

(1998) 09 GUJ CK 0019
In the Gujarat High Court

State of Gujarat

APPELLANT

Vs

Bhagchand Sadhumal and Another

RESPONDENT

Date of Decision : 18-09-1998

Acts Referred:

Bombay General Clauses Act, 1904 — Section 28
Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 12, 13(2)
Criminal Procedure Code, 1973 (CrPC) — Section 103, 275, 276, 278
Evidence Act, 1872 — Section 10(7), 114, 68
General Clauses Act, 1897 — Section 27, 28
Prevention of Food Adulteration Act, 1954 — Section 10(7), 11(1)(b), 13(2), 14, 16

Citation : (1999) 3 GLR 2220

Hon'ble Judges : B.C. Patel, J

Bench : Single Bench

Judgement

B.C. Patel, J.—State, being aggrieved by an Order of acquittal passed on 29-9-1990 by Judicial Magistrate, First Class, Junagadh in Criminal Case No. 5022 of 1984 wherein the accused were tried for an offence punishable u/s 7 read with Section 16 of the Prevention of Food Adulteration Act, has preferred this appeal.

2. On 2-8-1984, complainant Babulal Patel, P.W. 1 visited the shop of the accused No. 1 who was dealing in food Articles. In the presence of panch Ambalal Nagjibhai, P.W. 2, after giving introduction to the accused No. 1, Food Inspector collected a sample of chilly powder from him under a panchnama. The sample was collected from a plastic bag whereon name of the accused No. 2 was printed. One of the sample bottle was forwarded to the Public Analyst for analysis and on being found that the sample contained non-permitted coaltar dye, the Public Analyst opined that the sample is adulterated. On receiving the report, after launching the prosecution, the copy of the same was forwarded to the accused in compliance with Section 13(2) of the Act. On appreciation of the evidence, the trial Court acquitted the accused, and hence the State has preferred this appeal.

3. The trial Court held that the sample was not collected in the manner provided in Section 11(1)(b); That there was delay by the Public Analyst in forwarding the report and hence there was breach of Rule 7(3) of the Rules; That dry and clean bottles were not used and hence there was a breach of Rule 14; That panchas being hostile, it cannot be said that the sample is collected in compliance with Section 10(7) of the Act, and so far as accused No. 2 is concerned, intimation as required u/s 13(2) of the Act is wanting. The trial Court, therefore, held that the benefit of doubt must be given to the accused, and accordingly, acquitted the accused.

4. The Food Inspector has stated on oath that there were about 20 plastic bags, each containing one kg. of chilly powder. On the plastic bag the name of "Shri Mahalaxmi Masala Bhandar, Gondal" as the manufacturer and that the product is "laboratory tested" were, printed. On the bag, in another label, date manufacturing as 21/5, and date of expiry as 21/1, lot number 2 were also printed. Accused No. 1 produced before the complainant and in the presence of panch a copy of bill Exh. 15, stating that the Article of food in question was purchased from Mahalaxmi Masala Bhandar. He has further stated that one bag was opened from which by means of dry and clean spoon, on a dry and clean paper, 150 gms. chilly powder was taken out thrice; Thereafter, the same was put in dry and clean and transparent glass bottle in accordance with Rules. The trial Court held that 150 gms. Of chilly powder was taken in three bottles separately and that the Food Inspector has not divided the entire quantity of 450 gms. in three equal parts; therefore, no reliance can be placed on the report of the Public Analyst on a sample so collected.

5. Section 11(1)(b) is the relevant section in this regard, which reads as under:

11(1) When a Food Inspector takes a sample of food for analysis, he shall-

(a) xxx xxx xxx xxx (b) except in special cases provided by Rules under this Act, divide the sample then and there into three parts and mark and seal or fasten up each part in such a manner as its nature permits and take the signature or thumb-impression of the person from whom the sample has been taken in such place and in such manner as may be prescribed.

