

(1995) 04 OHC CK 0026

In the Orissa High Court

Case No : Criminal Miscellaneous Case No. 1841 of 1994

Nestle India Limited

APPELLANT

Vs

Shri A.K. Chand, Food Inspector and Another

RESPONDENT

Date of Decision : 17-04-1995

Acts Referred:

Constitution of India, 1950 — Article 21
Criminal Procedure Code, 1973 (CrPC) — Section 482
Prevention of Food Adulteration Act, 1954 — Section 13(2)
Prevention of Food Adulteration Rules, 1955 — Rule 37, 37A, 37B

Citation : (1995) CriLJ 3053 : (1995) 1 OLR 639

Hon'ble Judges : A. Pasayat, J

Bench : Single Bench

Advocate : S.C. Lal, for the Appellant; Addl. Standing Counsel, for the Respondent

Judgement

A. Pasayat, J.—In this application u/s 482 of the Code of Criminal Procedure, 1973 (in short, the "Code"), legality of the proceeding in 2 (c) CC No. 153 of 1993 pending in the Court of Subdivisional Judicial Magistrate, Bhawanipatna (in short, the "SDJM") is under challenge. The said proceeding was initiated on the basis of prosecution report submitted by the Food Inspector. Bhawanipatna.

2. Background facts leading to the filing of the application are as follows :

On 18-9-1992, the Food Inspector visited business premises of Shri Motilal Jain, M/s. Samaleswari Agencies. Following food items amongst others were stored for sale.

- (a) 30 packets of Lactogen
- (b) 43 packets of Cerelac wheat Apple
- (c) 36 packets of Farex vegr.

The shopkeeper produced, purchase invoices before the Food Inspector to show

that first two items were purchased from M/s. Nestle India Limited, Cuttack and the last item from M/s. Glaxo India Limited. Cuttack depot. Since the food items were suspected to be adulterated and misbranded, he served written notice u/s 11(1)(a) of the Food Adulteration Act, 1954 (in short, the "Act") read with Rule 12 of the Food Adulteration Rules, 1955 (in short, the "Rules"). -Samples " were purchased from the shop-keeper the samples were sent to Public Analyst, Orissa for analysis. The Public Analyst prepared the analysis reports on .13-10-1992. The reports were received by the Food Inspector on 4-11-1992. Report Nos. 976, 977 and 978 of 1992 related to (a) Lactogen, (b) Cerelac wheat Apple, and (c) Farex Veg. respectively. According to the concerned report Lactogen was neither adulterated nor misbranded. But in respect of Cerelac wheat Apple, following were the findings :

(a) The sample was misbranded under Rule, 37 (b)(i) inasmuch as the picture of infant was appearing on the label.

(b) The sample of Cerelac wheat apple is adulterated in respect of crude fibre content.

On the basis of aforementioned findings, submitted after obtaining written consent of Local Health Authority. Though a plea was taken by the petitioner that the written consent was not filed along with the prosecution report, that was not perused, as on verification of records it was conceded that the plea was factually incorrect. Accusation in the prosecution report related to contra prosecution report was ventions, attracting culpability u/s 16(1), a (i), a (ii), relatable to Section 7 (i), (ii) and (v) read with Section 2 (ia) (a), (m), 2 (ix) (g), (k) of the Act, and Rule 37-B (i), with Rule 5 read with item A. 11.02.18 of Appendix-"B"- of the Rules. Learned SDJM took cognizance of offence punishable u/s 16(1)(a) (i), a (ii) of the Act.

3. According to petitioner, valuable right available to it u/s 13(2) of the Act was prejudicially affected because of delayed filing of the prosecution report. The life of the sample analyse was 9 months from the date of manufacture, as indicated in the packet itself. Even if petitioner would have opted for analysis by Public Analyst that would have been an exercise in futile. No explanation having been offered for the delay, prosecution is liable to be quashed. It is further urged that there is no contravention of Rule 37-B, as Cerelac wheat Apple is meaning food meant to supplement food for a baby more than four months of age. It is not a breast milk substitute-Learned counsel for the State submitted that the points urged by the petitioner are essentially to be adjudicated during trial and a case for interference u/s 482 of the Code is not made out.

