

(2016) 02 GUJ CK 0002

In the Gujarat High Court

Case No : Criminal Revision Application (Against Order Passed by Subordinate Court) No. 475 of 2011

State of Gujarat

APPELLANT

Vs

Nareshkumar Gordhandas Hotvani and Others

RESPONDENT

Date of Decision : 01-02-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 245, Section 245(2)
Drugs and Cosmetics Act, 1940 — Section 18A, Section 23, Section 24, Section 25,
Section 25(3), Section 25(4), Section 30
Prevention of Food Adulteration Act, 1954 - Se

Citation : (2016) 02 GUJ CK 0002

Hon'ble Judges : V.M. Pancholi, J.

Bench : Single Bench

Advocate : D.K. Modi and M.D. Modi, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

V.M. Pancholi, J.—1. The applicant-State of Gujarat has preferred this Revision Application challenging the order dated 30.04.2011 passed below Application Exh. 84 by learned Chief Judicial Magistrate, Himmatnagar in Criminal Case No. 2783 of 2006, by which the respondents-accused have been discharged.

2. Heard learned APP Mr. N.J. Shah for the applicant-State and learned advocate Mr. D.K. Modi for the respondents-accused.

3. Learned APP submitted that on 04.02.2006, Food Inspector visited the shop of the accused No. 1 alongwith Panch. At that time, accused No. 1 was present. He was selling mints and biscuits etc. The Food Inspector after following procedure, purchased three packets of Jesco Glucose biscuits, each of 250 Gram after making payment and thereafter, after following procedure prescribed under the provision of The Prevention of Food Adulteration Act (hereinafter referred to as "the Act" for short) as well as The Prevention of Food Adulteration Rules, 1955 (hereinafter referred to as "the Rules" for short) send the samples to local health

authority for analysis. As per the report received from the public analyst, the sample in question was not as per the prescribed standard and therefore after obtaining necessary sanction from the competent authority, Criminal Case No. 2783 of 2006 came to be registered against the respondents-accused. Learned APP thereafter submitted that Trial Court conducted the trial and convicted the accused for the offense punishable under Section 7(1) of the Act and imposed punishment to remain present in the Court till rising of the Court and fine of Rs. 1,000/- was imposed. Against the said order, the State preferred Criminal Appeal No. 1092 of 2010 before this Court for enhancement of the sentence. This Court by an order dated 20.12.2011, quashed and set aside the said order and remanded the matter back to the Trial Court for deciding the same on merits and in accordance with law. Thereafter, before the Trial Court, the respondents-accused submitted an application Exh. 84 under Section 245(2) of the Code of Criminal Procedure, 1973 and requested for discharging them. The Trial Court by an impugned order, discharged the respondents-accused and therefore, this Revision Application is preferred.

4. Learned APP mainly contended that once this Court has remanded the matter back to the Trial Court, the Trial Court ought to have heard the matter on its own merits and it was not open for the respondents-accused to submit an application for discharge of the accused. Trial Court wrongly exercised the powers under Section 245 of the Code and thereby discharged the accused. Therefore, this Revision Application be allowed and the Trial Court be directed to decide the matter on its own merits.

5. On the other hand, learned advocate Mr. Modi appearing for the respondents-accused mainly contended that the complainant-Food Inspector has filed the complaint after the expiry of the sample in question and therefore, when this Court has remanded the matter back to the Trial Court for deciding the same on its own merits and to decide the same in accordance with law, Exh. 84 application was submitted by the respondents-accused. In the said application, it was specifically contended that sample was collected by the complainant Food Inspector on 04.02.2006. The manufacturing date of the said sample/biscuit was November 2005 and the said sample was best for use before six months from the date of packing. Thus, the expiry date of the said sample was six months from the date of packing i.e. 6 months from November 2005. Hence, the expiry date of the sample was April, 2006. Public analyst submitted his report on 08.03.2006. The competent authority gave his sanction on 12.07.2006 and thereafter the complainant filed the complaint on 22.08.2006 before the learned Chief Judicial Magistrate. Thus, it is an admitted position that the complaint was filed by the Food Inspector after the expiry of the sample. Hence, when the complaint was filed before the concerned Magistrate Court, self life of the sample had expired. The respondents-accused therefore could not request to the Trial Court for sending the sample to the Central Food Laboratory and therefore, they had lost the opportunity for sending the sample to the Central Food Laboratory. Thus, prejudice is caused to the respondents-accused. The complainant has

