

(1984) 04 GAU CK 0012
In the Gauhati High Court

Banowarilal Tibrewalla

APPELLANT

Vs

State of Assam and Another

RESPONDENT

Date of Decision : 23-04-1984

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 202, 204, 397, 482
Prevention of Food Adulteration Act, 1954 — Section 11, 16, 17, 7
Constitution of India, 1950 — Article 21, 47

Citation : (1985) CriLJ 1148

Hon'ble Judges : T.N. Singh, J

Bench : Single Bench

Judgement

T.N. Singh, J.—Who is to be blamed if food-adulterations escape prosecution or conviction? The law or the investigator/prosecutor? This, is the core question in issue in this case involving interpretation of some of the tricky, though not tanned, provisions of the Prevention of Food Adulteration Act, 1954, for short, the Act.

2. However, I may first deal with two peripheral issues which obstruct my entry upon the core question. According to learned Public Prosecutor, Assam, Mr. S. R. Bhattacharjee, I must not hear this application because it is beyond my jurisdictional competence. His further submission is that the application is premature. Both these aspects are considered in a recent decision of their Lordships of the Supreme Court in *Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others*, and according to me both objections have no merit. It is, however, necessary for me to state briefly the facts leading to this application to show that these objections are futile and also to answer the core question.

3. On 7-9-1978 the complainant, Area Food Inspector, Tezpur, found one Hanuman Singh "a salesman and carrier" of M/s B. G. Rice and Oil Mills, Narayanpur, selling mustard oil from a truck which was parked in front of the shop of M/s. Paresh Chandra Narayan Chandra Saha at Gobardhan Road in Tezpur town. He found the said Hanuman Singh near the truck and selling

mustard oil in tins to customers who introduced himself as the "sales-man and the carrier agent" of the said M/S. B. G. Rice and Oil Mills. The complainant collected sample of mustard oil after complying with the formalities enjoined by law by giving an intimation in Form VI to the vendor Hanuman Singh. In the complaint it is also stated that the said Hanuman Singh disclosed the name of the petitioner (Banowarilal Tibrewala) as one of the partners of the said M/s. B. G. Rice and Oil Mills. The complaint was filed on 28-10-1978 in the court of the Chief Judicial Magistrate, Darrang, Tezpur, wherein not only Hanuman Singh but M/s. B. G. Rice and Oil Mills was also arrayed as an accused along with "all the partners" (8 in number), including the petitioner and 3 ladies. Along with the complaint certain documents were filed with a list. The acknowledgment of Public Analyst " dated 14-9-1978 and another document which was called "Declaration by vendor Sri Hanuman Singh dt. 7-8-1978" besides the "sanction" and some other papers, which were 11 in number, figured in the list. On 22-12-1978 the trial court issued summons to all the accused persons named in the complaint petition and in the course of trial for the purpose of framing charges against the accused evidence was recorded. The complainant examined himself and also proved the documents filed with the complaint. The paper entitled "Declaration by vendor" was proved as Ext. 2. Of the other 2 witnesses who were examined By the trial court P. W, 3 was the District Food Inspector, Darrang, who corroborated the complainant as respects formalities observed in collecting the sample and also proved his signature on certain formal documents which were used in collecting the sample. P. W. 2 was also one of the witnesses of the prosecution and he proved his signature on the relevant papers. On a consideration of the evidence and other materiak on record the learned Chief Judicial Magistrate framed charge against the petitioner as also against Hanuman Singh and M/s. B. G. Rice and Oil Mills u/s 16(1)(a) read with Section 17(1) of the Act by his order passed on 20-9-1979 in C. R. Case No. 925 of 1978. He discharged the other 7 accused on the ground that there was no evidence against them to show that they were "partners in charge and responsible for the conduct of the business when the offence was committed." Against the accused he found that Hanuman Singh had given out his name and, therefore, there was material against him. It is against this order that this Court is approached for quashing the charge against the petitioner. In this connection I may refer to Ext. 2 which apparently persuaded the court below to hold that the petitioner was liable to be tried. It is a cyclostyled form addressed to District/Area Food Inspector, Tezpur, which is filled in ink; its relevant entries may be summarised as follows:

- (i) The name, address and designation of the declarant. In this case "Hanuman Singh son of Bhanwar Singh carrier of the establishment of B. G. Rice and Oil Mills which is a partnership firm owned by the following partners."
- (ii) Names of partners and permanent address. In this case "Shri Banowarilal Tibrewalla, son of late Jagannath Tibrewalla."