4. When question relating to legality of order of cognizance is raised by an accused, proper course for him is to move learned Magistrate who took cognizance to show that further continuance of proceeding would be abuse of process of Court or that ingredients necessary to constitute an offence are absent even if accusations are accepted in toto. That would be in line with view

expressed by apex Court in *K. M. Mathew v. State of Kerala and Anr.* (1992) 5 OCR 66.

5. Exercise of power u/s 482 of the Code in a case of this nature is the exception and not the rule. The section does not confer any new powers on High Court. It only saves the inherent power which the Court possessed before the enactment of the Code. It envisages three circumstances under which the inherent jurisdiction may be exercised namely; (i) to give effect to an order under the Code, (ii) to prevent abuse of process of "Court, and (iii) to otherwise secure the ends of justice. It is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent -jurisdiction. No, legislative enactment dealing with procedure can provide for all cases that may possibly arise. Courts therefore, have inherent powers apart from express provisions of law which are necessary for proper discharge of functions and duties imposed upon them by law. That is the doctrine which finds expression in the section which merely recognizes and preserves inherent powers of High Courts. All Courts, whether civil or original, possess, in the absence of any express provision, as inherent in their constitution all such powers as are necessary to do the right and to undo a wrong in course of administration of justice on the principle *quando lex aliqui concedit, concedere videtur id sine quo ipsa, esse non potest* (when law gives a person anything it gives him that without which it cannot exist). The inherent jurisdiction of the High Court preserved in this section is vested in it by "law" within the meaning of Art.. 21 of the Constitution. While exercising powers under the section, the Court does not function as a Court of appeal or revision. Inherent jurisdiction under the section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself. It is to be exercised *ex debito justitiae* to do real and substantial justice for the administration of which alone Courts exist. Authority of the Court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice, the Court has power to prevent abuse. It would be an abuse of process of Court to" allow any action which" would result in injustice and prevent promotion of justice. In exercise of the powers Court would be justified to quash .any proceeding if it finds that initiation continuance of it amounts to abuse of process of Court or quashing of those proceedings would otherwise secure the ends of justice When no offence is disclosed by the complaint, the Court may examine the question of fact. When a complaint is sought to be quashed. It is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in to to. In exercising its jurisdiction, the High Court will not embark upon an enquiry as to whether the evidence in question is reliable or not. or whether on a reasonable appreciation of it accusation would not be sustained.

6. Section 13(2) of the Act Confers a valuable right on the accused to prove his innocence by getting the sample tested by the Central Food Laboratory. It is the

choice of the accused either to accept the Public Analyst's report or to get the sample analysed by the Central Food Laboratory. u/s 13(3) of the Act, the certificate issued by the Central Food Laboratory supersedes the report given by the Public Analyst. In case the sample is found by the Central Food Laboratory to be unfit for analysis due to decomposition due to passage of time or any other reason attributable to the conduct of the prosecution, the valuable right as referred to above would stand denied. That would constitute in itself sufficient prejudice to the accused so as to entitle him to acquittal. The apex Court held so in *Municipal Corporation of Delhi v: Ghisa Ram* 1975 (I) FAC 186. Delay in such cases plainly comes to the rescue of the accused. On the other Hand, if the sample continues to remain for analysis in spite of the delay, the accused is certainly not prejudiced notwithstanding such delay. Food adulteration is one of the most heinous crimes. It affects public health and no stones should be left untouched to prevent escape of any member of the adulterer tribe from the net of law. The liability in law is absolute with mandatory sentence but the conviction dependant on sophisticated chemical tests, compliance with rigorous requirements to ensure fair trial to the accused. Section 13(2) aims to provide that safety valve to him.

