
(2010) 02 BOM CK 0122

In the Bombay High Court

Case No : Criminal Writ Petition No. 76 of 2010

Dilipsinh Bhatia

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 26-02-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 26
Penal Code, 1860 (IPC) — Section 273
Prevention of Food Adulteration Act, 1954 — Section 14, 14A, 16(1AAA), 16(4), 2
Prevention of Food Adulteration Rules, 1955 — Rule 32

Citation : (2010) 112 BOMLR 1249 : (2010) CriLJ 2014

Hon'ble Judges : P.R. Borkar, J

Bench : Single Bench

Advocate : C.R. Deshpande and Rashmi Hardas, for the Appellant; Suryawanshi, Assistant Public Prosecutor in Criminal Writ Petition No. 76/2010 and B.R. Khakale, Assistant Public Prosecutor in Criminal Writ Petition No. 77/2010, for the Respondent

Judgement

P.R. Borkar, J.—These two writ petitions raise identical question of facts and law, namely, whether possession of Gutka for sale constitutes offence punishable u/s 273 of I.P.C.

2. Heard Shri C.R. Deshpande, learned Advocate for the Petitioners and the learned A.P.Ps. Shri K.M. Suryawanshi and Smt. B.R. Khakale for the Respondent State in the respective Writ Petitions.

3. Rule. With consent of learned Counsel for parties, rule made returnable forthwith and both the petitions are taken up for final disposal.

4. Briefly stated, the facts are that on 9.9.2003, Police Constable Balu Ahirrao, Assistant Sub Inspector Shri Savkar, Police Constables Sarvashree Pravin Devare and Ashok Suryawanshi of Police Station Nardana, got information that in a motor truck bearing No. AP.09/KB.9002 plying on BombayAgra Highway from Indore to Dhule, gutka of Goa1000 Company was being brought to Maharashtra

from Indore. Therefore, after the said track came to Nardana, after crossing the border of Madhya Pradesh, it was stopped. The two panchas were called and in their presence truck was searched. On search and enquiry, it was found that the truck was owned by Dilipsinh Bhatia (petitioner in Criminal Writ Petition No. 76 of 2010) and petitioners in Writ Petition No. 77 of 2010 were driver and cleaner of the truck. In the search carried out, several packets bearing label of Goa1000 9 T 8 T and other labels and containing gutka packets were found. Those articles were seized under panchanama. Complaint was lodged under the provisions of Section 16(4) of Prevention of Food Adulteration Act, 1954, so also u/s 273 of the Indian Penal Code. Charge sheet was filed in the Court of the learned J.M.F.C. Shindkheda which was registered as R.C.C. No. 110 of 2003.

5. Pending trial of R.C.C. No. 110 of 2003, applications (Exhibits 29 and 27) were filed by the present petitioners seeking discharge. The learned Magistrate, by common order dated 21.6.2008, disposed of both the applications and discharged the petitioners accused of the offence punishable u/s 7 read with Section 26 of the Code of Criminal Procedure, 1973. However, he rejected the prayer for discharge so far as offence punishable u/s 273 of I.P.C. is concerned.

6. As against rejection of prayer for discharge from offence u/s 273 IPC, two Criminal Revision Applications bearing Nos. 146 and 142 of 2008 were filed by present petitioners in the Sessions Court, Dhule. However, both the revisions were dismissed by the learned Adhoc Additional Sessions Judge¹, Dhule by common order dated 26.11.2009.

