
(2009) 03 KAR CK 0049
In the Karnataka High Court
Case No : Writ Petition No. 15119 of 2006

Raju Laxman Pachapure

APPELLANT

Vs

State of Karnataka and Others

RESPONDENT

Date of Decision : 17-03-2009

Acts Referred:

Prevention of Food Adulteration Act, 1954 — Section 16, 17, 2 (v), 7

Citation : (2009) CriLJ 3081 : (2009) 4 KarLJ 470 : (2009) 3 KCCR 101 SN :
(2010) 6 RCR(Criminal) 418

Hon'ble Judges : P.D. Dinakaran, C.J.;V.G. Sabhahit, J

Bench : Division Bench

Advocate : Basavaprabhu Patil for Srinand A. Pachhapure, for the Appellant;
Niloufer Akbar, A.G.A. for Respondent-1, K.N. Puttegowda, for Respondent-2,
K.G. Raghavan for G.K.V. Murthy and P.E. Umesh for Respondent-6 and Arvind
Kumar, Assistant Solicitor General for Respondent-7, for the Respondent

Judgement

P.D. Dinakaran, C.J.—The issue that arises for our consideration in W.P. No. 15119 of 2006, a public interest litigation filed in the year 2006, is whether respondent be directed to take appropriate action against 6th respondent-industry based on the representation of petitioner dated 11-9-2006 for manufacturing gutka product which undisputedly falls within the definition of "Food" defined u/s 2(v) of the Prevention of Food Adulteration Act, 1954 (hereinafter referred to as "PFA Act") on the ground the samples of gutka which is admittedly manufactured by 6th respondent contains use of anticaking agent viz., magnesium carbonate which is barred under Rule 62 of the Prevention of Food Adulteration Rules, 1955 (hereinafter referred to as "PFA Rules"), is a major public health hazard.

2. When the matter came originally for admission on 4-6-2008, this Court passed the following interim order:

We find it necessary in the public interest to issue an interim order directing the petitioner to give a written complaint on the issues raised in the writ petition to

the 3rd respondent-Commissioner, Food and Civil Supply Department, Government of Karnataka within one week from today. The 3rd respondent is directed to ensure that necessary enquiry is conducted and appropriate action is taken in accordance with law by the statutory authority having competence and jurisdiction to take such action. The action, if any taken in the matter shall be reported to this Court within three months from the date of submission of the complaint.

3. Pursuant to the said direction dated 4-6-2008, the Commissioner of Food and Civil Supplies and Consumer Affairs Department, Bangalore filed report dated 16-8-2008 which reads as hereunder:

With reference to the above mentioned writ petition and the interim order dated 4-6-2008, the petitioner has given a written complaint on 10-6-2008 to this office. A meeting was conducted with the officials of the Department of Health and Family Welfare on 23-6-2008 to ascertain who is the Competent Authority in this case (copy of the meeting proceedings is enclosed in Annexure-I).

Joint inspection was conducted and samples were drawn from M/s. Dhariwal Industries limited, Nos. 2, 3 and 4, Singasandra Village, Hosur Road, Bangalore-68 by the Competent Authority on 24-6-2008 (copy of the mahajar report is enclosed in Annexure-II). The samples were sent for analysis on 24-6-2008 (Annexure-III).

The analysis report dated 30-6-2008 is enclosed in Annexure-IV. Wherein it was observed that "the sample sent for analysis is adulterated as per Rule 62 of the Prevention of Food Adulteration Rules, 1955.

As a result, the Taluk Health Officer and Local (Health) Authority has reported that a case has been registered vide CC No. 1354 of 2005 by the jurisdictional Food Inspector of Health Department and local Health Authority, Bangalore South Taluk, Bangalore Urban District (Copy of letter is enclosed in Annexure-V).

The above information is submitted to your kind self with a request to submit it before the Hon"ble High Court for further action.

4.1 Mr. KG. Raghavan, learned Senior Counsel appearing for 6th respondent submits that the report dated 16-8-2008 in any way is not prejudiced to the 6th respondent because Rule 62 of the PFA Rules only bars using of anticaking agent in food articles, but will not render any food article as adulterous, if the anticaking agent viz., magnesium carbonate in the instant case gutka is already existing in the raw materials used for manufacture of such food material. In other words, it is contended that what is bar under Rule 62 is external use of magnesium carbonate as anticaking agent while manufacturing gutka, but Rule 62 does not prohibit using of raw materials which contains anticaking agent viz., magnesium carbonate.

4.2 In view of the above stand taken on behalf of 6th respondent, this Court again by order dated 16-10-2008 directed the analyst to get the raw materials

also tested and sought a report as to the percentage of magnesium carbonate in the raw material and passed the following order:

to send sample for analysis as to whether magnesium carbonate found in gutka manufactured by 6th respondent was added to gutka or the same as found in the raw materials naturally.

