
(1999) 12 BOM CK 0064

In the Bombay High Court

Case No : Criminal Revision Application No. 271 of 1992

State of Maharashtra

APPELLANT

Vs

Arunkumar Hirji Shah and another

RESPONDENT

Date of Decision : 02-12-1999

Acts Referred:

Evidence Act, 1872 — Section 114

Prevention of Food Adulteration Act, 1954 — Section 11(1)(c)(i), 13, 14A, 16, 2(ia)(m)

Citation : (1999) 12 BOM CK 0064

Hon'ble Judges : Ranjana Desai, J

Bench : Single Bench

Advocate : Pravin Singhal, app, for the Appellant;

Judgement

Smt. Ranjana Desai, J.—In this revision application the State of Maharashtra has challenged order dated 31st July, 1992, passed by the Additional Chief Metropolitan Magistrate, 46th Court, Mazgaon, Bombay, in Case No. 213/S of 1989, discharging the respondents original accused nos. 1 and 2 of the offences u/s 7(i) read with section 2 (i-a) (m) punishable u/s 16 of The Prevention of Food Adulteration Act, 1954 (for short "the said Act").

2. Briefly stated the facts which give rise to this petition are as under:

Food Inspector Shri T. N. Lohar along with Food Inspector Shri P. L. Halmaniyar and independent witness Shri P. L. Dhutia visited the firm Rajesh Stores, situated at Shop No. 2. Shivam Building, Shimpoli Road, Borivali (W), Bombay, on 17-1-1985 at 3 p.m. At that time accused No. 1 Arunkumar Hirji Shah was present. He was looking after the business of the shop. Shri T. N. Lohar disclosed his identity to him as a Food Inspector and also his intention to draw the sample of the food articles for the purpose of analysis. He demanded and purchased 600 gms. of chilly powder in the presence of witness and paid Rs. 13.20 ps. as its cost. He then gave intimation in Form No. VI and notice u/s 14A of the said Act and obtained signature of accused No. 1 and the independent witnesses. He divided the chilly powder into three equal parts and put each part in a clean, dry

and empty polythene bag separately. He carried out the necessary formalities as detailed by him in his evidence. I shall advert to it a little later. He carried out the panchnama and then forwarded the samples as per the rules to the Public Analyst and to the Local Health Authority. The Public Analyst in his report dated 9-2-1985 opined that the sample was adulterated.

Thereafter he prepared proposal in proforma "A" and with his own report, he sent all the documents to Joint Commissioner, Food and Drugs Administration (FDA for short) for the purpose of obtaining consent i.e. sanction for prosecution of the accused. The Jt. Commissioner F.D.A. after scrutinising the papers and report of the Public Analyst issued the necessary consent order. After receipt of the consent the complaint was filed.

Being a warrant triable case, the prosecution examined its witnesses to make out prima facie case for framing the charge. The prosecution examined P.W. 1. Shri Gajanan Patkar, a Clerk working in Public Health Department, B.M.C., P.W. 2 Tatasahab Lohar, Food Inspector, P.W. 3 Shrikant Phadke and P.W. 4 Shri Chatim, the Public Analyst. After perusing the evidence and after hearing the arguments advanced by the learned Counsel appearing for both the sides, the learned Magistrate discharged the accused on the ground that there was breach of rules 14, 15 and 16, of the Prevention of Food Adulteration Rules, 1955 (for short "the said Rules") and Section 11 (I) (c) (i) of the said Act. He also held that the consent order was vague and omnibus. In his opinion, absence of proper consent vitiated the prosecution. It is this Order which is impugned by the State of Maharashtra.

3. I have heard Shri Pravin Singhal, learned Additional Public Prosecutor, who appears for the applicant State. None represents respondents accused though they have been duly served.

4. Mr. Singhal, submitted that the impugned judgment and order is perverse and liable to be set aside. He stated that the evidence of the two witnesses examined by the prosecution clearly shows that there is a compliance of rules 14, 15, 16 of the said Rules and section 11(I)(c)(i) of the said Act. The Food Inspector, argued Mr. Singhal, has given the meticulous details as to how the samples were drawn, what care was taken to seal them and how they were sent to the Public Analyst and also to the Local Health Authority. It was, therefore, not proper for the learned Magistrate to come to a conclusion that there was breach of the said provisions. Mr. Singhal also contended that the consent order was valid.

