

(1992) 03 GUJ CK 0022
In the Gujarat High Court

Case No : Criminal Appeal No's. 768 and 1219 of 1983

State of Gujarat

APPELLANT

Vs

Khimabhai Nathabhai Bharwad and Others

RESPONDENT

Date of Decision : 20-03-1992

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Prevention of Food Adulteration Act, 1954 — Section 16, 16(1A), 2, 2(1), 2(AA)
Prevention of Food Adulteration Rules, 1955 — Rule 20, 44, 52, 65

Citation : (1993) CriLJ 1084 : (1993) 2 GLR 1007

Hon'ble Judges : B.S. Kapadia, J

Bench : Single Bench

Advocate : K.N. Valikarimwala, app, for the Appellant; N.N. Gandhi, for Respondent Nos. 1 and 2 and A.R. Thakkar, for the Respondent

Final Decision : Allowed

Judgement

B.S. Kapadia, J.—The above criminal appeals are filed against the order of acquittal passed by the learned Chief Judicial Magistrate, Bhavnagar, on 10-6-1983 in Criminal Case No. 3043 of 1980 by which he acquitted both the accused of the offences under Sections 7(i)(iii)(5), 16(i)(A)(i)(ii) and 16(1-A)(i)(ii) of the Prevention of Food Adulteration Act. The Criminal Appeal No. 768/83 is filed by the "State while the Criminal Appeal No. 1219/83 is filed by the Food Inspector, the original complainant.

2. The question that arises in the present case is that when a milk vendor adds formalin to the milk to be sold to the public for human consumption whether he commits an offence under the provisions of the Prevention of Food Adulteration Act or the Rules made thereunder, or not.

3. The short facts of the case are that the respondent No. 1 is the father of the respondent No. 2. The respondent No. 1 is doing milk business in Bhavnagar by going to the houses of the customers. He is also holding a licence issued by the Municipal Authorities. In absence of the respondent No. 1, the respondent No. 2,

his son was doing the business on behalf of respondent No. 1. On 27-8-1980 at about 11.30 a.m. the original accused No. 2 (respondent No. 2) sold milk to the Food Inspector, who took two samples of the milk each of 750 ml. and he paid Rs. 1.50 per sample. After following the required procedures the Food Inspector gave to the first sample of 750 ml. "Section 26" and he gave "Section 27" to the second sample. In the sample Section 26 he added 60 drops of formalin and he put the milk in three cleaned dried bottles in equal quantity and thereafter packed it properly by affixing the cork tightly with a view to avoid any leakage therefrom. Thereafter as per the rules he also packed the said bottles. But he did not add any formalin in Section 27. He also packed the said sample of milk in three cleaned dried bottles. He sent the sample Section 27 to the Public Analyst at Bhuj after mentioning in a covering letter (Ex. 30) that no formalin was added to the sample milk. So far as sample Section 26 is concerned, opinion is clearly stated in report (Ex. 36) that total solids 9%, milk fats 0.3% (PFA limit 0.5%), milk solid non-fat 0.7% (PFA limit 0.7%). As in the positive test formalin was found in sample Section 27 though no formalin was added by the Food Inspector, the aforesaid offence was made out.

4. Before the learned Magistrate it was argued on behalf of the accused that adding formalin to the milk or skimmed milk is not prohibited and that adding formalin does not become an offence. It was also pointed out that in Rule 44 there is reference about adding of water and that it does not speak about adding of formalin and therefore, adding formalin is not prohibited. The learned Magistrate accepted the said argument made on behalf of the original accused though the learned Advocate for the complainant had pointed out some observations from the British Pharmaceutical Codes, 1953 with regard to formalin.

5. Before the evidence on the point is considered it is necessary to find out as to whether adding formalin to milk by milk vendor is prohibited or not. Section 2(1-a) of the Prevention of Food Adulteration Act, 1954, reads as under :

"2(1-a) "adulterated" an article of food shall be deemed to be adulterated -

(a)&(j)....

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

...

It is therefore, clear that if the article contains any prohibited preservative it will be adulterated article. Section 2(xiii) of the Act defines "sale" and it includes sale of any article whether for cash or on credit and whether by wholesale or retail, for human consumption or use, or for analysis.

6. Rule 20 of the Prevention of Food Adulteration Rules, 1955 provides that the preservative used in the case of sample of any milk shall be liquid commonly known as "formalin", that is to say, liquid containing about 40 per cent, of

formaldehyde in aqueous solution in the proportion of 10.1 ml. (two drops) for 25 ml. or 25 gms. It is clear from reading Rule 20 of the said Rules that preservative used in the sample of milk would be formalin. Sample is defined in Section 2(xiv) of the Act which means sample of article of food taken under the provisions of the Act or of any rules made thereunder. In the instant case the Food Inspector has also taken the sample No. 26 and he added the preservative permitted under Rule 20 of the said Rules. Under Rule 44 of the said Rules there is clear prohibition of selling adulterated article. Clause (1) of Rule 44 relates to milk or a milk product specified in Appendix B containing a substance not found in milk, except as provided in the rule. Said clause has been added by G.S.R. 1533 dated 8-7-1968. There is no rule which permits the milk vendor to add formalin preservative in the milk which is to be sold for the purpose of human consumption. This clause (1) clearly prohibits adding of any foreign substance in the milk or milk product specified in Appendix B.