7. Whether sample collected would be decomposed after a certain time would depend on the nature of commodity. As observed . by the apex Court in *State of Tamilnadu v. Shanmugham Chettiar and Ors.* 1980 (2) FAC 187 *Dhadu Behera v. P.uri Municipality and Anr.* 1931 (II) OLR 241; and *Chamurulal Agarwala v. State of Orissa* : 34 (1992) OJD 78 no hard and fast rule can be laid down regarding any particular time after which sample would not be sent for analysis. The determinative factor would be the nature. of commodity.

8. The case at hand has some peculiar features. The Cerelac Wheat Appeal (Batch No. USAE 1) was manufactured in August, 1992. The package contained a declaration that- the Cerelac would be fit for consumption within 9 months from the date of manufacture". The outer limit would therefore extend to end of May, 1993 (by excluding the month August, 1992 from computation) Sample was collected on 18-9-1992, analysed by the Public Analyst on 13-10-1992, and report of the Public Analyst was received by the Food Inspector on 4-11-1992. Prosecution report was prepared on 4-9-1993, and complaint was instituted in the Court of SDJM, Bhawanipatna on 10-9-1993. Since the report itself was prepared and complaint lodged long after the period of fitness of consumption as indicated in the sample packet itself, analysis by the Central Food Laboratory, even if a request had been made therefore would have yielded no fruitful result. Taking into consideration, the nature of the commodity, I am inclined to hold that petitioner's valuable right conferred u/s 13(2) of the Act has been prejudicially affected and the continuance of the proceeding would serve no useful purpose.

9. In view of the aforesaid conclusion-, it is really not necessary to dilute the disputes touching that question, I But, considering large number of dispute touching that question, deem it necessary to deal with that question. Rule 37-B

which inter alia refers to Weaning food reads as follows :

"37-B. Labelling of infant foods :

Restriction on use of words or pictures on labels of infant foods:

(1) "The package and/or the label and/or the advertisement of infant milk food. Infant formula and any other special infant food marketed as breast milk substitutes, shall not have a picture of infant or picture of mother breast feeding infant or other forms of pictures or text which may idealise the use of such product, The terms "Humanised" or "Materialised" or similar expressions shall not be used.

The package and/or the label and or the advertisement of infant food shall also not use the word "Full Protein Food or "Health food" or similar expressions."

(2) In addition to the labelling requirements specified under Part-V11 and also where under the Prevention of Food Adulteration Rules 1955, the label and/or advertisement of every infant food package shall bear the following, namely :

A statement-

(i) in bold capital letter as follows:

Important Notice- Breast Milk is best for your Baby.

The colour of the statement shall be different from that of background text of label and/or advertisement. The statement shall be prominent and conspicuous in central panel of the label Whereas in case of weaning food the statement shall be prominent and conspicuous on any panel of the label: Provided further that in case of weaning food the statement shall be accompanied by the statement "from 4 months of age, give baby cereal food in addition to mother milk. The types of letters used shall not be less than 5 millimetres in all such declarations made on label.

(ii) indicating the process of manufacture (spray or roller dried) (except in case of weaning foods).

(iii). containing Instructions for "appropriate and hygienic preparation including cleaning of utensils, bottles teats.

(iv) warning against health hazards of inappropriate preparation as under:

"Infant Formula/Infant Milk food/Special infant food Warning/Caution-Careful and hygienic preparation of infant food is most essential for health. Do not use fewer scoops than directed, since dilute feedings" will not provide adequate nutrients needed by your baby. Do not use more scoops than directed since concentrated feed will not provide the water needed by your baby".

