

(2017) 08 BOM CK 0203
In the Bombay High Court
Case No : 5503 of 2004

Bharat Puri, & Ors.

APPELLANT

Vs

The State of Maharashtra, & Anr.

RESPONDENT

Date of Decision : 03-08-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 482](#) - Saving of inherent powers of High Court
[Prevention of Food Adulteration Act, 1954](#), [Section 16](#), [Section 7\(1\)](#)

Citation : (2017) 08 BOM CK 0203

Hon'ble Judges : A. K. Menon

Bench : SINGLE BENCH

Advocate : Kirti Parekh, Henna Daulat, Prem J. Ranga, P.N. Dabholkar, G.H. Keluskar

Judgement

1. These two criminal applications under Section 482 of the Code of Criminal Procedure can be conveniently disposed of by this common order. The facts leading to the present applications are extracted from Application no. 5503 of 2004 and are set out as under : Applicant No.7 is Cadbury India Limited. They have also been impleaded as applicant Nos.8 and 9 in these applications because the original complaint names them separately with different addresses at which the applicant no.7 carries on business. Applicant No.1 was the Managing Director of Applicant no.7 at the material time. Applicant Nos.2 to 6 were Executive Directors of Applicant no.7. Respondent No.2 Pimpri Chinchwad Municipal Corporation filed a criminal complaint against the applicant no.1 - Mr. Cedric Vaz, nominee of applicant no.7 under the Prevention of Food and Adulteration Act, 1954 (the "Act"), directors of the Applicant no. 7 and one M/s. Indrayani Bazar a retail and grocery store selling various articles including chocolates and the office bearers of the said Indrayani Bazar.

2. It is contended that on or about 10th August, 2003 one Mr.Patil purchased a Cadbury milk chocolate and upon opening it he found a live insect inside. The

said Patil filed a complaint under the Act at Yamuna Nagar police station and the police Sub-Inspector communicated this fact to the Medical Health Officer of Respondent no.2 corporation. The Health Officer ordered samples to be taken from the said shop which were accused i.e. Indrayani Bazar - original accused no.12.

3. On 10th August, 2003 the complainant Patil along with the Food Inspector visited Yamuna Nagar and a panch, one Mangilal Choudhari, when the Chairman of Indrayani Bazar, Sanjay Thembre was present. The Food Inspector explained the purpose of his visit and purchased a number of samples of Cadbury milk chocolates weighing 13 gms and 25 gms manufactured at - applicant no.7's factory at Induri District. A panchnama was prepared and the complainant with the Food Inspector visited Yamuna Nagar police station, who examined 5 gms chocolates but did not find any insect at that time. The samples were then sent to the State Health Laboratory and Local Health Officer with detailed information. The public analyst reported presence of live grub and concluded that chocolate does not conform to standards of milk chocolate as per the Act. The chocolate was found to be unfit for human consumption. The Food Inspector forwarded the samples with all relevant correspondence to the Joint Commissioner of Food and Medical Administration, State of Maharashtra to file a complaint against all concerned.

4. On 16th December, 2003, the Joint Commissioner, Food and Medical Administration, State of Maharashtra gave sanction to file a complaint and around 18th December, 2003. A complaint came to be filed against Indrayani Bazar, its Chairman and the person nominated by the company under Section 17 read with Rule 12-B of the Prevention of Food and Adulteration Rules, 1954 (for brevity "Rules"). A consumer complaint was also filed by the said Hindurao Patil. Respondent No.2 also addressed a letter dated 23rd December, 2003 informing them that the complaint had been filed before the Judicial Magistrate at Akurdi. The Magistrate issued process and it is this issuance of process that has been challenged by the applicants invoking the inherent powers of this Court under Section 482 of the Code of Criminal Procedure and seeking process to be quashed.

5. Mr. Parekh, learned counsel appearing on behalf of the applicants in both these matters submitted that the applicants are being incorrectly prosecuted. In fact accused nos.22 and 23 were the same company but shown as carrying on business at different addresses. Applicant No.21 one Mr. Cedric Vaz was the "nominee" of applicant no.7 company and was responsible for the affairs of the company by virtue of his nomination under Rule 12-B of the Rules and under the Act. Respondent No.2 has also prosecuted the said Vaz. As far as prosecution against the present applicants are concerned, Mr. Parekh submitted that by an order dated 24th June, 2004 further proceedings in the trial Court were stayed upon Rule being issued.