7. Being aggrieved by the dismissal of revision applications, original accused have filed present Writ Petitions.

8. At this stage itself, reference to Section 273 of I.P.C. may be made. Section reads:

Section 273. Sale of noxious food or drink. Whoever sells, or offers or exposes for sale, as food or drink, any article which has been rendered or has become noxious, or is in a state unfit for food or drink, knowing or having reason to believe that the same is noxious as food or drink, shall be punished with imprisonment or either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

9. It is argued by Shri C.R. Deshpande, learned Advocate for the petitioners that Section 273 is a non cognizable offence and only in States of Uttar Pradesh and West Bengal, by State amendments, offence u/s 273 of IPC is made cognizable. Therefore, according Advocate Shri Deshpande, the prosecution against the petitioners does not survive. However, chargesheet was sent also for offence punishable under Prevention of Food Adulteration Act and as per Maharashtra amendment to Section 20 to the said Act, said offence is cognizable. The mandate of Section 20 is as follows;

20. Cognizance and trial of offences. (1) No prosecution for an offence under this

Act, not being an offence u/s 14 or Section 14A shall be instituted except by, or with the written consent of, the Central Government or the State Government or a person authorised in this behalf, by general or special order, by the Central Government or the State Government:

Provided that a prosecution for an offence under this Act may be instituted by a purchaser or recognized consumer association referred to in Section 12, if he or it produces in court a copy of the report of the public analyst along with the complaint.

(2) No court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the First Class shall try any offence under this Act.

(3) Notwithstanding anything contained in the Code of Criminal Procedure 1973 (2 of 1974), an offence punishable under Sub-section (1AA) of Section 16 shall be cognizable and non bailable.

10. It may be noted that as per Sub-section (2) of Section 20 of the Prevention of Food Adulteration Act, Police Officer below the rank of Inspector of Police is not authorized to arrest any person without warrant. So, in the facts of the present case, Assistant Sub Inspector was incompetent and, therefore, could not have effected the raid and that is one of the vital aspect of the matter, so far as taking of cognizance is concerned.

11. Secondly, Advocate Shri C.R. Deshpande relied upon the case of Godawat Pan Masala Products I.P. Ltd. v. Union of India AIR 2004 SC 405 and more particularly on paragraphs 67, 68 and also paragraph 77 which read:

67. We are, therefore, unable to agree with the contention that pan masala or gutka does not amount to "food" within the meaning of definition in Section 2(v) of the Act. However, we do not rest our decision solely on this issue.

Paradoxical consequence:

68. There is yet another reason why we are inclined to take the view that Section 7(iv) deals with a situation of emergency with respect to the local area. A decision for banning an article of food or an article containing any ingredient of food injurious to health can only arise as a result of broadly considered policy. If such a power be conceded in favour of a local authority like the Food (Health) Authority, paradoxical results would arise. The same article could be considered injurious to public health in one local area, but not so in another. In our view, the construction of the provision of the statute must not be such as to result in such absurd or paradoxical consequences. Hence, for this reason also, we are of the view that the power of the State (Health) Authority is a limited power to be exercised locally for temporary duration.

77. As a result of the discussion, we are of the view that:

1. Section 7(iv) of the Act is not an independent source of power for the State Authority.

2. The source of power of the State Food (Health) Authority is located only in the valid rules made in exercise of power u/s 24 of the Act by the State Government to the extent permitted there under;

3. The power of the Food (Health) Authority under the rules is only of transitory nature and intended to deal with local emergencies and can last only for short period while such emergency lasts;

4. The power of banning an article of food or an article used as ingredient of food, on the ground that it is injurious to health, belongs appropriately to the Central Government to be exercised in accordance with the Rules made u/s 23 of the Act, particularly, subsection (1A) (f);

5. The State Food (Health) Authority has no power to prohibit the manufacture for sale, storage, sale or distribution of any article, whether used as an article or adjunct thereto or not used as food. Such a power can only arise as a result of wider policy decision and emanate from Parliamentary legislation or, at least, by exercise of the powers by the Central Government by framing Rules u/s 23 of the Act;

6. The provisions of the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of the Trade and Commerce, Production, Supply and Distribution) Act, 2003 are directly in conflict with the provision of Section 7(iv) of the Prevention of Food Adulteration Act, 1954. The former Act is a special Act intended to deal with tobacco and tobacco products particularly, while the latter enactment is a general enactment. Thus, the Act 34 of 2003 being a special Act, and of later origin, overrides the provisions of Section 7(iv) of the Prevention of Food Adulteration Act, 1954 with regard to the power to prohibit the sale or manufacture of tobacco products which are listed in the Schedule to the Act 34 of 2003;

7. The impugned Notifications are ultra vires the Act and, hence, bad in law;

8. The impugned Notifications are unconstitutional and void as abridging the fundamental rights of the appellants guaranteed under Arts. 14 and 19 of the Constitution.