thereby violated the mandatory provision of Section 13(2) of the Act and therefore, the Trial Court has rightly discharged the accused. Hence, no interference is required. In support of the aforesaid contention, learned advocate Mr. Modi has placed reliance upon the following decisions:

"I. In the case of M/s. Medicamen Biotech Limited v. Rubina Bose, Drug Inspector, reported in , 2008 (7) SCC 196

II. In the case of State of Haryana v. Unique Farmaid P. Limited and others, reported in 1992 (2) FAC 399

III. Order passed by this Court dated 15.12.2015 in Criminal Misc. Application No. 17597 of 2015 with Criminal Appeal No. 1373 of 2015."

6. I have considered the submissions canvassed on behalf of learned advocates appearing for the parties. I have also gone through the provision of law relied upon by the learned advocates. I have also gone through the decision relied upon by the learned advocates for the parties. From the record, it is clear that this Court remanded the matter back to the Trial Court for deciding the same on its own merits and in accordance with law and therefore, application Exh. 84 was given by the respondents-accused under Section 245(2) of the Code. It is an undisputed fact that sample was taken on 04.02.2006 by the Food Inspector. Date of manufacturing is November, 2005. Sample was best before six months from the date of packing. The said date would expire on April, 2006. Admittedly the complaint was filed by the Food Inspector on 22.08.2006 i.e. after the self life of the sample has expired. Thus, in background of the aforesaid undisputed facts, provision of law contained in the Act as well as the decision relied upon by the learned advocate appearing for the respondents-accused are required to be seen.

7. Section 13(2) of the Act provides as under:

"13. Report of Public Analyst

(2) On receipt of the report of the result of the analysis under sub-section (1) to the effect that the article of food is adulterated, the Local (Health) Authority shall, after the institution of prosecution against the person from whom the sample of the article of food was taken and the person, if any, whose name, address and other particulars have been disclosed under section 14A, forward, in such manner as may be prescribed, a copy of the report of the result of the analysis to such person or persons, as the case may be, informing such person or persons that if it is so desired, either or both of them may make an application to the Court within a period of ten days from the date of receipt of the copy of the report to get the sample of the article of food kept by the Local (Health) Authority analysed by the Central Food Laboratory.

(2A) When an application is made to the Court under sub-section (2), the Court shall require the Local (Health) Authority to forward the part or parts of the sample kept by the said Authority and upon such requisition being made, the

said Authority shall forward the part or parts of the sample to the Court within a period of five days from the date of receipt of such requisition.

(2B) On receipt of the part or parts of the sample from the Local (Health) Authority under subsection (2A), the Court shall first ascertain that the mark and seal or fastening as provided in clause (b) of sub-section (1) of section 11 are intact and the signature or thumb impression, as the case may be, is not tampered with, and dispatch the part or, as the case may be, one of the parts of the sample under its own seal to the Director of the Central Food Laboratory who shall thereupon send a certificate to the Court in the prescribed form within one month from the date of receipt of the part of the sample specifying the result of the analysis.

(2C) Where two parts of the sample have been sent to the Court and of one part of the sample has been sent by the Court to the Director of the Central Food Laboratory under sub-section (2B) the Court shall, as soon as practicable, return the remaining part to the Local (Health) Authority and that Authority shall destroy that part after the certificate from the Director of the Central Food Laboratory has been received by the Court:

Provided that where the part of the sample sent by the Court to the Director of the Central Food Laboratory is lost or damaged, the Court shall require the Local (Health) Authority to forward the part of the sample, if any, retained by it to the Court and on receipt thereof, the Court shall proceed in the manner provided in sub-section (2B).