6. There is lengthy cross-examination of the Food Inspector but there is nothing to show that he took three times separately 150 gms of chilly powder and put each part in three bottles separately. This argument is even otherwise required to be rejected as the purpose of dividing the sample into three equal parts is to ensure that the contents of the three bottles are identical in nature and substance, and the sample sent to the Public Analyst for analysis is a representative of the bulk of the Article which was being sold from which the sample was obtained. In the case of Martand v. Hasanbhai reported in 1978 GLR 957, this Court considered a case where vegetable ghee was purchased from the same container by the Food Inspector in three parts instead of one bulk in 1500 gms. This Court held that the vegetable ghee purchased from the same container

could not differ in nature or substance. The Court, therefore, held that the procedure followed by the Food Inspector while purchasing the sample of ghee was not in any way contrary to the requirements of Section 11(1)(b) of the Act. In the instant case, from one container or bag, samples were collected and even if instead of collecting 450 gms. Of chilly powder from the bulk and then dividing it into three equal parts of 150 gms., the Food Inspector has purchased separately 150 gms. Of chilly powder thrice, the nature and substance would not vary for the simple reason that the same has been purchased from the same container. If from three different containers 150 gms., each of sample was collected, then the matter would have been different. In view of this, the trial Court has seriously erred in holding that there is breach of provisions contained in Section 11(1)(b) of the Act.

7. The trial Court also came to the conclusion that there is breach of Rule 7(3) of the Rules. The said Rule reads as under:

7(3) The public analyst shall, within a period of forty days from the date of receipt of any sample for analysis send by registered posts or by hand to the Local (Health) Authority a report of the result of such analysis in Form III.

7.1 It is submitted by the learned Advocate for the accused that the Public Analyst has not forwarded the sample within a period of forty days from the date of receipt. In the instant case, the Public Analyst received the sample on 4th August 1984 which was analysed on 28th August 1984; the report was received by the office of the Local (Health) Authority on 19-9-1984. The purpose of statutory requirement of forwarding the report is to ensure that there is no delay in launching the prosecution if the sample is adulterated. The delay may lead to protraction of trial and ultimate decision which causes harassment to the accused and also affect public interest. To avoid such consequences, provision has been made to forward the report within the time stipulated. However, as to the purpose of a particular provision, the consequence of holding a provision to be mandatory or directory, the public mischief sought to be avoided, the period is prescribed, and that is only with a view to see that there is initiation of prosecution within a reasonable period. In having caused a delay, whether prejudice is caused or not is to be seen from the facts of each case. If the sample remains fit for analysis, it cannot be said that any prejudice is caused and prosecution cannot be rejected on the ground that Public Analyst's office has caused delay in forwarding the report. The Apex Court in the case of T.V. Usman v. Food Inspector reported in 1994 (1) GLH 420 held in paragraph 11 as under:

In Rule 7(3) no doubt the expression "shall" is used but it must be borne in mind that the Rule deals with stages prior to launching the prosecution and it is also clear that by the date of receipt of the report of the Public Analyst the case is not yet instituted in the Court and it is only on the basis of this report of the Public Analyst that the authority concerned has to take a decision whether to institute a prosecution or not. There is no time-limit prescribed within which the prosecution has to be instituted and when there is no such limit prescribed then there is no

valid reason for holding the period of 45 days as mandatory. Of course that does not mean that the Public Analyst can ignore the time-limit prescribed under the Rules. He must in all cases try to comply with the time-limit. But if there is some delay, in a given case, there is not reason to hold that the very report is void and on that basis to hold that even prosecution cannot be launched. May be, in a given case, if there is inordinate delay, the Court may not attach any value to the report but merely because the time-limit is prescribed, it cannot be said that even a slight delay would render the report void or inadmissible in law. In this context it must be noted that Rule 7(3) is only a procedural provision meant to speed up the process of investigation on the basis of which the prosecution has to be launched. Therefore, it must be shown that the delay has led to the denial of right conferred u/s 13(2) and that depends on the facts of each case and violation of the time-limit given in Sub-rule (3) of Rule 7 by itself cannot be a ground for the prosecution case being thrown out.