5. Relying on the judgment of this Court delivered on 8th of November, 1993 in Criminal Revision Application No. 164 of 1990 (The State of Maharashtra vs. Shri Arjunbhai Hargovindbhai Rathod) Mr. Singhal stated that the consent order need not disclose as to what type of adulteration was there. He relied upon the same judgment to canvass the argument that the Food Inspector need not be discredited merely because it was suggested in the cross that he had not used dry, clean bottles for taking samples or he himself has not cleaned and dried the

bottle. He, therefore, contended that the impugned order of discharge deserves to be set aside.

6. With the help of Mr. Singhal, I have gone through the evidence and also the record of the case.

7. Since the main ground on which the learned Magistrate has ordered discharge of the accused is the breach of rules 14 to 16 of the said Rules, it is, necessary to see what is the breach and what the learned Magistrate has to say about it. This is how he has dealt with it:

"It is admitted by the Food Inspector Shri Lohar that he has not cleaned the polythene bag personally. These bags were not clean by anybody in his presence. Similarly, the labels were not pasted on these particular bags but they were at the wrapper. The mouth of the bag have not been sealed. The labels were pasted at the wrapper and again the bag was wrapped in another brown paper and paper slip was pasted on it. Thereafter, the sample was tied vertically and horizontally by a twine, and four seals were put. This shows that Food Inspector has committed breach of the Rules regarding the sealing of the mouth of the polythene bag. So the breach of the provisions given in Rule 14 to 16 are obvious and establish by the defence counsel."

8. It will be, therefore, necessary to have a look at the said Rules. Rule 14 of the said Rules reads thus :-

"14. Manner of sending samples for analysis. - Samples of food for the purpose of analysis shall be taken in clean dry-bottles or jars or in other suitable containers, which shall be closed sufficiently tight to prevent leakage, evaporation, or in the case of dry substance, entrance or moisture and shall be carefully sealed."

9. In the opinion of the learned Magistrate, which is implicit in the above quoted paragraph of his judgment, because the Food Inspector has admitted that he had not cleaned the polythene bags personally and that the bags were not cleaned by anybody in his presence, there is breach of rule 14 of the said Rules. I am unable to agree with the learned Magistrate.

10. The Food Inspector has said in the cross-examination that the polythene bags were supplied to his office in a sampling kit from the store section of their department. He has stated that those bags were not cleaned as they were supplied by the company in fresh and new condition. He has clarified that he received the bags in the same condition in which they were supplied by the manufacturer. He has, further stated that he collected the sample in those bags in the same condition in which he had received them from his office. According to him the bags were new and inner surfaces of the bags were stuck to each other. He denied the suggestion that due to moisture inner surfaces of the polythene bags had stuck to each other. He has further clarified that the bags which he used were in such a condition that there was no scope for any gap or air and

humidity to be there between the two layers. He has denied that due to humidity and wetness the inner surfaces of the polythene bags were sticking to each other. He has also stated that on a visual examination he found bags to be dry, clean and empty. He has denied the suggestion that the polythene bags were never cleaned and dried and not fit for collecting the samples. What seems to have weighed with the learned Magistrate is the statement made by the Food Inspector that he had not personally cleaned the polythene bags. Probably in his opinion, the Food Inspector either should have personally cleaned the bags or should have supervised the cleaning of the bags. But it is pertinent that the Food Inspector has stated that the bags supplied to his office were fresh and in new condition and he had collected samples in the bags which were in the same condition in which they were supplied by the manufacturer. The Food Inspector has also stated that the surfaces had stuck to each other and hence there was no scope for any air or humidity being present between the two layers.

11. In my opinion, it was, therefore, improper for the learned Magistrate at this stage to come to a conclusion that the bags were not clean on the basis of the solitary statement made by the Food Inspector in the cross-examination that he had not personally cleaned the bags. The prosecution ought to be given chance to lead evidence on this point.

12. In this connection it is necessary to refer to the judgment of this Court in Criminal Revision Application No. 164 of 1990 (The State of Maharashtra vs. Shri Arjunbhai Hargovindbhai Rathod) wherein somewhat similar fact situation this Court has held that the Food Inspector cannot be discredited merely because it was suggested in cross-examination that he had himself not cleaned and dried the bottle. This Court referred to the fact that the Food Inspector had stated in his evidence that a panchnama was made when the samples were taken. It Was held that the panchas could have been examined at the later stage in support of the case of the prosecution. In the circumstances the order of discharge was set aside. In the present case also the Food Inspector has clearly stated that the panchnama was drawn. It was always open for the prosecution to prove the panchnama by examining witnesses. In my opinion the present case is covered by the judgment in Arjunbhai "s case (supra). There was no justification for the learned. Magistrate to discharge the accused on this ground.