(iii) Declaration, in this case, "that the stock of food article out of which sample has been collected by you today the 7th Sept. 1968, for chemical analysis was carried by me on 7-8-1978 from the following person-

Names and address of the persons : Shri Banowarilal Tibrewalla, partner of M/s. B. G. Rice and Oil Mills, Narayanpur, (Lakhimpur District).

4. In Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others, Delhi Municipality, through its Food Inspector, had launched prosecution under the Act against M/s Upper Ganges Sugar Mills of which Ram Kishan was manager and respondents 2 to 5 were Directors of the said Company. Respondents successfully moved Delhi High Court for quashing the complaint. Delhi Municipality came up against High Court's order complaining that the High Court ought not to have quashed the proceedings as a clear case was made out against all the respondents. Their Lordships of the Supreme Court allowed the appeal to the extent that High Court's order quashing the proceeding against the Manager (Ram Kishan) was set aside but as regards other respondents (Directors) it was dismissed. Before their Lordships the same objection, as raised before me, was agitated in that the Magistrate's order (summoning the respondents for trial under the Act) was an "interlocutory order" against which the High Court could not entertain a revisional application u/s 397(2), Cr. P. C. Their Lordships held that in view of the decision in Madhu Limaye Vs. The State of Maharashtra, the objection was without merit because in that case the court had held that power could be exercised in such circumstances u/s 482, Cr. P. C. which has a different parameter and was a provision independent of Section 397(2). Reference was also made to the decision in Raj Kapoor and Others Vs. State and Others,

5. Mr. S. R. Bhattacharjee, however, relied on the decision in Amar Nath and Others Vs. State of Haryana and Another, and also V.C. Shukla Vs. State through C.B.I., However, what was actually decided in Amar Nath's case was that the Magistrate's order summoning the appellant was not an "interlocutory order" but which decided a serious question as to the rights of the appellant before trial and, therefore, the revision against the order was fully competent u/s 397(1) or u/s 482 because the scope of both the provisions in a matter of this kind was more or less the same. In Shukla's case also import of the term "interlocutory order" came up for consideration. However, proceedings in that case were pending before a Special Judge who was empowered to hold the trial under a special enactment, namely, Special Courts Act, 1979. Because there occurred in Section 11 of the Act a non obstante clause, the court held that the impugned order was "interlocutory order", and an appeal against that order was incompetent. In Raj Kapur's case (supra), though these cases were not referred to, the ratio of the decision in Madhu Limaye's case (supra) was explained and amplified. The court held that there was no total ban on the exercise of inherent power where there was abuse of the process of the court or other extraordinary situation excited court's jurisdiction and that in a case in which the High Court was invited to quash a criminal proceeding on the ground that it was initiated

illegally, vexatiously or was without jurisdiction, notwithstanding anything contained in Section 397, the High Court can entertain the application and exercise its inherent power. I have no doubt, therefore, that law on this point is well-settled and, therefore, the first objection as to the maintainability of the petition, made by Mr. S. R. Bhattacharjee, is without force, I may, however, refer in this connection to *State of Karnataka Vs. L. Muniswamy and Others*, on which reliance was placed by the learned Counsel for the petitioner, Mr. J. P. Bhattacharjee. Their Lordships in that case upheld High Court's order passed u/s 482, Cr. P. C. quashing an order by which some accused were discharged and the case was adjourned for framing specific charges against the other accused. This decision also meets the second objection of the learned Public Prosecutor because the court held, as there was no material on the basis of which any tribunal could reasonably come to the conclusion that the accused were in any manner connected with the incident leading to the prosecution, the High Court was justified in quashing the proceeding. *Ram Kishan (supra)* also similarly meets the learned Public Prosecutor's second objection. The court referred in this case to its decision in *Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi and Others*, wherein the scope of Sections 202 and 204 was considered and the grounds on which a pending proceeding could be quashed were also laid down. The first and foremost ground on which a proceeding can be quashed, according to their Lordships, is "when the allegations made in the complaint or the statements of the witnesses recorded in support thereof taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused." It is this ground on which relief is sought in the instant application and, therefore, I do not feel inclined to hold that the instant application, as submitted, is premature. Because, what is agitated in this case is non-application -of mind by the investigating and prosecuting agency to the provisions of the amended Section 17 of the Act on the basis of which it is submitted that the complaint in the instant case was itself incompetent.