7. At this juncture it would not be out of place to mention that the learned Magistrate only considered clause (b) of the said Rule 44 which prohibits selling of milk which contains any added water. Therefore, the learned Magistrate has given the reasoning that adding of formalin has not been prohibited or sale of milk with added formalin has not been prohibited. If clause (1) of said Rule 44 would have been brought to the knowledge of the learned Magistrate possibly he would not have taken the view which he had taken. Said clause (1) has escaped from the notice of the learned Magistrate. When the said Rule prohibits adding of any substance not found in the milk except as provided in the Rules and when formalin is added to milk, it becomes adulterated food within the meaning of Section 2(1-a)(k) of the Act.

8. It may be stated that Rule 20 of the said Rules enables adding of formalin as a preservative in the case of sample of any milk. When the sample was taken by the Food Inspector for analysis there was no question of human consumption. Formalin (preservative) is to be added to the sample of milk to avoid decomposition. After taking the sample of milk for analysis if formalin is not added then possibly the milk will be decomposed and no proper analysis of the sample of the milk would be possible. Rule 20 of the said Rules speaks about the preservative used in the case of samples of any milk. Under Rule 52 of the said Rules definition of preservative is given. According to the said definition "preservative" means a substance which when added to food, is capable of inhibiting, retarding or arresting the process of fermentation, acidification or other decomposition of food. Rule 65 of the said Rules refers to the restriction on the use of insecticides and it provides that subject to the provisions of sub-rule (2) no insecticides shall be used directly on articles of food provided that nothing in this sub-rule shall apply to the fumigants which are registered and recommended for use as such on article of food by the Registration Committee and the amount of insecticides in column 2 on the foods mentioned in column 3, shall not exceed the tolerance limit prescribed in column 4 of the Table given in the said Rule. Serial No. 26 of the said Table is regarding Formation and the food

items mentioned in the said column are citrus fruit, other fruits, vegetables, peppers and tomatoes. There is no entry of milk for adding preservative in any of the rules. It is therefore, clear that there is only Rule 20 which permits the use of preservative formalin for the sample of milk when milk is taken by the Food Inspector. But the milk vendor cannot use the preservative formalin in the milk for sale for human consumption.

9. It appears that the Legislature had advisedly not permitted use of preservative "formalin" looking to its properties. In Vol. 11 Encyclopedia Americana "Formalin" and its properties have been mentioned. On page 602 of the said book for "Formalin" is mentioned "See Formaldehyde". The properties of "Formaldehyde" and its chemical formula are given there. According to the said book, it is inter alia stated "pure formaldehyde is a colourless, poisonous gas with a pungent odour; its boiling point is 21°C and its melting point is 92°C. It is usually handled and stored as the 37% aqueous solution which is known as formalin. Formaldehyde is prepared commercially by the catalyzed air oxidation of methanol vapour or the limed oxidation of natural gas or other hydrocarbons. Formaldehyde is copolymerized with phenol to produce the Bakelite resins, with urea to: form moulding plastics, and with ammonia to form hexamethylene tetramine, which is used in making high explosives".

10. In addition to what is stated in Encyclopedia Americana it is inter alia stated in Vol. 9 of Encyclopedia Britanica that pure monorheric formaldehyde is a rather unstable compound, but it has been obtained and is a gas and that formaldehyde is oxidized to formic acid and is reduced to methanol and it reacts with practically all types of organic compounds, including unsaturated hydrocarbons, aldehydes, ketones, esters, alcohols, carbohydrates, proteins, amines, amides and phenols and it is this versatile chemical behaviour which makes formaldehyde such an important intermediate in technical process. Thereafter its industrial uses are also mentioned. It is clear from what is stated above that formalin has a poisonous character and therefore, it cannot be mixed with any food for human consumption. Once formalin is added to milk it becomes adulterated food and sale or distribution of such item would be an offence under the provisions of the Act.

11. In the present case the question would be whether the prosecution has proved that formalin was added to the milk before sample was sold to the complainant by the original accused No. 2. On that point evidence of the complainant is clear. He has clearly stated that he had added formalin to Sample Section 26 and he had not added formalin to sample Section 27. He had also denied the suggestion in his cross-examination that he had taken 1500 gms. of milk and that he had taken it in one tumbler and had added formalin in the entire quantity of 1500 gms. of milk.