7.2 In view of what is stated above, there is no substance in the contention raised by the learned Advocate to support the findings recorded by the trial Court that on account of delay in forwarding the report to the Local (Health) Authority, the prosecution case requires to be thrown out and the accused is required to be acquitted.

8. The trial Court also erred in appreciating the concept of warranty. Section 19 is for protection of the vendors. However, Sub-clause (2) of Section 19 is relevant, which reads as under:

19(2). A vendor shall not be deemed to have committed an offence pertaining to the sale of any adulterated or misbranded Article of food if he proves-

(a) That he purchased the Article of food-

(i) In a case where a licence is prescribed for the sale thereof, from a duly licensed manufacturer, distributor or dealer:

(ii) In another case, from any manufacturer, distributor or dealer, with a written warranty in the prescribed form; and

(b) That the Article of food while in his possession was properly stored and that he sold it in the same state he purchased it.

8.1 The trial Court seems to have shifted the burden on the prosecution to prove that the accused No. 1 has purchased the Article of food from accused No. 2 and as the prosecution has not proved, the benefit requires to be given to the accused No. 1. It was the case of accused No. 1 that he purchased the Article of food from accused No. 2. It is for the accused No. 1 to prove that he purchased the Article of food with a written warranty as contemplated in Section 19(2) of the Act and that the Article of food, while in his possession, he stored it in the same condition as he purchased it.

8.2 Rule 12-A refers to warranty, which reads as under:

12-A. Every manufacturer, distributor or dealer selling an Article of food to a vendor shall give either separately or in the bill, cash memo or label, a warranty in Form VI-A.

8.3 Thus, reading Section 19(2) and Rule 12-A, it becomes clear that if the vendor wants to take up a defence with a view to exonerate himself, then it is for him to prove that he purchased the Article of food with a written warranty in terms of Rule 12-A. It is for the vendor to prove that he purchased from the manufacturer as contemplated u/s 19(2) of the Act. It was submitted before the Court that on the container, name of the manufacturer was printed and it was also mentioned on the label that it was laboratory-tested, and therefore, it could be said that the goods were supplied by accused No. 2 with a written warranty.

8.4 In the case of M/s. Murlidhar Shyamlal and another Vs. State of Assam, , on the container there was a printed label reading as "New Rice & Oil Mill, Raha, pure mustard oil (Biswanath Brand) nett wt. 16 kg." The Apex Court in paragraph 9 held as under:

It would only indicate that the packed tin containing the same weighing 16 kg. (nett) with a printed label on it "New Rice & Oil Mill, Raha, pure mustard oil (Biswanath Brand) nett wt. 16 kg." was stored for sale in the said premises. From this, it is contended that the appellant had the warranty and that, therefore, by operation of Section 19(2) read with Rule 12-A, the appellant is absolved of his liability to be prosecuted for sale of the adulterated Article of food. We are afraid that we cannot accept the contention. In view of the above warranty as envisaged under Form VI-A, there must be specific mention therein by the dealer or distributor or manufacturer, that the Article of food sold was in the same nature and quality of the Article of food, as the case may be. Then only he would get acquitted, though the Article of food was found adulterated. It would be then open to the prosecution to proceed against the manufacturer, dealer or distributor.

8.5 In the instant case, neither the accused No. 1 nor anyone on behalf of the accused No. 1 has entered the witness box to prove the warranty and/or bill.

8.6 It was submitted by the learned Advocate for the accused that in view of proviso to Section 14, the bill is deemed to be a warranty. The said section with proviso reads as under:

14. No manufacturer or distributor of, or dealer in any Article of food shall sell such Article to any vendor unless he also gives a warranty in writing in the prescribed form about the nature and quality of such Article to the vendor:

Provided that a bill, cash memorandum or invoice in respect of the sale of any Article of food given by a manufacturer or distributor of, or dealer in such Article to the vendor thereof shall be deemed to be a warranty given by such manufacturer, distributor or dealer under this section.