6. I may now come to the core question and for this it is necessary for me to indicate that Section 17 of the Act was substantially altered in 1976. Indeed it was wholly substituted by a new section of which particular notice has to be taken of the provisions made for "nomination". Sub-section (1) of Section 17 contemplates that when an offence under the Act is committed by a Company the person, if any, who has been nominated under Sub-section (2) to be in charge of, and responsible to, the Company, for the conduct of the business of the Company, or when no such person has been so nominated, every person who at the time of the offence was committed was in charge of, and was responsible to the Company, for the conduct of the business of the Company, and the Company, shall be deemed to be guilty of the offence and "shall be liable to be proceeded against and punished accordingly". The term "Company" by the Explanation appended to the section, is defined to mean any body corporate and includes a firm or other association of individuals while the term "Director" in

relation to a firm is defined to mean a partner in the firm. The procedure of nomination and other matters relating thereto are provided for in sub-sees. (2) and (3) and the form of nomination is appended as Form No. VIII to the "Central" Rules framed under the Act. According to R. 12-B no nomination in terms of Section 17(2) of the Act shall be valid unless the person nominated gives his consent in writing and has affixed his signature in Form VIII in token of such consent but the person nominated can only be "the Director or Manager". From the form it appears that the person nominated accepts the position that he was "in charge of, and responsible to, the Company for the conduct of the business of the said Company". The rule and the form do not leave it in doubt that nomination of only a single person is contemplated, and therefore, u/s 17(1) also, only a single person, whether so nominated or not can be proceeded against. What is, therefore, stressed in this case is that Ext. 2 on its face did not disclose that it was in the prescribed Form No. VIII or even otherwise the petitioner, though named as a partner therein, of M/s B. G. Rice and Oil Mills at the time the offence was allegedly committed, he could not be said to be in charge of and responsible, for the conduct of its business "to the said M/s B. G. Rice and Oil Mills" and, therefore, he could not be "proceeded against". Therefore, the prosecution against him was still-born as the complaint itself was incompetent. It is also contended that the petitioner cannot be said to be a "person" who could be prosecuted u/s 7 or 18 as the term "person" itself was defined in Section 17.

7. As Ram Kishan is also pressed in service to support this contention I may first refer thereto. On what basis the complaint sought to make out a case against the Directors appeared in clause No. 5 of the complaint which their Lordships extracted in their judgment. It was inter alia mentioned therein that "accused Nos. 4 to 7 are the Directors of accused No. 2 and as such they were in charge of and responsible for the conduct of business of accused No. 2" at the time of sampling. Their Lordships held that by mere use of the words "as such" the complaint could not attribute any criminal responsibility to accused Nos. 4 to 7. Except that they were in charge of and responsible for the conduct of the business of the Company it stated nothing. It was held that there was no "clear averment" of the fact that the Directors were "really in charge of the manufacture and responsible for the conduct of business" of the Company. The words merely indicated that the complainant presumed the Directors to be guilty because they were holding a particular office. In this view of the matter their Lordships upheld; High Court's finding that no case against the Directors had been made out ex facie on the allegations made in the complaint and the proceeding against them was rightly quashed. Mr. J. P. Bhattacharjee also placed reliance on Smt. Manibai and Another Vs. The State of Maharashtra, wherein conviction of a particular partner of a firm was quashed because there was no evidence to show that she was in charge of and responsible for the conduct of the business which was carried on at the shop. A decision of this Court reported in Benoy Krishna Mukherjee Vs. State of Manipur and Another, is also cited by

the learned Counsel. Therein it was held by Saikia, J. that the complaint petition must state as to how the Company and each of the persons prosecuted is liable for the offence committed by .the Company as provided in Section 17 of the Act.

8. There is no doubt that legislature has taken note of the changing pattern of trade practice by amending Section 17 to ensure effective enforcement of the Act and, therefore, in my opinion, it is the duty of the court to construe the provision in a manner as will fulfil this object. It is also difficult to overlook that the provisions of the Act furthered and promoted the rights of the society postulated under Article 47 of the Constitution to compel the State to adopt measures for the protection of "Public Health". Long drawn or endless investigation and protracted trial and in many cases multiple proceedings ending in fruitless results with discharges and acquittals do not reflect well either on the law or on the efforts of the prosecuting agency and above all sap the morale; of the honest prosecutor on the one hand and on the other hand shake public confidence in the enforcement of law and administration of justice.