(2D) Until the receipt of the certificate of the result of the analysis from the Director of the Central Food Laboratory, the Court shall not continue with the proceedings pending before it in relation to the prosecution.

(2E) If, after considering the report, if any, of the food inspector or otherwise, the Local (Health) Authority is of the opinion that the report delivered by the public analyst under subsection (1) is erroneous, the said Authority shall forward one of the parts of the sample kept by it to any other public analyst for analysis and if the report of the result of the analysis of that part of the sample by that other public analyst is to the effect that the article of food is adulterated the provisions of sub-sections (2) to (2D) shall, so far as may be, apply.]"

8. Similar type of provision is contained in Section 24 of Insecticide Act, 1963, which reads as under:

"24. Report of Insecticide Analyst

1. The Insecticide Analyst to whom a sample of any insecticide has been submitted for test or analysis under sub-section (6) of Sec. 22, shall, within a period of sixty days, deliver to the Insecticide Inspector submitting it a signed report in duplicate in the prescribed form.

2. The Insecticide Inspector on receipt thereof shall deliver one copy of the

report to the person from whom the sample was taken and shall retain the other copy for use in any prosecution in respect of the sample.

3. Any document purporting to be a report signed by an Insecticide Analyst shall be evidence of facts stated therein, and such evidence shall be conclusive unless the person from whom the sample was taken has within twenty-eight days of the receipt of a copy of the report notified in writing the Insecticide Inspector or the Court before which any proceeding in respect of the sample are pending that he intends to adduce evidence in contravention of the report.

4. Unless the sample has already been tested or analyzed in the Central Insecticides Laboratory, where a person has under sub-section (3) notified his intention of adducing evidence in contravention of the insecticide analysts report the Court may, of its own motion or its discretion at the request either of the complainant or of the accused, cause the sample of the insecticide produced before the Magistrate under sub-section (6) of Sec. 22 to be sent for test or analysis to the laboratory, which shall make the test or analysis and report in writing signed by, or under the authority of, the Director of Central Insecticides Laboratory the result thereof, and such report shall be conclusive evidence of the facts stated therein.

5. The cost of a test or analysis made by the Central Insecticides Laboratory under subsection (4) shall be paid by the complainant or the accused as the Court shall direct."

9. Similar provision is also contained in Section 25 of Drugs and Cosmetics Act of 1940. Section 25 of the said Act provides as under:

"25. Reports of Government Analysts

(1) The Government Analyst to whom a sample of any drug a [or cosmetic] has been submitted for test or analysis under sub-section (4) of section 23, shall deliver to the Inspector submitting it a signed report in triplicate in the prescribed form.

(2) The Inspector on receipt thereof shall deliver one copy of the report to the person from whom the sample was taken b [and another copy to the person, if any, whose name, address and other particulars have been disclosed under section 18A], and shall retain the third copy for use in any prosecution in respect of the sample.

(3) Any document purporting to be a report signed by a Government Analyst under this Chapter shall be evidence of the facts stated therein, and such evidence shall be conclusive unless the person from whom the sample was taken b [or the person whose name, address and other particulars have been disclosed under section 18A] has, within twenty-eight days of the receipt of a copy of the report, notified in writing the Inspector or the Court before which any proceedings in respect of the sample are pending that he intends to adduce evidence in controversion of the report.

(4) Unless the sample has already been tested or analysed in the Central Drugs Laboratory, where a person has under sub-section (3) notified his intention of adducing evidence in a controversion of a Government Analyst's report, the Court may, of its own motion or in its discretion at the request either of the complainant or the accused, cause the sample of the drug a [or cosmetic] produced before the Magistrate under sub-section (5) of Section 23 to be sent for test or analysis to the said Laboratory, which shall make the test or analysis and report in writing signed by, or under the authority of, the Director of the Central Drugs Laboratory the result thereof, and such report shall be conclusive evidence of the facts stated therein.

