DINESH KUMAR –*VS*- STATE OF MADHYA PRADESH
(2004 AIR SCW-7406) - A CRITIQUE

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In the afternoon of 29.03.1988 Dinesh Kumar of Itava Road, Bhind, Madhya Pradesh sold a sample of Beson to the Food Inspector. On analysis the Public Analyst found the part of the sample of Beson sent to him to be adulterated. A complaint for an offence under section7 read with section 16 of the Prevention of Food Adulteration Act, 1954 (PFA Act hereinafter) followed. The Chief Judicial Magistrate, on completion of the trial acquitted Dinesh Kumar. The State of Madhya Pradesh filed an appeal before the Madhya Pradesh High Court against the acquittal. The High Court reversed the acquittal and upon conviction Dinesh Kumar was awarded the mandatory minimum sentence for the offence of selling adulterated Beson. Dinesh Kumar became the appellant before the Supreme Court. The Supreme Court delivered the Judgment in Dinesh Kumar's appeal being Criminal Appeal No. 1096 of 1999 on 27.10.2004. This is the background of Dinesh Kumar Vs- State of M.P., 2004. AIR SCW 7406. On perusal of this judgment of the Supreme Court the writer is reminded of Nikhil Ch. Saha –Vs- State of Assam decided by the Gauhati High Court on 16.08.2001 and reported in 2001 (3) GLT 56. That was also a case of adulterated Beson. A critique of Nikhil Saha (Supra) appeared in the journal section of 2003 (2) GLT at page 8 to 10 where Nikhil Saha (supra) was shown to be a judgment per incuriam. Some three and half years later Dinesh Kumar (supra) from the Supreme Court appears to make the grade. That answers the why of this critique of Dinesh Kumar (supra).

1. THE LAW

Section 2 (i-a) of the PFA Act contains the definition of "adulterated". According to this section there are, from section 2(i-a) (a) to section 2 (i-a) (m), thirteen different situations when an article of food shall be deemed to be adulterated. These thirteen categories, however, are not mutually exclusive. In simpler words the same article of food may be adulterated under one or more of these thirteen categories. Prem Ballab –Vs- the State AIR 1977 SC 56, Kisan Trimbak Kothule –Vs- State of Maharastra A.I.R. 1977 SC 435 a three Judge Decision of the Supreme Court and Muralidhar Meghraj Loya –Vs- State of Maharastra AIR 1976 S.C. 1929 say as much.

Section 13(5) of the PFA Act says that facts stated in the Report of the Public Analyst may be used as evidence unless the Report is superseded by the certificate of the Director of Central Food Laboratory. Rule 7(3) of Prevention of Food Adulteration Rules, 1955 requires the Public Analyst to send a Report of the result of analysis of the food sample in Form III. It may now be examined how the law indicated above has been applied in the case of Dinesh Kumar.

2. THE CHIEF JUDICIAL MAGISTRATE

Apparently the Public Analyst detected Kesari Dal Powder in the sample of Beson analysed by him and that is the reason of his opinion that the sample of Beson is adulterated. The trial court held that because of the mixture of Kesari Dal the article cannot be held to be adulterated. "It noted that there was no finding recorded by the Public Analyst that the percentage of powder of Kesari as had been found in the sample, affected injuriously the nature, substance and quality of the food article analysed". On the aforesaid reasoning the Chief Judicial Magistrate held the sample of Beson not to be adulterated. The collocation of the words "affect injuriously the nature, substance or quality" has been used only in three out of the thirteen categories of adulteration defined under section 2(i-a) of the PFA Act. These three categories are provided in section 2(i-a) (b), 2(i-a) (c), and 2(i-a) (d) of the PFA Act. The trial court did not go beyond these three categories and did not bear in mind the holdings of the Supreme Court in the three cases indicated in para 1 above. Had he done so he might have found the sample to be adulterated under section 2(i-a) (m). Thus the holding by the trial court is erroneous being per incuriam in as much as it failed to apply the statute law as in section 2(i-a) (m) as also the binding precedents from the Supreme Court indicated earlier.

3. THE HIGH COURT

The High Court also failed to notice section 2(i-a) (m). Besides, the High Court fell into another kind of error on facts. The High Court because of the presence of Kesari Dal powder found in the sample of Beson by the Public Analyst, concentrated on Rule 44-A whereby power has been granted to the State Govts to prohibit sell etc of Kesari Dal or its products by itself or as an ingredient in any other article of food by issuing a notification in the official gazette specifying a date for such prohibition. The High Court assumed, wrongly as it turned out, that such a notification had been issued and was in force on the date of the offence. In fact as far as the state of Madhya Pradesh is concerned such a notification was issued only with effect from the 6th of April 2000 whereas the sample was collected on 29.03.1988. At the date of the sale therefore there was no prohibition against sell etc. of Kesari Dal and/or its products by itself or as an ingredient in say Beson.

