

(2008) 12 GUJ CK 0044
In the Gujarat High Court

Case No : Criminal Revision Application No. 177 of 1999

Satyanarayan Bishandayal and Another	APPELLANT
Vs	
State of Gujarat and Another	RESPONDENT

Date of Decision : 26-12-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 377(3)
Prevention of Food Adulteration Act, 1954 — Section 2
Prevention of Food Adulteration Rules, 1955 — Rule 29

Citation : (2009) 1 GLH 627 : (2009) 2 GLR 1762

Hon'ble Judges : C.K. Buch, J

Bench : Single Bench

Advocate : Benajir, for Anil S. Dave, Nos. 1 and 2, for the Appellant; H.L. Jani, Assistant Public Prosecutor for Respondent No. 1 and Satyam Y. Chhaya, for the Respondent

Final Decision : Allowed

Judgement

C.K. Buch, J.—This Criminal Revision Application is preferred by the petitioner challenging the judgment and order dated 22-2-1999 delivered by the learned Additional City Sessions Judge, Court No. 22, Ahmedabad in Criminal Appeal No. 46 of 1994 confirming the judgment and order dated 18th October, 1994 delivered by the learned Metropolitan Magistrate, Court No. 8, Ahmedabad in Criminal Case No. 31 of 1989.

2. Heard Ms. Benajir appearing for Mr. A.S. Dave, learned Counsel for the petitioner and Mr. H. L. Jani, learned A.P.P. for the respondent No. 1 State. Mr. Satyam Chhaya, learned Counsel appearing for the respondent No. 2 (original-complainant) is absent when the matter is called out.

3. Earlier, when this matter was listed, submissions in part were made by Ms. Benajir. However, she had sought time to cite decisions to convince the Court that the petitioner could not have been held guilty for committing offence of selling misbranded food article or adulterated food article. I have heard Ms.

Benajir today afresh. She has taken me through the complaint, judgment and order of conviction and sentence passed by the learned Metropolitan Magistrate, Court No. 8, Ahmedabad and confirmed by the learned Additional Sessions Judge, Court No. 22, City Sessions Court, Ahmedabad.

4. Through the record and proceedings available with the Court, Ms. Benajir has taken me through the complaint filed by the respondent No. 2 and the evidence led by prosecution including report of Public Analyst (Exh. 2) which was tagged with the original complaint (Exh. 1). Opinion given by the Public Analyst was that sample of Kharek with silver foil does not conform to the standards and provisions laid down under the provisions of Food Adulteration Rules, 1955. According to Ms. Benajir, according to complaint, the applicant was prosecuted for selling misbranded food article and sample therefore was sent for analysis, and therefore, the applicant was not facing prosecution for selling adulterated food article.

5. For the sake of arguments, even if it is considered that use of aluminium foil amounts to adulteration, then also, the prosecution was under obligation to prove two material things to bring home the charge that there was clear prohibition of using the aluminium foil on the food article of which sample was taken by the complainant and/or the same was injurious to health. In more than one decision of this Court and other Courts, it is held that use of aluminium foil on food article like sweets or chocolates is not injurious to health nor there is any statutory prohibition of using such foil. It is therefore submitted that the petitioner could not have been held guilty of selling adulterated food article to the complainant. There is no such averment in the complaint itself that the complainant was deceived by the accused that he was being given Kharek covered with silver foil. It is also not the case of the complainant that he had purchased any packet having description that Kharek packed inside is covered with silver foil. So, it is very likely that aluminium foil may have been used to make food article attractive and not for any other purpose. This idea or probability has not been considered by any of the lower Courts. The learned Sessions Judge was assisted by more than one judgment wherein it is held that use of "aluminium foil is not injurious to health nor it is prohibited. But the reason assigned by the learned trial Judge to treat the article as misbranded is based on bare words of the complainant that he had purchased the food article Kharek as sample considering the said article as covered with or decorated with silver foil. For the sake of argument, even if it is accepted that the bill contains the words "Ruperi Kharek", then also it should not be construed that seller intended to sell the article under the pretext that the same is covered with only silver foil, because, the words "Ruperi" or "Soneri" are also used in vernacular Gujarati to describe the sample qua its simple look or colour and in absence of statutory prohibition, a food article can be decorated similarly by using either silver foil or aluminium or glittery foil. It is submitted that the conviction, thus, is not either legal or can be said to be based on logical or legal appreciation of evidence. She has drawn attention of the Court to the judgment of Bombay High