6. Mr. Parekh further submitted that there is no substance in the complaint

against the applicants inasmuch as no prima facie case was made out against the present applicants for issuance of process. Quite apart from the fact that applicant no.7 company cannot be prosecuted thrice for the same complaint and for the alleged incident, there is no allegation of any overt act alleged against the applicants except the mention of their names in the cause title. There is no evidence as required under Section 17 of the Act by which the concept of vicarious liability could be invoked and fastened on the Directors especially since, as provided in Rule 12-B of the said rules, Mr. Vaz had been nominated by the company under the Act to be responsible for the affairs of the company.

7. According to Mr. Parekh the complaint has been filed to pressurize and harass accused nos.14 to 19 who are the Managing Director and other Executive Directors because it is not the case of respondent corporation that the aforesaid persons or applicants were responsible for conducting business of the company. It was further submitted that the complaint against Mr. Vaz could proceed and there was no occasion for the complainant to proceed against present applicants especially since the company had nominated the said Mr. Vaz.

8. In application No.5505 of 2004 the complaint was filed by the same person based on the same set of facts but a separate complaint was filed on account of the seizure of a 35 gms pack of the same chocolate.

9. In support of his contention Mr. Parekh has relied upon the following judgments : (i) Pepsico India Holdings Pvt. Ltd. vs. Food Inspector & Anr. (2011) 1 SCC 176

(ii) Kapil Wadhawan & Anr. vs. State of Maharashtra Criminal Application No.707 of 2011 dt. 27th July 2011

(iii) Adhiraj Amar Kannhaiyalal Sarin & Ors. vs. State of Maharashtra 2011(1)Mh.L.J. 769

(iv) Keki Bomi Dadiseth & Ors. vs. State of Maharashtra 2002(3)Mh.L.J. 246

(v) Corpn. Products Co. & Ors. vs. S.B. Shinde & Anr. Criminal Writ Petition No.807 of 1998 dt. 29th June, 2001

10. Mr. Parekh submitted that the complaint cannot be proceeded with in view of the specific provision that when a Manager is named under Rule 12-B, in absence of relevant facts alleging liability of individual Director and in absence of the complaint indicating as to whether the Directors had any role to play and whether they or any of them were in charge of day-to-day management and conduct of the business, it would not be appropriate that the Directors should be prosecuted. In the circumstances he submitted that the complaint against accused nos.1 to 6 could not be proceeded with. Mr. Parekh further submitted that the aforesaid Vaz has already been nominated and hence there was no occasion to permit the prosecution of other Directors against whom there was no specific complaint.

11. Mr. Parekh further submitted that in case of Kapil Wadhawan and Anr (supra) a Single Judge of this Court had allowed the criminal application for the same reason when the complaint reveal that the applicant as Director of the company was responsible for day-to-day affairs of the company and no specific role was attributed to the applicant. Similarly, in the case of Adhiraj Sen (supra) another Single Judge of this Court had also held in favour of the applicant to the effect that there was no role attributable to the Directors and only the Director(s) against whom such a role is attributable will be responsible. Mr. Parekh also relied upon a decision of the Keki Bomi Dadiseth (supra) and submitted that the prosecution of the Directors of the company for alleged violation of the provisions of the Act could not be sustained when there was no specific allegation or complaint which would demonstrate the consent or connivance by the Directors with regard to commission of offence.

12. In yet another decision of this Court Corn Products Co. (India) Ltd. (supra) the Court likewise held that the complaint itself did not contain a whisper of allegation and there was valid nomination held under Section 17 read with Rule 12- B and in absence of such specific allegations against the Directors it would not be open for the authorities to prosecute the Directors especially when there was a nomination under the Rules. He therefore submitted that the present application is liable to be allowed and the complaint against the applicants be quashed.