9. Provisions for punishment of body corporates embodied in Section 17 aimed at securing conviction to those who wanted to escape liability donning the corporate cloak. Because of the very nature of the corporate enterprise, however, such liability could only be an imputed liability and, therefore, Section 17 had to be amended to make it more effective and adequate to deal with the changing pattern of behaviour of the trade and traders. Liability thereunder is, as has to be, in such cases, limited only to those persons who would be "in charge of and responsible to" the body corporate for the conduct of its business inasmuch as in such cases the question of vicarious liability, as in the case of an individual or proprietary concern, cannot arise. Noting, therefore, the distinction between the two situations and noting the manner and methods of the working of a body corporate and its organizational modalities, the provisions for nomination was made in 1976 to ensure that such member of the body" corporate who was directly responsible for any of the acts of such a body and had violated the provisions of Section 7, could not get scot free. Because, such body corporate according to Section 17 was also punishable in virtue of its own character though such punishment could obviously be in the nature of a fine by which, according to the legislature, the offence against public health could not be adequately punished or purged, as is apparent from Section 16, provision had, therefore, to be made by the amendment to bring home guilt and punish adequately such people as were real offenders according to the legislature.

10. Viewing thus the change in law I am of the opinion that in a case where a body corporate (Company, partnership, Cooperative Society etc.) is sought to be prosecuted ("proceeded against"), the condition precedent therefore must be fulfilled. The prosecutor must find out who was the "person" it terms of Sections 7, 16 and 17 dehors the body corporate itself, who could be "proceeded against" and punished, before commencing the proceedings. He must find out if there was any nomination made by such body corporate in terms of Sub-section (2) of

Section 17 and in accordance with R.12-B of the Rules, and if not, who was the person "in charge of and responsible to* the body corporate concerned for the conduct of its business. This question could not be left to be determined subsequently at the trial in a roving enquiry by arraigning other innocent persons. Such a procedure would be violative of Article 21 of the Constitution and indeed amended Section 17 therefore eschewed omnibus indictment necessitating roving inquiry. Because of the imputed liability only a single person in his character as a "partner" can be "proceeded against" and not all the partners of the firm generally. R. 12-B and Form VIII aforesaid make this position clear. He must therefore, name such "person" in the complaint and attribute to him in clear and specific term the vice of his office or his act or activity rendering him liable to be punished therefor. This, according to me follows from the decision of their Lordships in Ram Kishan's case 1983 Cri LJ 9) (SC) (supra). This also follows, in my opinion, from the language of amended Section 17 itself which must be construed in a manner as to make the legislative mandate portentously potent otherwise the legislative object is likely to be defeated which may be manifested, as in the instant case, in multiplicity of proceedings and protracted trials resulting in frequent discharges and acquittals. Even when any conviction is hopefully secured and in some case maintained by superior court through the same protracted processes, the purpose of the Act, in my opinion, cannot be said to be fully achieved. Legislature chose its weapon to fight the pernicious social evil and in my opinion it is manifestly deterrence which is writ large in the provisions of the Act. Could the weapon produce the desired result if it is blunted? The efficacy of the weapon lies in speedy punishment which only a speedy trial and flawless prosecution can produce.

11. For the foregoing reasons I find myself unable to uphold the impugned order in so far as the petitioner is concerned. The complaint on its face does not disclose that the petitioner was in charge of and responsible to, the accused No. 2 (M/s. B. G. Rice and Oil Mills) for the conduct of latter's business. Even Ext. 2 proved in this case does not fill up this lacuna. Indeed, as Mr. J. P. Bhattacharjee has rightly submitted, the said Ext. 2 is not a nomination form as contemplated under the Rules and in this case no such form at all has been filed or exhibited by the prosecution to attribute the guilt to the petitioner in terms of Section 17(1).

12. Accordingly, although I am quashing the charge against the petitioner, I would, however, like to make it clear that the trial of the other 2 accused, namely, Hanuman Singh and M/s. B. G. Rice and Oil Mills, shall proceed expeditiously and be completed if possible within a period of 2(two) months of the receipt of the records by the trial court. Let the records be sent down forthwith.

13. Now a post script to say why judgment in this case could not be delivered earlier. It is because of the judicial detour which took me away first to Imphal on the east and then to Agartala on the was leaving little time to sit at the Principal

Seat to fulfil this assignment.

14. I direct that a copy of this order be sent to the Director of Health Services, Assam. Indeed, a copy should also be sent to the Secretary, Law Department, Govt. of Assam as it appears to me that there is scope for amending the State Rules which may be considered by the appropriate authority. I say so because Assam Rules framed in 1960 do not apparently take note of the 1976 amendment of Section 17 and indeed Part II of the said Rules which deals with the powers and functions of the Food (Health) Authority and Local Authority does not at all prescribe the duties of the Food Inspector though by Section 24(2)(a) the State Govt. has been empowered to make rules in this behalf.