12. It may be mentioned that when there is a positive report (Ex. 35) on the test for formalin it means that though the Food -Inspector after taking the sample did not add formalin to sample Section 27, positively formalin was found in the test

for formalin. It clearly indicates that before the sample of the milk was sold to the Food Inspector formalin was added and that sample milk with added formalin was sold to the complainant for analysis. It is true that the complainant had admitted in his cross-examination that the Public Analyst had informed him with regard to the sample Section 27 that it was decomposed, but it does not mean that decomposed milk cannot be tested for finding out whether formalin was added to it or not. Moreover, if at all the accused No. 2 was desirous of challenging the report of the Public Analyst in respect of positive finding on the test for formalin in respect of sample Section 27, certainly he would have opted for getting the opinion of the Central Food Laboratory. However, he has not chosen to do so. Merely because the complainant had admitted in the cross-examination that the Public Analyst had informed about the decomposed milk, it cannot be said that finding given by the Public Analyst regarding the presence of formalin in the aforesaid test is in any way affected.

13. It is submitted by Mr. N. N. Gandhi, learned Advocate appearing for the accused-respondents that the panch witness has not fully supported the prosecution case. On perusal of the evidence of the panch witness Dilip Anantrai, it is clear that he had admitted that he was studying in the Final Year B.A. and was serving in the Cooperative Bank at the relevant time; that on that day he was called as a Panch near the shop near Khar Gate where there was one milk vendor and that he was asked his name and he had given his name which is mentioned in the Panch-nama. As this witness did not support the prosecution case permission was sought for to cross-examine him. In the cross-examination he had stated that he could not say in how many tumblers complainant had taken milk; that he could not remember whether the spot test was taken and that he also could not remember whether milk was first taken in two tumblers and thereafter in one of the tumblers formalin was added. He had admitted that he had put his signature in the panchnama, but he had stated that he had not read the panchnama. In the cross-examination he had also stated that formalin was added in one tumbler and thereafter it was turned and said milk was filled in four to five bottles. It is true that this witness had not supported the prosecution version fully. Still however, this witness had admitted that he was called as Panch and in his presence milk was taken by the complainant and that in one tumbler of milk formalin was added. So, the evidence of this witness does support the version of the complainant on that point. That part of evidence also gets corroborated from the panchnama. It may be stated that now-a-days it is the tendency of the witnesses not to support the prosecution case or to support half-heartedly as in the present case. In the present case it appears that sincere and honest attempt was made by the complainant to have independent panch, who had agreed to act as such and had put his signature on the panchnama. When the panch does not support one has to fall back on the complainant. There is nothing on record even to suggest that the complainant was having any enmity with the said milk vendor. There is no contradiction on the point of taking the sample of the milk and/ or adding formalin in sample Section 26 and not in

sample Section 27. The complainant's version was tested by complete cross-examination, but nothing substantial is brought out to disbelieve his version.

14. Under the circumstances there was no reason for making out a false case against the accused Nos. 1 and 2 by the complainant particularly when the accused No. 2 had sold sample of the milk to him. On the contrary the say of the complainant is also corroborated by the fact that he had so stated even in the covering letter (Ex. 32) addressed to the Public Analyst, Bhuj, when he sent the sample Section 27.

15. In above view of the matter it appears that the learned Magistrate has failed to properly appreciate the evidence on record in the light of the principles for appreciating the evidence as laid down by this Court as well as the Supreme Court of India. If the evidence was properly appreciated the learned Magistrate certainly would have come to the conclusion that formalin was added to the milk before the sample was sold to the complainant by the respondent No. 2. The learned Magistrate has also erred in not accepting the report (Ex. 35) on the ground that how the sample was examined has not been mentioned in the report. If it was so, certainly the Public Analyst could have been summoned as a witness. However, no such attempt was made. Therefore, on that ground the test report (Ex. 35) cannot be rejected.

16. On the basis of the evidence on record I come to the conclusion that the prosecution has already established the case against the respondent No. 2 (org. accused No. 2) who had sold to the complainant sample of milk to which formalin was added.

17. So far as the respondent No. 1 (org. accused No. 1) is concerned, he was not present at the time when the respondent No. 2 had sold milk to the complainant and possibly without the knowledge of the respondent No. 1 the respondent No. 2 might have added formalin to the milk. Therefore, the respondent No. 1 cannot be held guilty of the offence alleged against him.

18. Accordingly the order of acquittal passed by the learned Chief Judicial Magistrate, Bhavnagar, on 10-6-1983 against the original accused No. 2 (respondent No. 2) Haribhai Khimabhai Bharwad, in Criminal Case No. 3043 of 1980 is hereby quashed and the original accused No. 2 (respondent No. 2) is convicted for the offence u/s 16(1 A) of the Prevention of Food Adulteration Act. The office is directed to issue notice to the respondent No. 2 (org. accused No. 2) making it returnable on 3-4-1992, for hearing him on the point of sentence. The order of acquittal passed by the learned Magistrate against the accused No. 1 (respondent No. 1) Khimabhai Nathabhai Bharwad in the aforesaid criminal case is hereby confirmed. Accordingly, the matters are adjourned to 3-4-1992.