13. Mr. Keluskar, learned counsel appearing on behalf of the respondent - corporation opposed the application on the basis that the interpretation of the Act and the Rules the applicant is not correct. He submitted that the attempt of the applicants was to take shelter under the provision for nomination of an officer under Rule 12-B read with Section 17 and that nomination alone will not relieve the applicants of their liability. He submitted that nomination is factory/plant specific. It was not a general nomination on behalf of the company and that in the case of any entity if there are different factories/plants, the nomination is only in respect of a particular plant. He further submitted that in the instant case the offending product was manufactured at the Induri plant and the nomination of Mr. Vaz was only in respect of factory at village Induri. Mr. Keluskar referred to Exhibit-E to the application which is the nomination Form No.VIII under Rule 12-B of the said Rules. The said nomination form refers to the resolution passed in the said meeting held by the company and it made Mr. Vaz responsible for the factory at Induri. Therefore, according to Mr. Keluskar the complaint as filed against other accused is certainly maintainable.

14. According to Mr. Keluskar the offence has occurred at Indrayani Bazar, Sambhaji Nagar, Chinchwad and the complaint was filed at Chinchwad. According to Mr. Keluskar the complaint has been filed on the basis of bill produced by the vendor and accused nos.1 to 13 were jointly responsible for production, distribution and sale of the milk chocolate in which insect was found and which was not appropriate for human consumption. According to him accused nos.14 to

20 viz, the Managing Director and Executive Directors (the applicant Nos.1 to 7) are liable for punishment under Section 16 and 17, Section 7(1) read with Section 2(ia)(a) 2(ia)(f) of the Act and related Rules. He submitted that accused nos.21 who is the said nominee Cedric Vaz and the accused no.22 and 23 viz the company are also liable for punishment under Section 7(1) read with Section 2(ia)(a) and 2(ia)(f) and Section 16 and 17, 7(1) read with Section 2(ia)(a) and 2(ia)(f).

15. Mr. Keluskar submitted that the accused are all responsible for the offences and that the applications have no merit and deserves to be dismissed. In support of his submission he relied upon the case of Azim Premji and Ors. vs. State of Maharashtra 2002 (1) Mh.L.J. 668 wherein it was held that a separate license is required in respect of each area and nomination of management of Directors under Section 17(2) of the Act has to be filed with the Local authority having jurisdiction where the manufacture, storage, selling or distribution for sale is being carried out. He submitted that in the instant case the health authority has to examine whether nomination is in order and transfer of primary liability to nominee would be effective only when there is strict compliance and complete adherence to the provisions relating to nomination including filing of nomination with valid jurisdiction with the health authority. Mr. Keluskar therefore submitted that the applications are liable to be rejected.

16. I have heard counsel for the parties at length and before dealing with rival contentions it is necessary to consider the contents of the complaint, at Exhibit-B and its fair translation at Exhibit-D-1. Both counsel agree that the translation at Exhibit-D-1 is an accurate translation of Exhibit-D of the complaint originally which is in vernacular. The complaint alleges that accused nos.1 to 12 are liable for violation of Section 7(1) read with Section 2 (ia)(a) and Section 2(ia)(f). The aforesaid provisions are reproduced for ease :

"2 [(i-a)] "adulterated" an article of food shall be deemed to be adulterated---

(a) If the article sold by a vendor is not of the nature, substance or quality, demanded by the purchaser and is to his prejudice, or is not of the nature, substance or quality, which it purports or is, represented to be;

(b) If the article contains any other substance which affect, or if the article is so processed as to affect injuriously the nature, substance or quality thereof;

(c) If any inferior or cheaper substance has been substituted wholly or in part for the article so as to affect injuriously the nature substance or quality thereof;

(d) If any constituent of the article has been wholly or in part abstracted so as to affect injuriously the nature, substance or quality thereof.

(e) If the article has been prepared, packed or kept under in sanitary conditions whereby it has become contaminated or injurious to health;

(f) If the article consists wholly or in part of any filthy, putrid, rotten,

decomposed or diseased animal or vegetable substance or is insect-infested or is otherwise unfit for human consumption;

17. Accused nos.1 to 3 are the Chairman, Vice Chairman and Secretary of Indrayani Bazar, Vice Chairman and Secretary. Accused no.4 to 12 are the Directors of the said Indrayani Bazar. Indrayani Bazar and its Directors are not party to the present application. Accused no.13 is proprietor of Gupta Marketing which is distributor of the products of the company. He is accused of offence liable for punishment under Section 16, 7(1) read with Section 2(ia) and 2(ia)(f). Accused nos.14 to 20 are present applicants who are accused of violating Section 16, 17, 7(1) 2(ia) and 2(ia)(f) of the Act. Accused no.21 is nominee of the company and accused no.22 is company. Both are accused of violation of Section 7(1) read with 1955 Rules read with Section 2(ia)(a) and 2(ia)(f). The company once again shown as accused no.23 for violation of same sections and rules.