5. It is pertinent to note at this juncture that while passing the said order dated 16-10-2008, this Court has not rejected the earlier report dated 16-8-2008 referred to above, but only directed the Competent Authority to send the sample for analysis as to whether magnesium carbonate found in the gutka manufactured by 6th respondent was added to gutka or the same was found in the raw materials naturally, obviously in view of the submissions made on behalf of learned Counsel for 6th respondent.

6. Thereafter, the Chief Chemist and Public Analyst, Sheshadri Road, Bangalore, submitted report dated 24-11-2008 which reads as hereunder:

(1) Gutka sample: Proprietary food Lable declaration: Premium RMD gutka, packed on 6/2008, Batch No. A, Best before: within six months from the date of packed. Manufactured by: Dhariwal Industries Limited, Site Nos. 2, 3 and 4, Singasandra Village, Hosur Road, Bangalore-68

(2) Gutka sample: Proprietary food Lable declaration: Premium RMD gutka, packed on 10/2008, Batch No. B, Best before: within six months from the date of packing. Manufactured by: Dhariwal Industries Limited, Site Nos. 2, 3 and 4, Singasandra Village, Hosur Road, Bangalore-68 (Karnataka) India

(3) Betel nut sample: Sampled sample

The result of the sample Nos. (1), (2) and (3) are as follows.:

Method of Magnesium analysis	Date of sent for analysis	Presence of Carbonate	Percentage Magnesium analysis	No. the sample analysis	Sl. Name of analysis Carbonate
Kolkatta	30-6-2008	Detected	2.23%	1.	Gutka CFL,
Kolkatta	25-10-2008	Detected	0.32%	2.	Gutka CFL,
Kolkatta	19-11-2008	Not detected	-	3.	Betel nut CFL,

7. Since the report dated 24-11-2008 clearly showed that magnesium was deducted in Gutka samples (1) and (2) and hence declared as adulterated vide reference Nos. (1) and (2) and magnesium carbonate was not detected in Betel nut sample, a direction was issued on 22-1-2009 to 6th respondent to stop the production, selling, distribution and marketing of the gutka product till the disposal of petition.

8. But the 6th respondent reported that when the direction dated 22-1-2009 was passed, they could not represent and therefore this Court by order dated 6-2-2009 kept the earlier order dated 22-1-2009 in abeyance.

9.1 In the meanwhile, the Public Health Institute, Sheshadri Road, Bangalore addressed another report dated 19-11-2008 to the Taluk Health Officer, collecting six samples for analysis of presence of magnesium carbonate on 10-11-2008 and the said report reads as hereunder:

sample	Method	Percentage of Presence of	No. sent for analysis	Sl. Name of analysis	
magnesium				carbonate	
CFL,	Kolkatta	4.64%	Not	1. Tobacco detected	
CFL,	Kolkatta	1.22%	Not	2. Betel nut detected	
Kolkatta		17.74%		3. Lime CFL, Detected	
whole	CFL,	Kolkatta	1.98%	Not	4. Cardamom detected
(Edible)	CFL,	Kolkatta	1.22%	Not	5. Catechu detected
Kolkatta		2.33%	Not		6. Saffron CFL, detected

Opinion.-The added magnesium carbonate is not detected in all the above samples sent for analysis.

9.2 The above report dated 19-11-2008 only refers to percentage of magnesium carbonate in the raw material used for the manufacture of gutka.

10.1 In this connection, it is apt to refer the following definitions of PFA Act:

2. (ia) "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 is purports or is represented to be;

(b) if the article contains any other substance which affects, 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 insanitary 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;

(g) if the article is obtained from a deceased animal;

(h) if the article contains any poisonous or other ingredient which renders it injurious to health;

(i) if the container of the article is composed, whether wholly or in part, of any poisonous or deleterious substance which renders its contents injurious to health;

(j) if any colouring matter other than that prescribed in respect thereof is present in the article, or if the amounts of the prescribed colouring matter which is present in the article are not within the prescribed limits of variability;

(k) if the article contains any prohibited preservative or permitted preservative in excess of the prescribed limits;

(l) 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 renders it injurious to health;

(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:

Provided that, where the quality or purity of the article, being primary food, has fallen below the prescribed standards or its constituents are present in quantities not within the prescribed limits of variability in either case, solely due to natural causes and beyond the control of human agency, then, such article shall not be deemed to be adulterated within the meaning of this sub-clause.

Explanation.-Where two or more articles of primary food are mixed together and the resultant article of food.:

(a) is stored, sold or distributed under a name which denotes the ingredients thereof; and

(b) is not injurious to health,

then, such resultant article shall not be deemed to be adulterated within the meaning of this clause;

...