The High Court thus erred in another direction. While upsetting the acquittal the High Court based the conviction on a wrong foundation on facts and failed to apply the correct law.

4. THE SUPREME COURT

The Supreme Court found the date of the notification to be the 6th April 2000 and detected the error of the High Court and corrected it by holding that "Rule 44-A could not have been applied to find the accused guilty." The Supreme Court said the following in para 9 of the Judgment :-

> **" Besides, Section 2(i) (c) of the Act is relevant, Section 2(i) defines "adulterated". Section 2(i) (c) deals with substitution of an article by inferior or cheaper substance which affects injuriously the nature, substance or quality thereof. In the Public Analyst's report there was no reference to this aspect. What would happen if the Public Analysts' report in this regard even if Rule 44-A was not in operation, does not, therefore, fall for consideration in this case. On that score alone the High Court's judgment is indefensible and is accordingly set aside."**

Every event in Dinesh Kumar's case occurred after the 1st of April 1976 when the amending Act 34 of 1976 came into force. By the amending Act major Amendments were made. It is obvious that references to section 2(i) (c) and Section 2(i) in the above quote from Dinesh Kumar (supra) have to be read as reference to Section 2(i-a) (c) and Section 2(i-a) respectively because of the amendments. Similarly the penultimate sentence in the quote, beginning with the words "what would" and ending with the words "fall for consideration in this case" understandably means that since the Public Analyst had not mentioned the facts required for application of Section 2(i-a) (c) of the PFA Act even if a notification under Rule 44-A was in operation what would happen if such facts were mentioned need not be considered in the case.

Whatever that may be the Supreme Court considered and applied only one category contained in Section 2(i-a) (c) out of the thirteen different definitions of the "adulterated" in Section 2(i-a). The Supreme Court in the Judgment mentioned Rule 5 of the PFA Rules, 1955, quoted the definition and standard of quality mentioned in Appendix B framed under Rule 5 at A.18.04 for Beson which runs thus :-

> **" A.18.04 –"Beson" means the product obtained by grinding dehusked Bengal gram (cicer arietinum) and shall not contain any added colouring matter or**

any other foreign ingredient. Beson shall conform to the following standard
(a) Total ash – Not more than 0.5%.
(b) Ash insoluble in HCL- Not more than 0.5%."

It is surprising that having gone thus far the Supreme Court did not notice Section 2(i-a) (m) reading as follow : (*only relevant portion quoted*)

" (a) ....
(b) ....
(m) If the quality or purity of the article falls below the prescribed standard or its constituents are present in quantities not within the prescribed limits of variability but which does not render it injurious to health ...."

The learned counsels for the State apparently did not place Section 2(i-a) (m) of the PFA Act. Moreover had the binding precedents Prem Ballab (supra), Muralidhar Meghraj (supra) and Kisan Trimbak (supra) been placed or even any one of them been placed the Supreme Court in Dinesh Kumar conceivably would not have stopped short at Section 2(i-a) (c) of the PFA Act and probably would have considered other categories of adulteration on the facts stated in the Public Analyst's Report. There can be no doubt that on the facts stated in the Public Analyst's Report presence of Kesari Dal powder even if not prohibited by notification under Rule 44-A will be the presence of a "foreign ingredient" and the sample will fall foul of the standard A-18.04 in Appendix B and as such will be adulterated under Section 2(i-a) (m). Indeed, on the authority of Prem Ballab (supra) and the other two cases indicated above if the Report of the Public Analyst contained the additional materials lack of which influenced the decision of the trial Court and the Supreme Court, the sample would have been adulterated both under Section 2(i-a) (c) and 2(i-a) (m). Additionally if on the date of sale the notification under Rule 44-A had been in operation the sample could fall within Section 2(i-a) (h), besides 2(i-a) (m) and even within Section 2(i-a) (l). The trial court as well as the Supreme Court was influenced by the absence of percentage of Kesari flour and resultant injurious affects on Beson because of such absence. Once standard of an article of food has been prescribed in Appendix B no such considerations can arise. The sanctity of the standards in Appendix B had, as long ago as 12th of March 1975, been judicially approved by the Three Judge Bench of the Supreme Court in Municipal Committee, Amritsar – Vs- Hazara Singh, AIR 1975 SC 1087 which quoted with approval the following from State of Kerala –Vs- Vasudevan 1975 FAC 8 :-