18. I am of the view that there is no justification in joining accused nos.22 and 23 repeatedly simply because there are different offices and factories from where the company operates. According to the complaint, the offence had occurred within jurisdiction of the Court at Akurdi. In these applications we are only concerned with the complaint against the present applicants. The relevant pleadings in the complaint as regards present applicants proceeds on the basis that accused nos.1 to 13 have committed offences by producing, distributing and selling of the chocolates. This is factually inaccurate since none of the applicant nos.1 to 13 are involved in the production of chocolates. To that extent the averment in the complaint is clearly erroneous. As far as present applicants are concerned there is not a single averment that by virtue of their having been Directors, they were engaged into the day-to-day affairs of the company. The complaint has dealt with various aspects of seizure of the product, manner of search, opening of chocolates in presence of the panchas, number of pieces sold and the amount paid for purchase of the chocolates in presence of panchas. It is also observed that stock of which samples were seized had not crossed expiry dates. The samples were then stored in model bottles and were labelled. The complaint records that on the basis of bills produced by the complainant, vendor information about the shop was collected and thereafter the Medical Health Officer had instituted the complaint and after receiving sanction from the Joint Commissioner, Food and Drug Administration the complaint was filed. There is no allegation in the complaint that the present applicants were engaged in the day-to-day affairs of the manufacture or distribution or storage of the product. There is nothing to connect the present applicants with these activities and on a regular basis. The decision in *Pepsico* (supra) deals with sweetened carbonated water (Pepsi) which allegedly contained residue of the pesticide carbofuran. It was alleged that the product was adulterated by violating standards prescribed by Directorate General of Health Services and the public analyst had so opined. The applicants" approached the High Court for quashing of criminal complaint. In the complaint filed against company the Directors were impleaded. The High Court refused to quash the complaint. In the course of submissions before the High

Court it was contended that the Directors would be liable vicariously and reference was made to the decision of the Supreme Court in *S.M.S. Pharmaceuticals Ltd. vs. Neeta Bhalla* (2005) 8 SCC 89 , wherein the question of vicarious liability was considered and it was held that a Director cannot be ipso facto be charged for responsibility of the company and for conduct of its business unless such fact was averred by the company. *SMS Pharmaceuticals* (supra) had made reference to the judgment of *MCD vs. Ram Kishan Rohtagi* (1983) 1 SCC 1 wherein it was held that vicarious liability did not extend to the Directors of the company who were not responsible to the company for its day-to-day business.

19. In paragraph 50 of the judgment in *Pepsico* the Supreme Court observed that in a complaint against the company and its Directors, the complainant has to indicate in the complaint itself whether the Directors are in charge or responsible to the company for day-to-day management or whether they were responsible to the company for conduct of its business. A mere bald statement that a person was a Director of the company against which certain allegations had been made was not sufficient to make such Director liable unless there were specific allegations regarding his role in the management of the company.

20. Furthermore, in paragraph 52 the Supreme Court considered the fact that the person had been nominated under Section 17(2) to be a person in charge of and responsible to the company for conduct of its business. Accordingly, the order impugned was set aside. In the case at hand is on similar lines inasmuch as Mr.Cedric Vaz has been nominated under Section 17(2) and Form VIII had been filed which clearly indicates that Mr. Vaz, Chief Manager Operations of Cadbury India Ltd. has been nominated to be in charge of and responsible to the said factory at Induri, Maharashtra. The complainant in the present case had specifically named the said nominee in the complaint. The complainant - respondent no.2 has expressly mentioned him by name. The company has also been named as accused no.22 (applicant no.8 herein). In the circumstances the contention of Mr. Keluskar that the judgment of this Court in *Azim Premji* (supra) and the observation therein that transfer of primary liability to the nominee would be effective when there is compliance, adherence and filing of the nomination within jurisdiction of the Local Health Officer does not in any manner help the respondent since in the instant case it is after inquiry into the facts that the complainant has chosen to file the complaint against the nominee Vaz by impleading him as accused no.21.

