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**(1988) 06 GUJ CK 0012**  
**In the Gujarat High Court**

State of Gujarat

APPELLANT

Vs

Jitendra Gangadas Parekh

RESPONDENT

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**Date of Decision :** 16-06-1988

**Acts Referred:**

Prevention of Food Adulteration Act, 1954 — Section 16, 16(1A)(i), 16(1A)(ii), 16(7)(ii), 2(ia)(j)

Prevention of Food Adulteration Rules, 1955 — Rule 22A, 29

**Citation :** (1988) 2 GLR 1244

**Hon'ble Judges :** I.C. Bhatt, J;G.T. Nanavati, J

**Bench :** Division Bench

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## Judgement

G.T. Nanavati, J.—These two appeals arise out of the judgment and order passed by the learned Additional Sessions Judge, Baroda in

Criminal Appeal No. 89 of 1980 whereby he acquitted the present respondent-original accused. The respondent-accused had filed the said appeal

against the order of conviction and sentence passed by the learned Judicial Magistrate, First Class (Municipal), Baroda in Criminal Case No. 5387

of 1979. Criminal Appeal No. 520 of 1981 is filed by the State against the order of acquittal passed by the learned Additional Sessions Judge;

whereas Criminal Appeal No. 943 of 1981 is filed by the Food Inspector who is the original complainant, against the said order of acquittal. As

both these appeals arise out of the same judgment, they were heard together; and are disposed of by this common judgment.

2. On 10-5-1979 at about 8-30 a.m. Food Inspector Manubhai Maganlal Pandya visited the shop of the accused. At that time the accused was

present in his shop. In the front portion of the shop, there was a cupboard; and in that cupboard several packets of Johnson cocoa were stored.

As the complainant suspected that the said cocoa-powder was adulterated, he purchased 600 grams of Johnson cocoa for the purpose of analysis.

He prepared three samples out of it; and got one such sample analysed by the Public Analyst of the Baroda Municipal Corporation. On analysis,

the said sample was found to contain permitted coal tar dyes colours and maize starch in substantial quantity. It was, therefore, reported to be

adulterated and misbranded. In view of this report, the Food Inspector filed a complaint in the Court of the Judicial Magistrate, First Class

(Municipal,) Baroda and on the basis of that complaint the accused was tried and ultimately convicted by the learned Magistrate.

3. Before the learned Magistrate, the prosecution examined the Food Inspector and the Public Analyst to prove that cocoa-powder which was

purchased from the accused was adulterated. Various contentions were raised before the learned Magistrate on behalf of the accused, but learned

Magistrate did not find any substance in any of them; and held that as the cocoa-powder which was sold by the accused contained colour even

though use of colour is not permitted by the Rules and as it contained substantial quantity of maize starch, the said Article of food was adulterated.

He also held that in substance, it was maize starch so coloured as to look like cocoa-powder. The Article which the accused sold can be said to

be a misbranded Article; and, therefore, the accused was found guilty of having committed an offence punishable u/s 7(ii) read with Section 16 of

the Prevention of Food Adulteration Act, 1954 (hereafter referred to as "the Act"). Even though the learned Magistrate has not specifically stated

in his judgment that he was convicting the accused for having committed breach of Rule 29 of the Prevention of Food Adulteration Rules, 1955

(hereafter referred to as "the Rules"), the finding that the sample contained artificial colour even though it is not permitted by Rules, makes it clear

that the accused has been convicted for committing breach of the said Rule. In fact, because of the allegation that he was selling cocoa-powder

which contained artificial colour, it was believed to be a case of adulteration falling within Sub-clause (j) of clause (ia) of Section 2 of the Act. It

was for that reason that the procedure which the learned Magistrate followed was the one prescribed for trial of warrant cases. Imposition of one

year's imprisonment on the accused also indicates that he has been convicted for the offence punishable u/s 16(1A)(i) of the Act.

4. We are required to make this clarification because in the final order, the learned Magistrate has written Gujarati letter ""A"" within brackets after figures 16(1) in Gujarati language. It appears to us that the learned Magistrate has committed an error in not properly describing the section under which he was convicting the accused.