(5) The cost of a test or analysis made by the Central Drugs Laboratory under sub-section (4) shall be paid by the complainant or accused as the Court shall direct."

10. Thus, all the aforesaid provisions are *pari materia* and therefore decision rendered by the Hon''ble Supreme Court in the case of State of Haryana (*supra*) as well as in the case of M/s. Medicamen Biotech Limited (*supra*) are applicable to the facts of the present case.

11. In the case of M/s. Medicamen Biotech Limited (*supra*), the Hon''ble Supreme Court observed in paragraph No. 10 as under:

"10. We find that this judgment helps the case of the appellant rather than that of the respondent because in spite of two communications from the appellant that it intended to adduce evidence to controvert the facts given in the report of the Government Analyst, the fourth sample with the Magistrate had not been sent for re-analysis. The observations in Amery Pharmaceuticals's case (*supra*) are also to the same effect. We find that the aforesaid interpretation supports the case of the appellants inasmuch they had been deprived of the right to have the fourth sample tested from the Central Drugs Laboratory. It is also clear that the complaint had been filed on the 2nd July 2002 which is about a month short of the expiry date of the drug and as such had the accused appellant appeared before the Magistrate even on 2nd July 2002 it would have been well nigh impossible to get the sample tested before its expiry. In the affidavit filed to the petition by Dr. D. Rao, Deputy Drugs Controller, and in arguments before us, it has been repeatedly stressed that the delay in sending of the sample to the Central Drugs Laboratory had occurred as the appellant had avoided service of summons on it till 9th May 2005. This is begging the question. We find that there is no explanation as to why the complaint itself had been filed about a month before the expiry of the shelf life of the drug and concededly the filing of the complaint had nothing to do with the appearance of the accused in response to the notices which were to be issued by the Court after the complaint had been filed. Likewise, we observe that the requests for retesting of the drug had been made by the appellant in August/September 2001 as would be clear from the facts already given above and there is absolutely no reason as to why the complaint could not have been filed earlier and the fourth sample sent for

retesting well within time. We are, therefore, of the opinion that the facts of the case suggest that the appellants have been deprived of a valuable right under Section 25(3) and 25(4) of the Act which must necessitate the quashing of the proceedings against them."

12. In case of Unique Farmaid P. Limited (supra), the Hon"ble Supreme Court observed in paragraphs No. 11 and 12 as under:

"11. Sub-section (1) of Section 30 which appears to be relevant only prescribes in effect that ignorance would be of no defence but that does not mean that if there are contraventions of other mandatory provisions of the Act, the accused have no remedy. Procedure for testing the sample is prescribed and if it is contravened to the prejudice of the accused, he certainly has right to seek dismissal of the complaint. There cannot be two opinions about that. Then in order to safeguard the right of the accused to have the sample tested from Central Insecticides Laboratory, it is incumbent on the prosecution to file the complaint expeditiously so that the right of the accused is not lost. In the present case, by the time the respondents were asked to appear before the Court, expiry date of the insecticide was already over and sending of sample to the Central Insecticides Laboratory at that late stage would be of no consequence. This issue is no longer res integra. In *The State of Punjab v. National Organic Chemical Industries Ltd.*, , JT (1996) 10 SC 480 this Court in somewhat similar circumstances said that the procedure laid down under Section 24 of the Act deprived the accused to have sample tested by the Central Insecticides Laboratory and adduce evidence of the report so given in his defence. This Court stressed the need to lodge the complaint with utmost dispatch so that the accused may opt to avail the statutory defence. The Court held that the accused had been deprived of a valuable right statutorily available to him. On this view of the matter, the court did not allow the criminal complaint to proceed against the accused. We have cases under the Drugs and Cosmetics Act, 1940 and the Prevention of Food Adulteration Act, 1954 involving the same question. In this connection reference be made to decisions of this Court in *State of Haryana v. Brij Lal Mittal & Ors.*, , [1998] 5 SCC 343 under the Drugs and Cosmetics Act, 1940; *Municipal Corporation of Delhi v. Ghisa Ram*, , AIR (1967) SC 970; *Chetumal v. State of Madhya Pradesh & Anr.*, , [1981] 3 SCC 72 and *Calcutta Municipal Corporation v. Pawan Kumar Saraf & Anr.*, , [1999] 2 SCC 400 all under the Prevention of Food Adulteration Act, 1954.