21. There is a specific averment is made in paragraph no.14(4) accused no.21 is liable for violation of Section 7(i) read with Section 2(ia)(a) and 2(ia)(f). Thus, the averment made consciously is that the said nominee is responsible for business of the company and as contemplated in the decision of the Supreme Court in *Pepsico* (supra). The decision in *Pepsico* (supra) has been followed by our Court in *Kapil Wadhwan* (supra) and *Keki Bomi. Dadisheth* (supra) which in turn has been followed in *Adhiraj Sarin* (supra). In *Keki Bomi Dadisheth* this Court observed that under scheme of Section 17 there are three categories in

which the accused can be found guilty. The persons nominated by the company can be held responsible for the company in conduct of business and any Director of the company can also be held responsible if it is proved that the offence had been committed which would demonstrate any aspect of consent or connivance in regard to commission of offence by the Directors or if even remotely the offence was attributable to any neglect on the part of such Director. In the instant case the complaint does not demonstrate nexus between the Director and the offence. There is nothing to show consent or connivance in regard to commission of offence which is attributable to the applicants. In the absence of such allegations in the complaint and in the facts of the present case it is not possible hold even prima facie that the allegation in the complaint are made out case against Director.

22. In *Corn Products* (supra) this Court quashed the process against the petitioner nos.2 to 9, who were Directors of the company since the complaint did not mention any offence being committed with consent or connivance by the Directors. In the case at hand the Respondents have maintained that the named nominee is responsible for the affairs of the company in relation to the Act at the material time. In the circumstances I am of the opinion that the contention of Mr. Keluskar, learned counsel for respondent no.2 corporation that notwithstanding impleadment of Cedric Vaz as nominee of the company and specific recognition of his being nominee of the Induri plant does not hold good to make him liable if at all. The contention of respondent no.2 to that it could prosecute all Directors of the company is in my view unsustainable. If the company and its Directors are to be prosecuted without specific material against them, it would run against the scheme of Section 17 read with Rule 12(b). The specific provisions are made to make the nominee accountable since it is company which has chosen to make him accountable and responsible for the business of the company. It is not possible to accept the contention of Mr. Keluskar that the product in question was not manufactured at Induri plant and therefore, nomination of Mr. Cedric Vaz is no longer relevant and that notwithstanding the fact that the complaint had been filed against him, it was now open to the complainant to proceed against all Directors.

23. The argument adopted by Mr. Keluskar, learned counsel appearing on behalf of respondent no.2 and based on the decision of *Azim Premji* (supra) does not entail that all the Directors can now be held responsible and prosecuted in the facts at hand. The complainant has chosen to implead the nominee and specific reference has been made against the nominee. The nomination of a said General Manager under Rule 12(b) is accepted by the respondent - corporation. The plea that the product in question was not manufactured at Induri plant but elsewhere and that Mr. Cedric Vaz has not been nominated for the other plant is obviously an after thought. In any case these are aspects that involve the merits of the case and cannot be gone into in these applications. In such case the Respondent would have accused such other nominee. According to Mr. Keluskar the offending product was found at Indrayani Bazar which is located in Sambhaji Nagar,

Chinchwad, whereas Mr. Vaz has been nominated at Induri plant. This by itself does not allow the Respondent a carte blanche to prosecute all the Directors of the company. In the circumstances the application 5503 of 2004 must succeed.

24. In application No.5505 of 2004 the complaint is identical. The allegations are also identical so are the accused persons. The nominee is also same person. The slight variation is in respect of the weight of the packets of chocolate seized. In one case the packet weighed 13 grams and in the other 25 grams. In the result all other facts being identical Application No.5505 of 2004 must also succeed.

25. In the circumstances I pass the following order :

(i) The proceedings in case No.9 of 2003 from the learned Judicial Magistrate, First Class I, Court at Akurdi, at Akurdi are quashed and set aside as against the applicants.

(ii) The proceedings in case No.10 of 2003 from the learned Judicial Magistrate, First Class I, Court at Akurdi, at Akurdi are quashed and set aside against the applicants.

(iii) The complaints against the accused no.21 nominee shall proceed in accordance with law uninfluenced by observations herein.

(iii) Rule made absolute in the above terms.