Section 2(v) deals with "food" means any article used as food or drink for human consumption other than drugs and water and includes.:

(a) any article which ordinarily enters into, or is used in the composition or

preparation of human food;

(b) any flavouring matter or condiments; and

(c) any other article which the Central Government may, having regard to its use, nature, substance or quality, declare, by notification in the Official Gazette, as food for the purposes of this Act.

10.2 Section 7 deals with prohibitions of manufacture, sale, etc. of certain articles of food. Section 16 deals with penalties, Section 17 deals with offences of the companies, Section 18 deals with forfeiture of property and Section 22-A deals with powers of Central Government; Section 23 provides powers of Central Government to make Rules and Section 24 provides power of the State Government to make Rules.

10.3 Exercising powers conferred u/s 23 of the PFA Act, PFA Rules, 1955 were framed. Rule 62 imposes restriction on use of anticaking agents and the same reads as hereunder:

62. Restriction on use of anticaking agents.-No anticaking agents shall be used in any food except where the use of anticaking agents is specifically permitted:

Provided that table salt, onion powder, garlic powder, fruit powder and soup powder may contain the following anticaking agents in quantities not exceeding 2.0 per cent, either singly or in combination, namely.:

(1) carbonates of calcium and magnesium;

(2) phosphate of calcium and magnesium;

(3) silicates of calcium, magnesium, aluminium or sodium of silicon dioxide;

(4) myristates, palmitates or stearates of aluminium, ammonium, calcium, potassium or sodium:

Provided further that calcium, potassium or sodium ferrocyanide may be used as crystal modifiers and anti-caking agent in common salt, iodized salt and iron fortified salt in quantity not exceeding 10 mg/kg singly or in combination expressed as ferrocyanide.

10.4 Exercising power conferred u/s 22-A, the Central Government by proceedings dated 13-7-2006 passed the following order:

It has been reported to this ministry that magnesium carbonate, an anticaking agent, is used in gutka in contravention to Rule 62 of the PFA Rules, 1955.

It may please be ensured that wherever a licence has been issued to gutka or similar product as proprietary product, it shall not contain magnesium carbonate.

Action taken in the matter may please be intimated to this directorate.

11.1 When certain queries were raised by 6th respondent by its application dated

7-1-2007 addressed to 7th respondent herein with reference to usage of impugned anticaking agent namely magnesium carbonate, the 7th respondent in their proceedings dated 22-3-2007 had replied as hereunder:

----- Issues raised
Reply to these issues
----- 5. Is it true
the use of "Magnesium There is no data that Magnesium Carbonate" is permitted
in different Carbonate as such is carcinogenic, food articles including infant food
Magnesium Carbonate is permitted under the Prevention of Food as anticaking
agents in some food Adulteration Act, 1954 and Rules articles under Rule 62 of
the PFA thereunder? Rules, 1955. However, Magnesium Carbonate is not
permitted to be added in infant food.
----- The
standards of gutka have not been prescribed under the PFA Rules, 1955 and
addition of Magnesium Carbonate in gutka is, however, not permitted under
the PFA Rules, 1955.
----- The food
additives sub-committee considered the issue and felt that the CCFS has already
recommended ban of gutka on the ground of it being potential health
hazardous chewing products hence it was not proper to go into the issue of the
role of magnesium carbonate as an additive in gutka. A relevant extract of the
minutes of the food additive sub-committee is enclosed.
----- 6. Whether
there is any scientific - do - data available with you that magnesium carbonate is
carcinogenic and causes cancer? Being Supreme Authority, have you given any
special instruction to the Food (Health) Authority and Commissioner of Food and
Drugs Administration, Maharashtra State that licence shall not be issued till the
standards are fixed for gutka in reference to use of magnesium carbonate?
----- 7. Whether it
is true that the - do - ingredients used in the preparation of gutka contain
magnesium carbonate naturally, which reflected in analysis report?

(emphasis supplied)

11.2 It is relevant to note the reply by 7th respondent to the 6th respondent wherein in its proceedings dated 22-3-2007 referred to above, namely, that magnesium carbonate is permitted as anticaking agent in some articles under Rule 62 of the PFA Rules has to be read with reference to the direction issued by Central Government by proceedings dated 13-7-2006 exercising power u/s 22-A of the PFA Act, where the Central Government has specifically clarified that reference to Rule 62 of the PFA Rules, it should be ensured that wherever licence has been issued to gutka or similar product as proprietary product, it shall not contain Magnesium Carbonate. The reason would be even as per Rule 62 of the PFA Rules that no anticaking agent shall be used in food except where the

anticaking agent is specifically permitted thereunder. The provision permits usage of magnesium carbonate as anticaking agent only in table salt, onion powder, garlic powder, fruit powder and soup powder, but not in any other food articles and the same is also restricted not exceeding 2%.