13. Since the learned Magistrate has also held that there is a breach of rules 15 and 16, it is necessary to examine whether there is any such breach. Rules 15 and 16 read as under:

"15. Bottles of containers to be labelled and addressed. -- All bottles or jars or other containers containing samples for analysis shall be properly labelled and the parcel shall be properly addressed. The label on any sample of food sent for analysis shall bear;

(a) (Code number and serial number of the Local (Health) Authority.)

(b) Name of the sender with official designation, if any.

(c)* * *

(d) Date and place of collection.

(e) Nature of article submitted for analysis.

(f) Nature and quantity of preservative, if any added to the sample :

(Provided that in the case of a sample of food which has been taken from Agmark sealed container, the label shall bear the following additional informations :

(a) Grade.

(b) Agmark label No. /Batch No.

(c) Name of packing station)

"16.. Manner of packing and sealing the samples. - All samples of food sent for analysis shall be packed, fastened and sealed in the following manner, namely:

(a) The stopper shall first be securely fastened so as to prevent leakage of the contents in transit.

(b) The bottle, jar or other container shall then be completely wrapped in fairly strong thick paper. The ends of the paper shall be neatly folded in and affixed by means of gum or other adhesive.

(c) A paper slip of the size that goes round completely from the bottom to top of the container, bearing the signature and code and serial number of the Local (Health) Authority, shall be pasted on the wrapper, the signature or the thumb impression of the person from whom the sample has taken being affixed in such manner that the papers slip and the wrapper both carry a part of this signature or thumb impression :

Provided that in case, the person from whom the sample has been taken refuses to affix his signature or thumb impression, the signature or thumb impression of the witness shall be taken in the same manner.)

(d) The paper cover shall be further secured by means of strong twine or thread both above and across the bottle, jar or other container, and the twine or thread shall then be fastened on the paper cover by means of sealing wax on which there shall be at least four distinct and clear impressions of the seal of the sender, of which one shall be at the top of the packet, one at the bottom and the other two on the body of the packet. The knots of the twine or thread shall be covered by means of sealing wax bearing the impression of the seal of the sender."

14. In order to see whether there is a breach of aforementioned rules 15 and 16 it is necessary to see what the Food Inspector has stated on this aspect. He has stated that after he filled each part of the chilly powder in three dry, clean and

empty polythene bags separately, he sealed the polythene bags by means of wax candle. He wrapped each part of the sample in brown paper and folded ends of the brown paper were pasted with gum. He prepared three labels having description of the food article, and having code number and other particulars of the food article. He himself signed on the labels and obtained signature of accused No. 1 and independent witnesses on all the three copies of the label. He pasted the label on each part of the sample and wrapped each part in brown paper and folded ends thereof were pasted with gum. He affixed paper slip having signature of Local Health Authority and code number around each part of the sample by means of gum. He fastened each part with strong coir cross-wise and he sealed each part by putting four seals on each part of the sample. He used his official seal and sealing wax for sealing the three parts of the sample and precaution was taken that knots of the twine were covered under the seal impression. Out of the four seals, one seal was put on the top, one at bottom and two at two sides of the sample part. He obtained cross-signature of accused No. 1 on all the three seal covers in such a way that part of his signature will lie on paper slip and part will lie on brown paper.

15. While arriving at the conclusion that the Food Inspector has committed breach of rules 15 and 16 of the said Rules, the learned Magistrate has observed that the mouth of the bags were not sealed. The food inspector has stated that after filling the chilli powder in three polythene bags he sealed the mouth of the bags by means of wax candle. Therefore, prima facie, the learned Magistrate is not right when he says that the mouth of the bags were not sealed.