12. It cannot be gainsaid, therefore, that the respondents in these appeals have been deprived of their valuable right to have the sample tested from the Central Insecticides Laboratory under sub- section (4) of Section 24 of the Act. Under sub-section (3) of Section 24 report signed by the Insecticide analyst shall be evidence of the facts stated therein and shall be conclusive evidence against the accused only if the accused do not, within 28 days of the receipt of the report, notify in writing to the Insecticides Inspector or the Court before which proceedings are pending that they intend to adduce evidence to controvert the

report. In the present cases Insecticide Inspector was notified that the accused intended to adduce evidence to controvert the report. By the time the matter reached the court, shelf life of the sample had already expired and no purpose would have been served informing the court of such an intention. The report of the Insecticide Analyst was, therefore, not conclusive. A valuable right had been conferred on the accused to have the sample tested from the Central Insecticides Laboratory and in the circumstances of the case accused have been deprived of that right, thus, prejudicing them in their defence."

13. This Court in the order dated 15.12.2015, passed in Criminal Misc. Application No. 17597 of 2015, in similar type of facts, observed in paragraphs No. 3 and 4 as under:

"3. Having regard to the facts and circumstances discussed above, this Court is at pains to express the displeasure qua the manner in which the case has been dealt with by the Food Inspector and other authorities contemplated under the PFA Act. The sample was taken on 01/06/2010 which prescribed the date of manufacture as 29/05/2010 and the life for consumption of the product was a period of three months thereof i.e. 28/08/2010. The said sample was promptly sent to the Local Health Authority, which received it on 07/06/2010 for analysis. Unfortunately, without being conscious to the date of expiry of the product, the Local Health Authority consumed about a month before submitting its report on 07/07/2010. If prompt action was taken even on 07/07/2010, the rest of the procedure could have been completed on priority, but that was not done even as the Food Inspector consumed one more month before deciding to secure the information of the firm involved in the case under Section 14A of the PFA Act. He received such information on 17/09/2010 and by that date, the product had already expired. That date itself ensured the impossibility of compliance with Section 13 (2) of the PFA Act; inasmuch as, as discussed above, even according to the manufacturer, it was not good for consumption and thus it was prone to natural hazards and risks and would not in all possibility pass the prescribed test under the Act. However, the Food Inspector again consumed about a month for the purpose of moving the competent authority for sanction which was granted only after about one and a half month by the sanctioning authority. 22 days more were consumed by the Food Inspector before the complaint came to be lodged on 23/12/2010.

4. For the foregoing reasons, the application for leave deserves rejection and is accordingly rejected. Rule is discharged. Consequently, the appeal must fail and is dismissed."

14. Keeping in mind the aforesaid provisions of law and the law laid down by the Hon"ble Supreme Court and this Court, this Court is of the opinion that, in the present case when the complainant Food Inspector has filed the complaint after the expiry of self life of the sample in question, the respondents-accused have lost their valuable right of sending the sample to the Central Food Laboratory and therefore, the complainant Food Inspector has violated the mandatory provision

of the Act. Hence, the Trial Court has not committed any error while discharging the respondents-accused and therefore, no interference is required in this Revision Application.

15. Accordingly, this application is dismissed. Rule is discharged.