12. In the light of reports referred above, Sri Basava Prabhu Patil, learned Senior Counsel appearing for the writ petitioner submits that since it is apparent on the face of reports dated 16-8-2008, 24-11-2008 and 19-11-2008 referred to above, that Gutka manufactured by 6th respondent contains anticaking agent viz., magnesium carbonate which is not permissible in law and in any event magnesium carbonate is found to be in excess than what is permissible i.e., 2% even in the case of table salt, onion powder, garlic powder, fruit powder and soup powder, hence action should be initiated against 6th respondent and therefore seeks issue of writ of mandamus directing respondents 1 to 5 to consider the representation dated 11-9-2006 at Annexure-E, directing respondents 1 to 5 to take action against respondent 6-industry.

13.1 Sri KG. Raghavan, learned Senior Counsel appearing for 6th respondent, per contra submits that gutka even though falls within the definition of "food" is not covered by provisions of PFA Act but only covered under the provisions of Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 and therefore Rule 62 of the PFA Rules is not applicable nor the direction issued by Central Government dated 13-7-2006 exercising power conferred u/s 22-A of the PFA Act are applicable to gutka.

13.2 In this regard learned Senior Counsel strongly placed reliance on the decision of Apex Court in Godawat Pan Masala Products I.P. Ltd. and Another Vs. Union of India (UOI) and Others, .

13.3 It is further contended that in absence of any Rules made under the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003, except for labelling and packing, neither the Central Government nor the State Government can take any action against 6th respondent banning manufacture, storage, distribution and sale of gutka. In any event, the respondents having already initiated criminal action against 6th respondent, no order could be passed against 6th respondent to ban manufacture, storage, distribution and sale of gutka.

14. Smt. Niloufer Akbar, learned Government Advocate placing reliance on the reports dated 16-8-2008, 24-11-2008 and 19-11-2008 referred to above contended that since gutka which is being-manufactured, stored, distributed and marketed contains magnesium carbonate which is prohibited under Rule 62 of the Rules, both the State Government as well as Central Government are empowered to take appropriate action against 6th respondent.

15. Sri Basava Prabhu Patil, learned Senior Counsel appearing for petitioner and

Sri Arvind Kumar, learned Assistant Solicitor General appearing for 7th respondent contend that reliance placed on the decision of Godawat Pan Masala's case is not applicable to the facts of the case as the question raised in the said decision is whether Maharashtra Government can frame Rules and Regulations under the PFA Act exercising the Rule making power u/s 24 of the PFA Act, when manufacture, sale, storage and distribution of gutka are governed under the Special Enactment Act 34 of 2003. It is also contended that the said decision do not bar the powers of State and Central Governments to take action against those who violates the provisions of PFA Act and the Rules framed and directions issued thereunder.

16. We have given careful consideration to the submissions of all the parties.

17. It is true the Apex Court in Godawat Pan Masala's case held that mere traces of magnesium carbonate formed during consumption of product along with lime cannot be banned, but in the instant case anticaking agent viz., magnesium carbonate is not found during consumption but the analytical report discloses that magnesium carbonate is contained in the very sample which, in our considered opinion may be either externally added or present in the raw materials. Whatsoever the case may be, the report discloses that there is usage of anticaking agent viz., magnesium carbonate in the food article in question namely gutka. That apart Supreme Court in the very same decision held that the provisions of PFA Rules framed and directions issued thereunder cannot be said as not applicable merely because licence is contemplated for manufacture of gutka under the Cigarettes and other Tobacco Products (Prohibition of Trade and Commerce, Production, Supply and Distribution) Act, 2003. The PFA Act was legislated for the prevention of adulteration of food whereas Cigarettes and other Tobacco Products (Prohibition of Trade and Commerce, Production, Supply and Distribution) Act, 2003 is intended to prohibit advertising and to regulate the trade and as such there is no conflict between the legislative objects between the two enactments.

18. Based on the materials available on record, we are of the opinion that the facts and circumstances in Godawat Pan Masala's case is not in any way similar to the grievance of the petitioner and the relief sought for in the present writ petition. In any event, since both the State and Central Governments are parties before us and the analysis report disclose that the impugned food article gutka contains magnesium carbonate, an anticaking agent and also as criminal action is already taken against 6th respondent in this regard, in that view of the matter, we are of the considered opinion that it is suffice for this Court to direct respondents 5 to 7 to take appropriate action against 6th respondent strictly in accordance with law under the relevant statute.

Writ petition is ordered accordingly.