8.7 However, in the instant case, even the bill is not proved by leading evidence.

Therefore, there is no question of considering that submission. It was submitted that the bill is produced on record along with a label, money receipt and the warranty which is in the handwriting along with a list Exh. 81. After seeing the bill, learned Advocate for the accused No. 1 was not able to establish the identity of the Article mentioned in the bill and the Article of food which was taken as sample. It is obvious that as held by the Apex Court in the case of Murlidhar (supra), the warranty is not proved. Even the cash memo does not contain the warranty as prescribed in Form VI-A. The Apex Court in the case of Murlidhar (supra) in para 10 held as under:

In this case, we cannot make any guess as to what would be the nature of the language used in the cash memo which was not filed in the absence of any specific recital therein. As in the recital of the panchnama, there is no mention thereof as envisaged in Form VI-A. Under these circumstances, we are constrained to confirm the conviction and sentence of minimum period of six months; it being mandatory after the Amendment Act, 1976, we cannot interfere with the sentence.

9. Learned Advocate submitted that the panch has turned hostile, and therefore also, the accused need to be acquitted.

9.1 The Apex Court in the case of Babu Lal Hargovindas Vs. The State of Gujarat, has pointed out that the Food Inspector is not an accomplice. The Apex Court observed as under, in paragraph 5 of the judgment:

Even otherwise, in our view no question of the trial being vitiated for noncompliance of these provisions can arise. It is not a Rule of law that the evidence of the Food Inspector cannot be accepted without corroboration: He is not an accomplice nor is it similar to the one as in the case of Wills where the law makes it imperative to examine an attesting witness u/s 68 of the Evidence Act to prove the execution of the Will. The evidence of the Food Inspector alone if believed can be relied on for proving that the samples were taken as required by law. At the most, Courts of fact may find it difficult in any particular case to rely on the testimony of the Food Inspector alone though we do not say that this result generally follows. The circumstances of each case will determine the extent of the weight to be given to the evidence of the Food Inspector and what in the opinion of the Court is the value of his testimony. The provisions of Section 10(7) are akin to those u/s 103 of the Criminal Procedure Code when the premises of a citizen are searched by the Police. These provisions are enacted to safeguard against any possible allegations of excesses or resort to unfair means either by the Police Officers or by the Food Inspectors under the Act. This being the object it is in the interests of the prosecuting authorities concerned to comply with the provisions of the Act, the non-compliance of which may in some cases result in their testimony being rejected.

The Apex Court further observed in the said paragraph that:

While this is so, we are not to be understood as in any way minimising the need

to comply with the aforesaid salutary provisions. In this case, however, there is no justification in the allegation that the provisions have not been complied with because the Panch witness had been called and his signatures taken which he admits. In these circumstances the Courts were justified on the evidence of the Food Inspector that he had complied with the requirements and that the samples were seized in the presence of the Panch witness whose signatures were taken in the presence of the accused.

9.2 The Apex Court, in the case of State of U.P. v. Hanif reported in held as under in paragraph 4 of the judgment:

It is not the law that the evidence of Food Inspector must necessarily need corroboration from independent witnesses. The evidence of the Food Inspector is not inherently suspected, nor be rejected on that ground. He discharges the public function in purchasing an Article of food for analysis and if the Article of food so purchased in the manner prescribed under the Act is found adulterated, he is required to take action as per law. He discharges public duty. His evidence is to be tested on its own merits and if found acceptable, the Court would be entitled to accept and rely on to prove prosecution case. If in a given case where the factum of the very purchase is put in question and any personal allegations are made against the Food Inspector, perhaps it may be necessary for the prosecution to dispel the doubt and to examine the Panch witnesses seeking corroboration to the evidence of the Food Inspector.

9.3 In the instant case, signatures of panchas and accused were taken which could not be denied. There are no allegation against the complainant of basis or mala fide. The Food Inspector took the sample in discharge of his duties. In the circumstances, the submission that the Food Inspector's evidence cannot be accepted also has no merit and deserves to be rejected.

