Cri.L.J. 1879 in a Judgment dated 6.7.1999 the Himachal Pradesh High Court again dealt with a case of Beson mixed with wheat and maize starch. The court following Bisheswar Das (Supra) again held the sample to be adulterated as not conforming to the standard A.18.04 in Appendix B.

Lastly in Bhagirathi Das Vs State of Orissa 1988 Cri.L.J. 261 Orissa High Court dealing with a case of admixture of Bengalgram Powder and Pea Powder like in Nikhil Saha (Supra) held thus :

*“ In his report (Ext. 10) the Public Analyst opines that insects or clusters of moulds, rodent hair or excreta were not present in the sample Pea Besan. Total ash content was 3.1 per cent. The percentage of ash insoluble in HCl was 0.08. There was no trace of Khesari powder. Starches of Bengalgram were however present. Therefore, he reported that the sample was adulterated as it was a mixture of Bengalgram powder and pea powder, the former being the major portion. He, however, did not opine that the article was injurious to health. As Pea Besan, the article cannot be said to be adulterated because of absence of a prescribed standard in Appendix B. But in view of the report of the Public Analyst if it is considered that it was Besan made of Bengalgram as per item A.18.04 because the minor portion was pea powder, then technically it is adulterated though not injurious to public health.”*

The effort above may be appropriately ended by recalling what has been stated in para 40 and 41 of the Judgment of the Supreme Court in state of U.P. Vs Synthetics and Chemicals Ltd. (1991)4 SCC 139 in exposing the doctrines of per incuriam and sub-silentio as exceptions to the rule of precedents.