5. In the appeal before the learned Additional Sessions Judge, it was urged on behalf of the accused that as the Act and the Rules do not prescribe

any standards for analysis of cocoa, the accused could not have been held guilty for selling an Article of food which did not conform to the

standard prescribed by the Act or the Rules. This contention was not accepted by the learned Additional Sessions Judge. It was also contended

on behalf of the accused that as the Food Inspector had failed to state in his deposition that the ends of the wrapper were not folded in as required

by Rule 16(b) of the Rules, it cannot be said that the prescribed procedure for taking a sample was followed by the Food Inspector. The learned

Additional Sessions Judge rejected this contention also. Validity of the sanction was also challenged. The contention raised in that behalf was also

not accepted. What impressed the learned Additional Sessions Judge was the contention that evidence of the Public Analyst being vague and

fallacious ought not to have been accepted. The learned Additional Sessions Judge also agreed with the contention raised on behalf of the accused

that the sealed packet in which the cocoa-powder was sold by the accused cannot be said to be a sealed container; and, therefore. Rule 22A of

the Rules has no application to the facts of the present case, with the result that the Food Inspector cannot be said to have taken the sample in the

manner prescribed by the Rules. Two other technical contentions raised on behalf of the accused also appealed to the learned Additional Sessions

Judge. One was that there was no specific charge with respect to the breach of Rule 29; and, therefore, the accused could not have been

convicted for that offence. Another contention was that there was no charge with respect to sale of misbranded food; and, therefore, he could not

have been convicted for the offence punishable u/s 7(ii) of the Act. The learned Additional Sessions Judge agreeing with the contentions raised on

behalf of the accused as pointed out above, acquitted him. The State and the Food Inspector have, therefore, filed these appeals challenging the

said order of acquittal.

6. What is urged on behalf of the appellants is that the learned Additional Sessions Judge has not properly appreciated the evidence of the Food

Inspector and the Public Analyst and has rejected the same on grounds which are not proper. It was also urged that the learned Additional

Sessions Judge committed an error in holding that the packets which were taken as samples cannot be said to be sealed container; and, therefore.

Rule 22A did not apply. It was also submitted that in the complaint it has been clearly stated that cocoa-powder sold by the accused contained

artificial colours and that he had committed breach of the Rules. Only Rule which applies in this case is Rule 29; and, therefore, it was submitted

that the complaint clearly indicated that the accused was charged for the breach of that Rule. It was also submitted that in the complaint it is clearly

mentioned that the accused sold misbranded food; and, therefore, it cannot be said that the accused was not charged for the said offence.

7. With respect to the evidence of the Public Analyst, the learned Additional Sessions Judge has observed in paragraph 12 of his judgment as

under:

12. He says that cocoa-powder is supposed to contain a sort of starch. However, he is unable to state as to how much starch it is supposed to

contain. He does not seem to be true in his opinion "on this point, inasmuch as the standard prescribed for low and high fat cocoa-powder is silent

about the presence of starch in it. Otherwise, it would have been certainly prescribed as to how much percentage of natural starch should be

present in cocoa powder. Therefore, either the analyst is wrong in his opinion or the standard prescribed for cocoa-powder is not correct. If

cocoa-powder is supposed to contain natural starch as its constituent in absence of any evidence to show as to what is the percentage of such

natural starch, it cannot be said that the given sample was adulterated. In this connection it is pertinent to note that the analyser has omitted to as

certain and mention the percentage of maize starch said to have been found present in the given sample. His opinion that the starch was maize

starch and not the natural starch, which is supposed to be present in cocoa, is entirely based on observation There is nothing in his evidence that he

himself made microscopic observation. As we know well a conclusion based

purely on observation is likely to be fallacious. It was necessary for the analyst to ascertain by making other tests as to whether the starch found present in the sample was maize starch. Rules of logic require that an impression gathered by observation should be further tested by scientific experiment. In absence of such test having done, the conclusion based on mere observation is likely to be false. There is nothing to show that the p Articles of no other starch can be similar in appearance to those of maize starch.

The learned Additional Sessions Judge has further observed in paragraph 13 that as major portion of the evidence of the Public Analyst is found to be fallacious, the other part of it cannot be relied upon. Having carefully gone through the evidence of the Public Analyst, we are of the opinion that the learned Additional Sessions Judge has committed an error in observing that the opinion of the Public Analyst that cocoa-powder should contain starch is not correct. The reason given by the learned Additional Sessions Judge is that in that case, the Legislature would have prescribed some standard with respect to it in the Rules. In our opinion, this reasoning of the learned Additional Sessions Judge is erroneous; and if accepted, it would result into failure of justice not only in this case, but also in all other cases of this type. Merely because the Legislature has not thought it fit to prescribe standards with respect to contents of starch in an Article of food, it cannot be said that, for that reason, the Article of food must not be containing starch at all. For various reasons, the Legislature may think it fit not to prescribe any standard with respect to the extent of starch which an Article of food should contain. The Public Analyst has stated that cocoa bin would contain starch. This part of his evidence has remained unshaken. We find no good reason for discarding the evidence of this witness on this point. Merely because this witness did not apply the method prescribed by the Rules for the purpose of finding out ash and fat contents of the cocoa-powder, it cannot be said that his evidence is unreliable and that if what he states is believed then it must be held that the Rules prescribe a wrong method. As he was required to analyse the sample of cocoa-powder naturally he tried to find out whether it conformed to the other prescribed standards or not. That is why he tried to find out the content of ash and cocoa-butter. But the charge against the accused was that