10. The trial Court has also erred in coming to the conclusion that there is noncompliance of Section 13(2) of the Act as the Postman is not examined by the prosecution. The trial Court relied on the decision of this Court in the case of Vadhere Devubhai Govindji Vs. Rameshwarpuri Ratanpuri, .

10.1 In the instant case, there is sufficient evidence to show that intimation notice Form VI was forwarded to the accused No. 2 and the same was returned as the accused No. 2 refused to accept the same. In the instant case, it is very clear that the registered letter was posted at the correct address. There is an endorsement of refusal by the postman. Once the evidence discloses that the letter was addressed at a proper address by registered post, then unless it is rebutted or the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of post, it is to be presumed that there is proper service. If the addressee either cannot be met or refused to take delivery, there appears to be no reason why the notice should not be considered as properly served on the addressee. The Courts have expressed views that if the addressee rebuts the presumption by his statement on oath, the veracity of

such statement is to be considered in the light of the other evidence available on the record as also conduct of the party. In the ordinary course, the Postman will produce the letter before the addressee and the endorsement made by the Postman of refusal is presumed to mean the refusal by the addressee himself.

10.2 A Full Bench of this Court in the case of Memon Adambhai Haji Ismail Vs. Bhaiya Ramdas Badiudas and Others, held that on the basis that a mere endorsement of refusal found on the returned registered envelope without being substantiated by any evidence of the postal peon who went to deliver the letter, a statutory rebuttal presumption of fact that the addressee had in fact refused to accept the delivery of the letter can be raised under the provisions of Section 114 of the Evidence Act. In paragraph 7 of the judgment in the case of Adambhai (supra), the Court held as under:

(1) That on the proof of the facts that a prepaid, properly addressed letter containing the document was sent by a registered post, a presumption u/s 27 of the General Clauses Act or Section 28 of the Bombay General Clauses Act arises that the registered letter reached its destination at the proper time and was received by the addressee.

(2) The words "unless the contrary is proved" govern both the parts of Section 27 or 28 of the said Act and the presumptions arising there under are rebuttable.

(3) That the mere production in Court of an unopened envelope of a registered letter bearing an endorsement of refusal does not by itself rebut the presumption arising u/s 27 or 28 of the General Clauses Acts.

(4) That the Court may raise a presumption u/s 114 of the Indian Evidence Act on the basis of the postal endorsement of refusal on the envelope that the registered letter was tendered to the addressee, that he refused to accept the same and that he knew the contents of the letter. The said presumption can be rebutted by the addressee by leading evidence to the satisfaction of the Court. The provisions of Section 12 of the Rent Act makes no difference. If the envelope bearing the postal endorsement is marked as an exhibit in the case, then question relating to the proof thereof cannot be raised for the first time in an appeal or a revision that is filed against the decree in the suit in which the envelope is exhibited.

(5) That the Court may raise a presumption u/s 114 of the Evidence Act on the basis of the postal endorsement marked on the envelope of a registered letter, even though the author thereof is not examined as a witness.

(6) The presumption arising u/s 114 of the Evidence Act relates to official acts being done in a regular manner and if the Court is not in a position to raise such a presumption in respect of the endorsement, the Court should not exhibit the endorsement but exhibit only the returned envelope and in that case the evidence of returned envelope is itself sufficient to rebut the presumption of the letter being received by the addressee which arises u/s 27 of the General Clauses

Act or Section 28 of the Bombay General Clauses Act and Section 114 of the Evidence Act.