Court in the case of State of Maharashtra v. Ramkishan Gangadin Yadav and Anr. reported in 1980 (1) PFAC 107 wherein, the respondent accused was found selling Barfi stuck with aluminium foil instead of silver foil. The accused was acquitted by the lower Court. The Bombay High Court was dealing with the acquittal appeal preferred by the State of Maharashtra and the Court dismissed the appeal observing that there was no statutory provision of using aluminium foil nor aluminium foil was injurious to health, and therefore, it cannot be said to be adulterated. Another judgment relied upon by the learned Counsel for the petitioner is in the case of State of Gujarat v. Rasiklal Amedbhai Shah and Anr. reported in 1993 (1) GCD 591. In the said case, this Court was dealing with the appeal preferred by the State praying for enhancement of sentence u/s 377(3) of Code of Criminal Procedure. Charge against all the accused was that they had used aluminium foil in decorating Dudhi Halwa instead of silver foil. The Court found that no report or evidence was there nor it was alleged that aluminium foil was injurious to health. In the present case also, no such averment is there in the complaint that aluminium foil is injurious to health nor it is mentioned in the complaint clearly that the complainant was sold Kharek under the brand that the same is covered with or decorated with silver foil. Learned Counsel also relied upon one more decision of this Court in the case of Iqbal Musabhai Hunani v. State of Gujarat and Anr. reported in 1993 (1) PFAC 62. In the said case, sample of Khajur quoted with silver foil was taken and on analysis, it was found to be quoted with aluminium foil. Of course, the accused was prosecuted for selling adulterated food article, but relying on the decision of the Bombay High Court referred to hereinabove, this Court allowed the revision application quashing the conviction recorded by the learned Chief Judicial Magistrate, Bulsar and confirmed by the learned Additional Sessions Judge, Bulsar at Navsari. Two concurrent findings recorded by the learned Courts below were quashed by this Court. It is rightly submitted that ratio of this judgment would positively help the petitioner and the petitioner deserves acquittal. Fourth judgment relied upon by the learned Counsel is in the case of State of Gujarat v. Mahadevpuri Ratanpuri delivered by this Court in Criminal Appeal No. 558 of 1992 on 22nd August, 2003. In the said case, sample of Chocolate Barfi was taken from the accused and the allegation against the accused was that Chocolate Barfi, instead of silver foil, was covered/decorated with aluminium foil. The learned trial Judge decided to acquit the accused and the State preferred an appeal against the order of acquittal. Relying upon the judgment in the case of Iqbal Musabhai (supra), this Court, while dismissing the Criminal Appeal No. 558 of 1992, preferred by the State, observed thus:

In the instant case what has been sold to the Food Inspector is chocolate burfi quoted with apparently silver foil, but on analysis the Public Analyst found the same to be aluminium foil and not silver foil. There is no evidence adduced by the prosecution to the effect that aluminium foil was injurious to health, the use of such foil for coating barfi would not make the article of food adulterated. The main article of food in the instant case is barfi, silver foil probably appears to

have been used to quote presumably for decorative purpose. Instead of silver foil what was found was aluminium foil. In absence of any evidence or report to the effect that aluminium foil is injurious to the health, it cannot be said that use of aluminium foil to quote barfi was in any manner injurious to health of its consumers.