12. I have already reproduced Section 273 of I.P.C. above and the ingredients for constituting offence under this Section are (1) accused commits act of sales, or offer or exposes for sale, as food or drink, (2) such article has been rendered or has become noxious or has become unfit for food or drink and (3) during the sale or offer for sale or exposing for sale, accused knew or has reason to believe that the article is noxious as food or drink. The word "noxious" as stated in Advanced Law Lexicon by P. Ramanatha Aiyar (3rd Edition Reprint 2009), when used in relation to article of food is to mean that the article is poisonous, harmful to health or repugnant to human use.

13. As per Section 2(xv) of the Prevention of Food Adulteration Act, the words "unwholesome" and "noxious" when used in relation to an article of food mean

respectively that the article is harmful to health, or repugnant to human use. So, as per Prevention of Food Adulteration Act, noxious means repugnant to human use and there is nothing on record to show that gutka is repugnant to human use. In *R. v. Marcus* (1981) 2 All ER 833, 837, it is observed that "noxious" means something different in quality from and of less importance than poison or other destructing things. Noxious, according to Shorter Oxford English Dictionary means "injurious, hurtful, harmful, unwholesum". In *R. v. Cato*; *R. v. Morris*, *R. v. Dudley* (1976) 1 WLR 110, heroin is held to be "noxious thing" for the purposes of the Offences against the Person Act, 1861. In the matter on hand, it does not appear that, after the decision in *Godawat's* case (*supra*), the Central Government amended the Prevention of Food and Adulteration Act till this date to prohibit gutka or lay down standard for it.

14. Section 273 of IPC Indicates that article of food or drink must have been rendered noxious or has become unfit for food or drink. Therefore, having regard to language used in Section 273 noxious food or drink literally would mean article of food or drink which earlier was not noxious, but should have become noxious or had been rendered noxious by lapse of time or by not taking proper precaution or for not adding preservatives or like.

15. In the present cases, learned A.P.Ps. Shri K.M. Suryawanshi and Smt. B.R. Khakale have placed on record the report of the Deputy Director of Health Services, State Public Health Laboratory, Pune, dated 21.10.2003 together with its accompaniment sent to the learned A.P.P. by Assistant Police Inspector, Nardana Police Station, District Dhule, vide his forwarding letter dated 18.2.2010. The report indicates that the sample of gutka was prohibited u/s 7(iv) of the Prevention of Food Adulteration Act, 1954 vide F (H) A order dated 23.7.2002 and the sample did not bear batch number and date of manufacture which was in contravention of Rule 32 of the Prevention of Food Adulteration Rules, 1955. Thus, the report does not indicate that gutka was noxious article of food within meaning of Section 273 of IPC. The said report along with its accompaniments is taken on record and marked "X" for the purpose of identification and kept in Criminal Writ Petition No. 76 of 2010.

16. In the circumstances, in my view, these writ petitions must succeed. In the result, both the writ petitions are allowed. The impugned common order passed by the learned Judicial Magistrate, First Class, Sindhkheda, on 21.6.2008 rejecting applications at Exhibits 27 and 29 in R.C.C. No. 110 of 2003, as confirmed by the learned Adhoc Additional Sessions Judge1, Dhule vide order dated 26.11.2009 dismissing Criminal Revision Application Nos. 142 and 146 of 2008, is hereby quashed and set aside. Consequently, the Petitionersaccused are discharged also of the offence punishable u/s 273 of I.P.C.

17. Petitions disposed of. Rule made absolute, accordingly.