10.3 In the case of Vadhere Devubhai Govindji Vs. Rameshwarpuri Ratanpuri, , the Court considered the denial by the addressee that the defendant-tenant never refused to accept the service of notice and that should have been held sufficient to rebut the presumption arising on account of the endorsement of the refusal on the registered Article. In that case, the Postman was examined wherein he stated that he knew the defendant by his address but he did not know him personally. There was also evidence that the defendant was working in a factory and working hours were from 7-00 a.m., to 8-00 p.m. The Court also noted that as per evidence, the Postman had gone to deliver the Article at about 9-30 a.m. In view of the evidence, it was clear that the working hours of the defendant was from 7-00 a.m. to 8-00 p.m., during which period the postman went to deliver the Article. It is under this circumstance that the Court held that there is conflicting presumptions.

In the instant case, the trial Court ought to have considered the facts of the case before coming to the conclusion.

11. In the case of Jagdish Singh v. Natthu Singh reported in AIR 1979 SC 1604, notices were no doubt actually not served on the appellant as they had come back unserved upon the alleged refusal of the appellant to accept them. The High Court relied upon the averments in the notices which could be treated as a part of the plaint having been referred to and relied upon therein. The Apex Court confirming the view of the High Court held that the notice must be presumed to have been served as contemplated u/s 27 of the General Clauses Act. In the instant case, presumption being not rebutted, it is required to be held that the intimation as contemplated u/s 13(2) of the Act has been reached to the accused No. 2.

12. At the fag-end, learned Advocate for the accused submitted that there is non-compliance of Rule 14 inasmuch as the bottles which were used for collecting the samples were not dry and clean.

13. In the evidence of the Food Inspector, he has stated that the samples were collected in dry and clean bottles. However, in the cross-examination, he has stated that the stoppers were not cleaned at that time. He has further stated that the cleaned stoppers were taken with him. He has also stated that the bottles were brought by the Peon. He was also questioned whether the bottles were cleaned on the spot or not. In answer to that question, it appears to have been stated by him that it is not correct to say that the bottles were not cleaned on the spot. The tenor of the evidence indicates that wherever suggestion was made and it was accepted as correct, the trial Court has written the sentence as "it is true that...", i.e., in the affirmative form. Wherever suggestion was made and was denied the trial Court has recorded it as "It is not true...", i.e., in the negative form. So far as the cleaning of the bottle is concerned, the sentence

does not begin with either "It is not true" or "It is true". The evidence is not correctly written so far as this aspect is concerned as the last word is not completely written. With regard to the spoon used, the trial Court has not proceeded in the positive or negative form but has stated that on the spot the spoon was not cleaned. With regard to the bottles, possibly, the witness must have answered that it is false to say that the bottles were not cleaned on the spot. However, in Gujarati language, the evidence recorded reads as : "bottlesthal upar saaf karel nathi thei kho_che".

Thus, the evidence is not clearly written. In the last words, "kho _ che" (), middle letter is missing and the tenor of first letter is such that it is difficult to reject the contention raised by defence Advocate. Benefit must go to the accused. If that be so, there is no convincing evidence that the bottles used for collecting the samples were clean and dry.

14. Criminal Procedure Code, (in Chapter XXIII, Section 278) requires that "As the evidence of each witness taken u/s 275 or Section 276 is completed, it shall be read over to him in the presence of the accused, if in attendance, or of his pleader, if he appears by pleader and shall, if necessary be corrected". This section further provides that "if the witness denies the correctness of any part of the evidence when the same is read over to him, the Magistrate or Presiding Judge may, instead of correcting the evidence, make a memorandum thereon of the objection made to it by the witness and shall add such remarks as he thinks necessary". In the instant case, the Court has not followed this procedure. Otherwise, the Court would have realised at that time whether mistake is committed in recording the evidence or not and witness would have pointed out the correctness or otherwise. In several warrant trial cases I have come across cases where evidence is not read over to the witness. It is the duty of the Presiding Officer recording the evidence to see that the evidence is read over and breach of this provision is required to be considered as a serious breach on the part of the Judicial Officer.

15. In the instant case, the fact remains that the bottles were brought by the Peon and when the bottles were brought in the office is not certain; When the bottles were cleaned is also not certain. Therefore, it is difficult to say that the samples were collected in clean and dry bottles.

16. In the result, the appeal fails and is dismissed.