cocoa-powder which he sold contained colour and maize starch and it was, therefore, an adulterated Article, and not that its ash content or butter content was less than what is prescribed by the Rules. Therefore, in our opinion which method the Public Analyst applied for the purpose of finding out the fat content is not of much relevance; and, therefore, the learned Additional Sessions Judge ought not to have rejected other evidence of the Public Analyst which has remained unshaken by cross-examination. In fact, as we will presently point out, there is no cross-examination of the said witness on this point.

8. The Public Analyst in his evidence has stated that the sample of cocoa-powder sent to him for analysis contained three colours. Those three

colours were used for the purpose of making the maize starch mixed in it look brown so as to resemble cocoa-powder. Only cross-examination

that we find on this point is that there is no authority on the point that cocoa does not contain such colours. Whether cocoa contains such colours

or not is besides the point, inasmuch as what is found against the accused is that artificial colours were found to have been added in cocoa-powder

which he was selling. This witness has further stated that starch is one of the constituents of cocoa. He further stated that on microscopic

examination it was found that the sample of cocoa-powder not only contained constituent of cocoa but it also contained maize starch and that the

extent of maize starch therein was more than 50 per cent. In cross-examination it was put to this witness that he had not himself carried out the

microscopic examination. This witness admitted that he had not done it; but stated that it was done by his assistant under his supervision. Merely

for that reason his evidence could not have been discarded as has been done by the learned Additional Sessions Judge. This witness has further

stated that the findings were recorded by his assistant and he had signed below the same. On the basis of those findings, this witness further stated

in his evidence that on analysis it was found to be maize starch because maize starch is poly-cornered and its size is about 10 to 15 MEW which is

equivalent to 1000th part of a millimetre; and it is star shaped. This part of his evidence which is not at all challenged has been totally overlooked

by the learned Additional Sessions Judge. The Public Analyst having given good reasons for coming to the conclusion that the starch which was

found to have been added in the sample was maize starch, his evidence could not have been discharged by the learned Additional Sessions Judge

solely on the ground that he himself had not carried out the microscopic examination of the sample. We are therefore, of the opinion that the

learned Additional Sessions Judge committed an error in not properly appreciating the evidence of this witness; and the said error is such which

would justify our interference even in an acquittal appeal. If this erroneous view viz. that as no standard is prescribed for the extent of starch in

cocoa and as it is not specifically prescribed that it should not contain maize powder, the same cannot be said to be adulterated even if maize

powder is found mixed with it, is allowed to hold the field it would naturally result into failure of justice in all cases of this type.

9. We are also of the view that the learned Additional Sessions Judge committed an error in coming to the conclusion that sample packets were

not sealed containers; and, therefore, Rule 22A did not apply to the facts of this case. The learned Additional Sessions Judge came to the

conclusion that they were not sealed container, because those packets were of transparent oily paper; and the evidence of the Food Inspector in

this behalf is vague. What the Food Inspector has stated in this behalf is that the accused was selling Johnson cocoa in sealed packets. Actual

words used by him are "sealed packed packets". What he thereby meant was that the packets were sealed. Therefore, the contents of the said

packets could not be reached without breaking open those seals, which were applied on the upper and lower ends of the packets. In his cross-

examination he stated that he was calling them sealed packed packets because the contents of the packets were packed in transparent oily paper

bags. Relying upon this statement in the cross-examination the learned Additional Sessions Judge held that his evidence was vague and that would

amount to admission that it was not a sealed container. In our opinion, the evidence of this witness on this point is not properly appreciated by the

learned Additional Sessions Judge. Not only in his evidence, but in the Panchnama also we find that the packets which the accused was selling

were sealed packets. The accused was selling the cocoa-powder in the same sealed condition in which they were packed by the manufacturer;

and it was not his case that the packets which were taken from him by the Food Inspector were not sealed packets. We fail to appreciate how, the

learned Additional Sessions Judge could persuade himself to take a view that the said sealed packets cannot be said to be sealed containers.

Word container used in Section 22A would include within its meaning any container which is capable of containing anything inside it. Such

container could be said to be a sealed container if without breaking open the seal, it would not be possible to reach the contents of that container.