6. One more judgment relied upon by Ms. Benajir is in the case of State of H.P. Vs. Sainu Ram, In the said case, accused was prosecuted for selling adulterated food and it was Barfi decorated with aluminium foil. Aluminium foil is not edible. However, there was nothing on record to show that aluminium foil or consumption of aluminium foil was injurious to health and there was no prohibition of its use for decoration of Barfi. It would be beneficial to reproduce relevant Paras 8 and 9 of the above judgment.

There is no denying that no standard has been prescribed under the Act and/or the Rules framed thereunder for "Barfi". The Public Analyst has found the sample of "Barfi" to be adulterated since it contained aluminium foil, which is not edible. The alleged adulteration, on the face of it, does not fall within the ambit of Sub-clauses (e) to (1) of Section 2(ia) of the Act.

9. Be it stated that the Public Analyst in the present case in his report Ex. P.W. 1/H has not stated that the aluminium foil used by the respondent in decorating the "Barfi" was injurious to health.

7. Considering the above cited decisions and the judgment of the first appellate Court, on evaluating the evidence, observations made by this Court in the case of Rasiklal Amedbhai Shah and Anr. (supra) are found relevant. Learned Sessions Judge in the said case has observed that accused Rasiklal Amedbhai was prosecuted for selling adulterated food article. In the present case, the accused is prosecuted for selling misbranded article. True, it is that in Para-11 of the judgment in case of Rasiklal Amedbhai and Anr. (supra), as stated above, the prosecution has not lodged any case of misbranding and in absence of any case of misbranding, obviously there was no necessity to consider or state the accusation pertaining to misbranding of the article of food. This observation by itself would not make conviction recorded by both the lower Courts either valid or legal. Proceedings were well before the first appellate Court as a case of misbranded food article. Sample was sent to the Public Analyst as "Kharek with silver foil" (packed theli). As per the evidence of the complainant, quantity in that "packed theli" was 200 grams and value of the same was quoted to the complainant as Rs. 5/- and the same was purchased. It is stated in the evidence that this plastic bag was not containing any label or writing stating that silver foil is used to decorate it. So, both the learned lower Courts were bound to appreciate the bare words used by the complainant and panch witness examined and the talk that may have taken place between the complainant and the accused at the time when sample of food article was sold to the complainant. The complainant says that the food article was sold to him telling that the same has been covered with silver foil. Here, it would be necessary to consider the

definition of the word "misbranded" defined u/s 2 of the Food Adulteration Act. For the purpose of present case, Sub-clauses (d) and (e) of Clause (ix) of Section 2 would be relevant, because it is the say of the prosecution that article was made to appear better or of greater value than it really was, because, if is referred as food article quoting covered with silver foil and if it is found to be in aluminium foil, then, prosecution can legitimately argue that consumer or customer has been misled by misbranding. Clause (e) relates to false claim if made upon the lable or otherwise. Here, case of the prosecution is that there was no lable or writing on the plastic container, but the say of the complainant is that he was verbally told about the use of silver foil, therefore, the prosecution can say that otherwise, the complainant was told about the use of silver foil. Food article weighing 200 grams sold at the cost of Rs. 5/-, whether would convince any man of reasonable prudence that such food article could be available in market if it is covered with and decorated with silver foil.