"The standard fixed under the Act is one that is certain. If it is varied to any extent, the certainty of a general standard would be replaced by the vagaries of a fluctuating standard. The disadvantages of the

> **resulting unpredictability, uncertainty and impossibility of arriving at fair and consistent decisions are great."**

The Three Judge Bench of the Supreme Court in Hazara Singh (supra) also clarified the decision of a Two Judge Bench of the Supreme Court in the following words :

> **" Indeed, this court's decision cited above discloses that Hidayatullah J (*as he then was*) was not laying down the law that minimal deficiencies in the milk components justified acquittal in food adulteration cases."**

Both these Supreme Court cases dealt with standards of Milk in Appendix B. There can be no doubt that the law laid down in the two Supreme Court cases in the above quotes will cover all the standards of different articles of food prescribed in the Appendix B. Thus once the Public Analyst finds a sample for which there is a statutory standard laid down in Appendix B not conforming to the standard even minimally he need not determine the percentage of variation etc. and for the absence of such specification the report cannot be dubbed as deficient. In such cases the Public Analyst on the findings is led to Section 2(i-a) (l) or 2(i-a) (m) both of which deals with standards to find the sample to be adulterated.

The Supreme Court has corrected the error of the High Court but has put the court's seal of approval to the error committed by the Chief Judicial Magistrate as shown above. In the critique of Nikhil Saha (supra) mentioned in the preface to this writing several decided cases from the High Courts on adulteration of Beson like 1998 (1) FAC 372, 2000 (1) FAC 119, 2000 Crl.L.J 1879 and 198 Crl.L.J. 261 were referred to. Of those Bisheswar Das –Vs- State of Himachal Pradesh 1998(1) FAC 372 seems to be on all fours with Dinesh Kumar (supra). Admixture of Kesari flour in Beson like in Dinesh Kumar (supra) fell for consideration in Bisheswar Das (supra) and the High Court after considering the statute law and precedents summed up thus :-

> **"Therefore, in the present case even if it be assumed that the admixture of "Kesari Dal" flour in the "Beson" was in a very small and negligible proportion, the same cannot be ignored since the same does not conform to the prescribed standard under the law."**

The learned counsels for the State of Madhya Pradesh did not place any of the above judgments of the High Court before the Supreme Court. Thus, Dinesh Kumar(supra) came in be decided by the Supreme Court per incuriam and is not a precedent to be followed by the High Court or the subordinate courts as a binding authority in later cases.

The critique of Nikhil Saha (supra) referred to in the preface of this writing was ended by recalling the statements in para 40 and 41 of (1991) 4 SCC 139. The critique of Dinesh Kumar (supra) may be concluded by recalling a portion of the statement in para 7 of the Five Judge Decision of the Supreme Court in Central Board of Dawoodi Bhora Community and another Vs State of Maharastra and another, (2005) 2 SCC 673 decided on 17.12.2004. The unanimous judgment of the Five Judge Bench incidentally was delivered by the Chief Justice of India. The relevant portion of the statements in para 7 of the said Judgment runs thus :-

> **"Per incuriam means a decision rendered by ignorance of a previous binding decision such as a decision of its own or of a court of co-ordinate or higher jurisdiction or in ignorance of terms of a statute or a rule having the force of law."**

Dinesh Kumar (supra) fails the latest expression of the test for judgements per incuriam quoted above.

5. THE POSTSCRIPT

In the preparation of cases and submissions in courts the primacy of lawyer's role in our system of administration of Justice cannot be doubted. When a deficiency if any, in a judgment is detected it is customary to lay the blame at the door of the lawyer. Law Reports and Law Journals are full of critical analysis of judgments replete with sentences like "Unfortunately section X of statute Y was not placed before the Court" and/or "Judgement X of the Supreme Court was not placed before the Court" etc. This critique is also no exception to the prevailing trend. Breaking tradition Lord Denning confessed to having a habit of doing his "own researches". In the Discipline of Law he says, "on many occasions I have done my own researches and given an opinion on matters on which the Court has not had the benefit of the arguments of counsel or of the judgment of the Court below. I have done this because counsel vary much in their ability and I do not think that their clients should suffer by any oversight or mistake of counsel."

In the present times the pitfalls and constraints in the way of the Judges "own researches" are many. To mention only one the explosion of the docket and need for speedy dispensation of Justice would not permit the modern Judge to adopt the habit of Lord Denning. The air is thick with talk of technology driven delivery of Justice. Cannot a way be found in Technology whereby all the relevant statute law and precedents would be before the Court automatically during the hearing of a case so that even if lawyers fail judges would not ?