Seal need not be of a particular type. Even if the container is found to have been closed from one end to the other by some process with the result

it would not be possible to reach the contents thereof without breaking open such seal, then such a container can be described a sealed container.

If transparent paper bag is sealed in such a manner that it would not be possible to reach the contents of that paper bag, without breaking open the

seal or without cutting the same, it can be described as a sealed container. We are, therefore, of the view that Rule 22A did apply in this case; and,

therefore, the sample which was taken by the Food Inspector must be regarded as a representative sample; and it cannot be said that the same

was not taken in the manner prescribed by the Act or the Rules.

10. Once we hold that the Food Inspector had prepared the samples of the Article purchased from the accused in the prescribed manner and that

on proper analysis the sample was found to contain colour and substantial quantity of maize starch, it will have to be held that cocoa-powder which

the accused was selling adulterated. Apart from breach of Rule 29, cocoa-powder sold by the accused must be held to be adulterated because it

was not of the nature, substance or quality which it purported or represented to be. The learned Counsel appearing for the accused was not in a

position to advance any argument to convince us that the Article of food sold by the accused cannot be said to be adulterated if it is believed that

cocoa-powder sold by him did contain foreign substance viz. maize starch to the extent of more than 50 per cent. Therefore, his only attempt was

to challenge the evidence of the Public Analyst as unreliable. It was challenged on the same grounds which were urged before the Courts below;

and for the reasons stated above we have not been able to agree with the submissions made by the learned Counsel for the accused. Therefore,

the accused will have to be held guilty for selling adulterated cocoa-powder.

11. Next question is whether the accused can be said to have sold an Article of

food which is adulterated within the meaning of Sub-clause (j) of Clause (ia) of Section 2 of the Act. It was not urged before us that if it is believed that the sample of cocoa-powder did contain artificial colours, it would not amount to breach of Rule 29. What was urged was that as there was no specific charge in this behalf, the accused cannot be convicted and sentenced for the offence punishable u/s 16(1A) of the Act. As pointed out above, in the complaint it has been specifically stated that on analysis the sample was found to contain artificial colours. Evidence was led on that point. The witness was also cross-examined. The procedure for trial of a warrant case having been followed in this case, charge was framed after recording the evidence produced by the prosecution. In the charge which is at Exh. 3 it is stated that the accused sold adulterated cocoa-powder and thereby committed an offence punishable u/s 7 read with Section 16 of the Act. It is no doubt true that there is no specific reference to breach of any rule in the charge. But that in our opinion is of no consequence because it is clearly stated in the charge that the Article of food which the accused had sold was adulterated. How it was adulterated is a matter of details and those details have been stated in the complaint. The learned Counsel for the accused was not in a position to point out any provision which requires that all these details are required to be stated in the charge. It is only when the nature of the case is such that the particulars mentioned in Sections 211 and 212 of the Code of Criminal Procedure do not give the accused sufficient notice of the matter with which he is charged, the charge should also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose. We do not think that this case is of that type. Therefore, merely because in the charge it has not been specifically stated that the accused committed breach of Rule 29 it cannot be said that he cannot be convicted for selling an Article of food which is found to be adulterated within the meaning of Sub-clause (j) of Clause (ia) of Section 2 of the Act. The learned Additional Sessions Judge was, therefore, not right in taking a contrary view.

12. As we hold that the accused had sold an Article of food which can be said to be adulterated as defined by Sub-clause (a) of Clause (ia) of

Section 2 of the Act as also by Sub-clause (j) of the said clause, the accused will

have to be convicted for the offence punishable u/s 7 read with Section 16 of the Act; and he will have to be punished with imprisonment or a period of one year which is the minimum sentence prescribed by Sub-section (IA) of Section 16. We, therefore, do not propose to examine the question whether the learned Additional Sessions Judge was justified in taking the view that there being no specific charge of selling misbranded Article, the accused cannot be held guilty for committing that offence. Since the Article of food which the accused sold purported to be cocoa-powder whereas it contained more than 50 per cent of maize starch, we are of the view that the Article which he sold was misbranded. On the basis of the evidence on record, it will have to be held that what was sold by the accused was a mixture of cocoa-powder and coloured maize starch and yet it was represented to be cocoa-powder.

13. In the result, both these appeals are allowed. The Judgment and order parsed by the learned Additional Sessions Judge is set aside; and the judgment and order of conviction and sentence passed by the learned Magistrate is restored. The accused is directed to surrender to custody; but he is given three months" time for that purpose.