8. It appears that this version of the complainant ought not to have been believed as reliable piece of evidence for linking the accused with the crime otherwise, the complainant could not have positively insisted that the bill of sample of food article conforming use of silver foil is issued accordingly. Exh. 10, which is Cash Memo given by the proprietor of Ganesh Trading Company simply describes in Hindi as "Kharik Warkh Saath". Rest of the documents, i.e. Receipt of 3 packets given to the complainant and contents of Form 6 prepared by the complainant ought to have been evaluated in the background of the word used in the Cash Memo, the master document, given by the accused. True, it is that more than one witness have stated that the accused was selling Kharek posing it to be covered with silver foil. But documentary evidence Exh. 10, which is the backbone of the prosecution, does not reflect that the food article sold as decorated by or covered with silver foil would make the oral evidence weak piece of evidence. It also appears that the accused was selling Pan Masala and other articles and pieces of Kharek were there in small packet having decoration. The word "warkh" used in Hindi is used for metallic leaf. It may be of gold or golden, it may be of silver or of any white leaf capable of decorating food article which is not otherwise injurious to health. But in this fact situation and considering the totality emerging from the evidence and the submissions made by Mr. H. L. Jani, learned A.P.P., who is resisting this revision on behalf of the State, the Court is of the view that the petitioner-accused could have been given benefit of doubt. This Court is not convinced that intention of the accused was to sell food article, i.e. Kharek purchased by the complainant in presence of panchas as misbranded article otherwise by telling the complainant that the same is decorated with silver foil. It was possible for the complainant to insist upon use of the word "silver" before the word "warkh". When he has mentioned this word in the document prepared by him, then, why he had not insisted that the vendor should use the words "chandi ka warkh" i.e. silver foil at the time of purchasing the sample. If the petitioner accused was pretending that he is selling Kharek decorated with silver foil, then, these words could have been got written on the Cash Memo

itself, i.e. document Exh. 10. No artificial sweetening agent was found on the article. Artificial colouring matter was in accordance with Rule 29. Test for silver foil was negative. However, test for aluminium foil was positive. Test for canesugar was also found positive.

9. Food article was sent to Central Food Laboratory and the report of Analyst is at Exh. 4 which is relevant and test carried out for presence of aluminium metallic foil was found positive and qua silver metallic foil test was negative. The prosecution instituted against the accused was under the allegation that the accused had sold misbranded article and report of C.F.L. showed that the sample showed presence of aluminium foil in the product and the sample is adulterated. So, finding of food article being misbranded by the Public Analyst would not help the prosecution and so far as the impeachment of adulteration is concerned, the above cited decisions are clear reply. Both the learned Courts below ought to have said that the prosecution cannot succeed for the reason that prosecution is selling misbranded food article and C.F.L. has not opined that the article can be said to be misbranded within the meaning of Clause (ix) of Section 2 of the Act. Report of public analyst, obviously, can be said to have been superseded by the report of the C.F.L. So, finding of both the lower Courts cannot be said to be in accordance with the opinion expressed by the Central Food Laboratory. The petitioner accused was never prosecuted for selling adulterated article and there are no contents or allegations in the complaint in this regard. This also would tilt the balance in favour of the petitioner.

10. Technically speaking, prosecution could have also stated that adding of canesugar was something else than Kharek sold. However, the complainant has not prosecuted the accused on that count. Test for canesugar was positive, whether accused could have been prosecuted for either selling misbranded food article or adulterated food article are the questions. But it is not necessary to make any comment on this aspect when the Court is convinced with inadequacy of convincing cogent evidence to link the accused with the crime for selling misbranded article, and therefore, the petitioner-accused deserves acquittal.

11. The Court is conscious that jurisdiction of the revisional Court is limited, more particularly in a case when the Court is dealing with a case where two concurrent findings of fact are recorded, but when use of aluminium foil is not prohibited under Prevention of Food Adulteration Act or Rules framed thereunder, the learned trial Judge as well as the first appellate Court were required to evaluate the evidence very closely, because, in such a case, main star witness i.e. complainant is a witness interested in the result of the case.

12. The revision is, therefore required to be allowed and is accordingly allowed. Judgment and order dated 22-2-1999 delivered by the learned Additional City Sessions Judge, Court No. 22, Ahmedabad in Criminal Appeal No. 46 of 1994 confirming the judgment and order dated 18th October, 1994 delivered by the learned Metropolitan Magistrate, Court No. 8, Ahmedabad in Criminal Case No. 31 of 1989 is hereby quashed and set aside. Rule is made absolute. Bail-bond

shall stand discharged.