Weaning food. - "Warning/Caution-Careful and hygienic preparation as per directions given is most essential for good health of your baby";

- (v) indicating the approximate composition of nutrients per 100 g of product.
- (vi) indicating the energy value in K. Cal/Joules;
- (vii) indicating the storage conditions specifically stating "Store in cool and dry place in an air-tight container;;
- (viii) containing the feeding chart and direction for use and instruction for discarding left-over feed. Instructions for use of measuring scoop be explicit (level or heaped). Quantity per scoop be mentioned;
- (ix) Indicating the period by which the product is to be consumed;
- (x) to the effect that the Protein Efficiency Ratio (PER) shall be minimum of 2.5 if the product other than the infant milk food and infant formula is claimed to have high quality protein."

10. Appendix-B in serial A 11 : 02 : 18 : 02 indicates what cereal based weaning food is. It is a supplementary food and not a breast milk substitute. Rule 37-B(1) prohibits three things. Firstly, it prohibits having a picture of infant or picture of mother breast feeding infant or other forms of pictures or texts which may idealise use of such products, on packages and/of the label and/or the advertisement of infant milk food, Infant formula and any other special infant food marketed as breast milk substitutes. Secondly, use of terms like "humanised", or "maternalised" or similar expressions is prohibited. Thirdly, use of word "Full Protein Food", "Complete Food", or "Health Food- or similar expressions in package and/or the label" end/or the advertisement of infant food is prohibited. Under Rule 37-B in case of weaning food the statement required to be given, has to additionally contain a statement to the effect "from 4 months of age, give baby cereal food in addition to mother milk". The words "in addition" are very significant. They clearly show that weaning food is not a substitute for mother milk.

11. Rules 37-A and 37-B deal with weaning food differently. In case of the former Rule, as provided for in the Explanation, the expression "infant food" inter alia means any food which may be used for partial or total replacement of breast-milk, commonly called breast milk substitute and includes any food as a complement to breast milk, to meet nutritional needs of the infant after 4 months of age, commonly called "complementary food", "breast milk supplement", or "weaning food". Rule 37-3 relates to prohibitions in respect of infant milk food, infant formula and any other special infant food marketed as breast milk substitutes, and requirement of an additional statement in respect of weaning food. Definitions and standards of quality as prescribed in Rule A 11 : 02 : 18, A 11:02:18:01 deal with Infant Milk Food and Infant Formula respectively. As indicated (supra). A 11:02:18:02 deals with cereal based weaning food. For the purpose of Rule 37-A, the Explanation provides an inclusive definition of "infant food". It deals with an article of infant food whose standards are not prescribed in Appendix "B". Even in the case of Rule 37-A,"

the weaning food in order to be encompassed must be a food which may be used for partial or total replacement of breast milk and is called breast milk substitute, as is suitable as a complement to breast milk. The word "complete" in the context it is used means to fill up, that which is required to make up a deficiency, to make- something else perfect and complete, that which fills up or completes. The food has to be a "replacement" and "substitute", and Weaning food" is defined to be one. In order to attract application of Rule 37-B, the food must be a special infant food marketed as a breast milk substitute if it is not an infant milk food; or infant formula. "Substitute" means to put instead or, something put in the place of. Used instead of. It is clear from Section 37-B (2) (iv) that for the purpose of Rule 37-B, weaning food is not included in Infant formula Infant milk food, special Infant food referred to in Rule 37-B (1). The use of the expression in addition to mother milk is clearly indicative of the legislative intent that weaning food for the purpose of Rule 37-B is not considered as a partial or total replacement of breast milk, commonly called breast-milk substitute. Incidentally, views of Directorate General of Health Services in its letter dated 14-2-1992 (Annexure-4) may be referred to, though it is really not necessary or permissible to do so. It says that weaning-food is not covered by infant milk food. Infant formula, and other Special Infant food marketed as breast milk substitute.

12. The prosecution report itself shows that Cerelac Wheat Apple has been treated as a Milk Cereal Weaning Food to allege contravention of Rule 37-B. In view of the analysis made above, the allegation is indefensible in the result the petition is accepted, and the impugned complaint as well as subsequent proceedings arising therefrom are quashed.