16. The learned Magistrate has also relied upon the statement made by the Food Inspector that he pasted label on the wrapper. The Food Inspector has stated that he wrapped each part of the sample in brown paper and he folded ends of the brown paper. He then pasted them with gum. Thereafter he prepared three labels having necessary particulars. He pasted labels on each part of the sample and wrapped each part in the brown paper. He pasted the folded ends of brown paper with gum. Therefore, wrapper seems to have been used twice and on the first wrapper labels were put. It is not as if the labels were put on the outer wrapper. On the outer wrapper he put the paper slip and followed the further procedure required by rule 16. On the basis of this evidence the learned Magistrate could not have discharged the accused. There was at least sufficient prima facie material to put up the accused for trial. A conclusion that there was breach of Rule 14 to 16, if it was possible to be arrived at, could have been arrived at in the facts of this case only after trial.

17. The learned Magistrate has also come to a conclusion that there is a positive breach of section 11(1)(c)(i). The relevant provision to section 11(1)(c)(i) reads thus:

"11. Procedure to be followed by Food Inspectors. - (1) When a Food Inspector takes a sample of food for analysis, he shall :

(a)

(b)

Provided

(c) (i) send one of the parts for analysis to the public analyst under intimation to the Local (Health) Authority; and

(ii) send the remaining two parts to the Local (Health) Authority for the purposes of sub-section (2) of this section and sub section (2-A) and (2-E) of section 13;

(2) Where the "

18. In this regard the learned Magistrate has observed that Food Inspector has not sent independent intimation to the Local (Health) Authority regarding the intimation of sending one part of the sample along with original memorandum in Form No. 7 to the Public Analyst for the purpose of analysis. He has also observed that there is no explanation offered.

19. The Food Inspector has in his evidence stated that on 18-1-1985, he sent one sealed part of sample along with original in Form No. 7 in sealed envelope to the Public Analyst, Bombay by hand delivery through sampling agent Shri Gaikwad. He produced office copy of the said forwarding letter Exhibit 18. On the same day he sent copy of the memorandum in Form No. 7 along with specimen seal impression of the seal in a sealed packet separately to the Public Analyst by hand delivery through sampling agent Shri Gaikwad with a forwarding letter. He produced the office copy of the said letter Exhibit 20. Therefore, prima facie it appears that he complied with rule 18 of the said Rules.

20. So far as the intimation to the Local Health Authority is concerned, he has stated that in the forwarding letter to the Local Health Authority dated 18-1-1985 (Exhibit 21) i.e. the same day on which one sample was sent to the Public Analyst, he had informed the Local Health Authority about sending of sealed sample to Public Analyst for analysis.

21. I have perused Exhibit 22. Exhibit 22 bears out the Food Inspector. Therefore, it is not as if Local Health Authority was not informed on the same day. Therefore, whether there is a breach of section 11(1) (c)(i) cannot be conclusively decided at this stage.

22. Last point on which the learned Magistrate has discharged the accused is the allegedly vague, obnious, non-speaking consent order which is issued u/s 20 of the said Act. According to the learned Magistrate the consent order is bad because the consenting authority has not referred to the percentage of the adulteration, because the consent order does not state which section or rule was breached, because the authority has not rendered reasons for his conclusion and because it is not mentioned in the consent order that it was in public interest. Implicit in this is also non-application of mind of the consenting authority.

23. I am unable to appreciate this reasoning. The consenting authority has stated that he had gone through the report No. FD/169 dated 9-2-1985, issued by the Public Analyst for the city of Greater Bombay, in respect of the food article (chilli powder) and all other relevant case papers and had come to a conclusion that it was a fit case for prosecution for contravention of section 7(1) of the Act, 1954. This shows that the consenting authority had gone through all the relevant papers and then come to a conclusion that it was a fit case for prosecution. Application of mind is prima facie evident.

24. As regards the other grounds it will be useful to read in this context the following observations of this Court in S.D. Nagdeve Vs. Sudhakar Raghunath Burange, :

Lastly it is contended that Exhibit 25, the order of consent, is not speaking in the sense it does not disclose the reasons in details and hence it does not comply with requirements of section 20, and, therefore, the prosecution is vitiated. Apart from the fact that validity of consent u/s 20 is a mixed question of law and fact and, therefore, cannot be allowed to be normally raised for the first time at appellate stage, because prosecution with notice of such objection can adduce evidence to prove validity of consent, we do not see any merit in the contention. Grant or refusal of consent under this provision is essentially an administrative and not a judicial function. Its purpose is not to record a prima facie finding about guilt because the stage of evidence upon which the result of prosecution depends is yet to arise. What then is its purpose? Purpose is to see whether prima facie material exists for the alleged offender to be put up for trial and whether trial is necessary in public interest. In other words to put check on frivolous and unnecessary trials. What is of essence is that the consenting authority must apply its mind to the facts of the case. In considering the question of validity of consent order, there is one more aspect which has to be kept in view and that is about a presumption u/s 114 of the Evidence Act of official act having been regularly performed. In this connection the case of Tulsi Ram Vs. State of U.P., , though in the context of section 196A, Criminal Procedure Code, is to the point. Moreover, hyper technicality should not come in the way of booking the offenders under the PFA Act considering its object.