19. In pursuance of the notice issued to the respondent No. 2 for hearing on the point of sentence, he has personally remained present with his learned Advocate Shri Gandhi and he has also submitted with his signature, his say on the point of sentence. He has submitted that the alleged offence was taken place on 27-8-80

and the learned Magistrate has acquitted him on 10th June, " 83 and after a long period of 12 years when he is convicted, he had to undergo mental tension and therefore, he has requested this Court to show mercy on the point of sentence and if possible, to impose sentence of fine only.

20. He has also submitted that he was simply doing the labour work of carrying the cans of milk from village Gamtalav to Khar Bazaar at the shop of Dave Sweet Mart and therefore, he had no intention of adulterating the milk and he did not know that this will amount to an offence. On that count also, he has requested to take a lenient view.

On perusal of Section 16(1-A) and also opening words of Section 16, it is clear that Section 16 is subject to the provisions of Sub-section (1-A) and Sub-section (1-A) of Section 16 speaks about providing for the penalties, inter alia for storing, selling, or distributing the articles of food which is adulterated within the meaning of any of the clauses ("e" to "1") both inclusive of sub-clause (1-a) of Section 2. Now, so far as present case is concerned, the article of food viz. milk is adulterated as per clause "k" of sub-sec. (1a) of Section 2 as it contained the prohibited preservative - formalin. Therefore, the present case is governed by the said Sub-section (1-A) of Section 16 of the Prevention of Food Adulteration Act, 1954.

21-22. The said sub-section provides for the penalty inter alia providing for the minimum sentence of imprisonment for one year and a fine which shall not be less than Rs. 2,000/-.

23. When the minimum sentence is provided for in Section 20(AA) of the Act clearly rules out the applicability of the provisions of the Probation of Offenders Act, inasmuch as the present respondent-accused is aged about 32 years, it would be in the interest of justice looking to the facts and circumstances of the case to award minimum sentence that would meet the ends of justice.

24. However, before passing the order on sentence, it may be mentioned that Mr. Gandhi, learned Advocate for the respondent - original accused, has submitted that though the Section provides for the minimum sentence as stated above, still however, this Court can exercise inherent powers u/s 482 of the Criminal Procedure Code for the purpose of securing ends of justice. It is true that some unduly long time has taken in disposing of this matter, however, the accused was free and was at liberty all these years and therefore, mere delay by itself would not be a ground for taking a view for imposing a sentence less than minimum. However, the important argument which is advanced by Mr. Gandhi is that it should be then for the purpose of securing the ends of justice. Normally speaking the dairy people in general and the vendors in particular are indulged in committing offences of adulteration for making profit. Unless the judiciary is strict in the matter, the ends of justice cannot be secured. On the contrary, the persons who are dealing with the adulterated goods would take it very lightly and with that view in mind, the amendment is made in Section 20(AA) of the

Prevention of Food Adulteration Act.

Further, the legislature has also thought it fit to provide for minimum sentence, so that no such lenient view in that matter will be taken. So, when there is an express legislative mandate for imposing the minimum sentence, whether it would be permissible and/or desirable to exercise the inherent powers u/s 482 of the Criminal Procedure Code in the name of securing the ends of justice? In my view, after considering the arguments advanced by Mr. Gandhi, learned Advocate for the accused, such inherent powers cannot be exercised as it will be contrary to the provisions of Section 16(1-A) of the Act. I apprehend that possibly, in such a manner if the powers are exercised, there will be no purpose in introducing the minimum sentence and possibility of misusing such powers also cannot be totally ruled out. In that view of the matter, after taking into consideration all the grounds for taking a lenient view in the matter, I think that ends of justice will meet by imposing 1 year rigorous imprisonment and a fine of Rs. 2,000/- (Rupees two thousand only) for the offences punishable u/s 16(1-A) of the Prevention of Food Adulteration Act, on the respondent No. 2 and in default of payment of fine, he is further ordered to undergo rigorous imprisonment for six months. Accordingly, it is ordered that the appeal is allowed. Respondent No. 2 - Haribhai Khimabhai Bharwad is directed to surrender before the police on or before 24th April, 92. In the meanwhile, he will also be at liberty to move the Hon"ble Supreme Court, if he so desires, as submitted by Mr. Gandhi.

In view of the fact that the acquittal order is set aside and the petitioner is convicted, he is entitled to get a copy of this judgment free of charge and the office is directed to immediately supply a copy of this judgment to the respondent No. 2.