25. It is also necessary to note the following observations contained in the same judgment in paragraph 15:

In our view, no conclusive inference can be drawn of non-application of mind by virtue of the only fact that in the consent order type of adulteration is not mentioned. All will depend upon facts and circumstances of each case.

26. Therefore, as observed in Nagdeve's case (supra), the validity of consent is a mixed question of law and fact and the prosecution can always adduce evidence to prove validity of the consent. It being merely an administrative function and not a judicial function, its purpose is to see whether prima facie material exists to put up the accused for trial. In considering the validity of a

consent order presumption u/s 114 of the Evidence Act will have to be kept in mind. Official acts must be presumed to have been regularly performed. Merely because the consent order does not mention the type of adulteration it cannot be held to be bad in all cases. It will depend on facts and circumstances of each case.

27. In the facts and circumstances of the present case, prima facie, I am not inclined to hold that the consent order is bad in law. The learned Magistrate was, therefore, clearly in error in discharging the accused on this ground. The prosecution must be given a chance to adduce evidence.

28. Framing of a charge against a person is a serious matter. It puts fetters on the liberty of a person to a great extent. A Court of law has, therefore, to take utmost care while framing a charge. It has to consider judicially whether the material warrants framing of charge because putting up a man to a trial on flimsy and totally unsustainable grounds means causing untold hardship and misery to him. But that does not mean that the provision of discharge is to be resorted to freely. In a glaring case of no evidence the Court is bound to discharge the accused.

29. Quoting the decision of the Supreme Court in *State of West Bengal and another Vs. Mohammed Khalid and others*, , the Supreme Court observed in *State of Maharashtra, Etc. Etc. Vs. Som Nath Thapa, Etc. Etc.*, , that while considering the question of framing of charge, the Court has to see whether the material brought on record would reasonably connect the accused with crime. No more is required to be enquired into. The test of "prima facie" case has to be applied. If on the material on record, a Court would come to the conclusion that commission of the offence is a probable consequence, a case of framing of charge exists. In *Somnath Thapa's* case (supra) the Supreme Court observed that, if the Court were to think that the accused might have committed an offence it can frame the charge though for conviction the conclusion is required to be that the accused has committed the offence.

30. In *State of Maharashtra Vs. Priya Sharan Maharaj and Others*, , the Supreme Court observed that "at the stage of framing of the charge the Court has to consider the material with a view to finding out, if there is ground for presuming that the accused has committed the offence or that there is no sufficient ground for proceeding against him and not for the purpose of arriving at the conclusion that it is not likely to lead to a conviction. If there is a grave suspicion against the accused, charge must be framed.

31. In the case on hand the report of the Public Analyst and the evidence of the Food Inspector is good enough material to make out prima facie case against accused for the purpose of putting him up for trial. The alleged breaches of mandatory provisions, the faulty consent order can be examined better at the stage of trial. The order discharging the accused is, therefore, clearly erroneous and deserves to be set aside.

32. In the result the following order is passed:

(a) Order dated 31st July, 1992, passed by the Additional Chief Metropolitan Magistrate., 46th Court, Mazgaon, Bombay, in Case No. 213/S of 1989 of original Case No. C.C. No. 129/S of 1985 is hereby set aside.

(b) The case is remanded to the trial Court for disposal according to law. Considering the time taken already, the learned Magistrate shall dispose of the case as expeditiously as possible; at any rate within a period of eight months after receipt of this order by him.

(c) It is clarified that all observations made in this judgment are prima facie observations. This Court has not expressed any final opinion on any aspect of the matter. The learned Magistrate seized of the matter shall deal with it independent of any observations made by me in this judgment.

(d) The present criminal revision application is disposed of in the aforestated terms.

(e) The Registrar, High Court is directed to send the record of the case to the trial Court immediately.