

(2009) 08 KL CK 0034
In the High Court Of Kerala
Case No : Criminal M.C. No. 774 of 2009

T. Johnson

APPELLANT

Vs

State of Kerala and Another

RESPONDENT

Date of Decision : 19-08-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Infant Milk Substitutes, Feeding Bottles and Infant foods (Regulation of Production, Supply and Distribution) Act, 1992 — Section 2
Prevention of Food Adulteration Act, 1954 — Section 10, 11, 11(1), 12, 13
Prevention of Food Adulteration Rules, 1955 — Rule 2, 37A, 37A(1), 37A(2), 37B

Citation : (2010) CriLJ 1788

Hon'ble Judges : M. Sasidharan Nambiar, J

Bench : Single Bench

Advocate : Bechu Kurian Thomas, for the Appellant; B. Vinod, Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

M. Sasidharan Nambiar, J.—Whether a food product which is not marketed or represented as a complement to mother's milk would be an infant food as defined under the Prevention of Food Adulteration Rules 1955 for the reason that its carton depicts picture of an infant. Whether prosecution for an offence under the Prevention of Food Adulteration Act is legal, if the sample of the article of food purchased by the Food Inspector, is not examined by the Public Analyst and no report is obtained. These are the questions to be settled in this petition.

2. Petitioner, the manufacturer of "Banatone" marketed "as natural banana powder", is the fourth accused in C.C.163/2008 on the file of Judicial First Class Magistrate, III, Thiruvananthapuram. Second respondent, the complainant, Food Inspector, Thiruvananthapuram purchased 6 packets of Banatone banana powder each weighing 100gms. after paying the price from Variety Traders Thiruvananthapuram and prepared three samples as provided under the Rules for the purpose of sending it to the Public Analyst. One sample was sent to the

Public Analyst and two samples were forwarded to the Local Health Authority. First accused is the employee and second accused the proprietor of Variety Traders and third accused the distributor through whom petitioner marketed the food article. Annexure A4 complaint was lodged before the Magistrate alleging that "Banatone" marketed as a natural banana powder is an infant food and in violation of Rule 38 the label contained inscription ISO 9001-2000 certified company and violated violation of Rule 37B(2), which prohibits showing picture of any infant or woman on the infant food and Rule 37A by manufacture and sale of infant food, without obtaining sanction of the Central Government and thereby committed offence punishable u/s 16(1)(a)(i)(ii), 7(ii)(v), 2(ix)(g)(k), Rule 37A and 37B(2) of Prevention of Food Adulteration Act and Rules. This petition is filed u/s 482 of Code of Criminal Procedure, to quash Annexure A4 complaint contending that there is no violation of any of the Rules as alleged and the product Banatone is not an infant food at all and therefore for that sole reason the prosecution is liable to be quashed. It is also contended that after taking sample, for sending to the Public Analyst, prosecution without getting a report from the Public Analyst is bad in law and is unsustainable. It is also contended that as seen from Annexure A5 communication from the District Food Inspector, the sample taken by the second respondent was sent to the Public Analyst but was rejected due to the wrong sampling and without getting the sample examined by the Public Analyst, the prosecution is lodged and for that sole reason alone the prosecution is not maintainable. It is also contended that sample of Banatone was taken earlier and sent for Public Analyst and evidenced by Annexure A6 report it was found that there was no adulteration and Annexure A6 report proves that there is no misbranding and in such circumstance prosecution is only an abuse of process of the court.

3. Learned Counsel appearing for the petitioner and learned Public Prosecutor were heard.

4. Learned Counsel pointed out that Banatone marketed by the petitioner is only a banana powder and is not an infant food as defined under Rule 2(db) of the Prevention of Food Adulteration Rules 1955 and as it is not an infant food. Rule 37A and 37-B is not applicable and therefore no offence was committed and the prosecution is to be quashed. Learned Counsel also argued that a food product would be an infant food as defined in the Rules, only if it is marketed or otherwise represented as a complement to mother's milk and when there is no claim in the product marketed by the petitioner that it is a complement to mother's milk to meet the growing nutritional needs of the infant, by showing the picture of an infant on the carton alone it will not make the banana powder, an infant food as provided under the Rules and therefore on that sole ground the prosecution is to be quashed. Learned Counsel also pointed out that when the Food Inspector had purchased the Banatone powder for getting it analysed by the Public Analyst and prepared the samples for forwarding to the Public Analyst, and in fact forwarded one sample to the Public Analyst and the remaining two samples to the Local Health Authority, no prosecution will lie before getting a

positive report from the Public Analyst as provided u/s 13 of the Act. Learned Counsel also argued that when the sample of Banatone in the case was taken on 5.4.2008, Annexure A6 report of the Public Analyst dated 25.1.2008, after examination of Banatone natural banana powder sent for analysis by the same Food Inspector, shows that it is not adulterated. It is argued that when there is no case for the Public Analyst that there is misbranding, lodging of Annexure IV complaint without getting a report of the Public Analyst is clearly an abuse of process of the court and is to be quashed.

5. Learned Public Prosecutor argued that under Rule 37B(2) picture of an infant shall not be shown on the infant food and Banatone powder is marketed and sold as an infant food and the Banatone marketed by the petitioner shows that it is marked as a complement to the growing nutritional needs of the infant. It is argued that eventhough it is not specifically marketed as a complement to mother's milk as it is marketed as a complement to the growing nutritional needs of an infant and is being passed of as a complement to the mother's milk and therefore it is an infant food as defined under the Rules and therefore prosecution is legal and valid and the question whether petitioner committed the offence or not can only be decided after evidence and the complaint cannot be quashed.

6. Annexure A4 complaint shows that prosecution was launched on the specific allegation that Banatone banana powder manufactured by the petitioner and distributed and sold through the other accused is an infant food as provided under the Prevention of Food Adulteration Act (hereinafter referred to as the Act) and Prevention of Food Adulteration Rules (hereinafter referred to as the Rules). It is on that basis second respondent alleged that there is violation of Rule 37B(2), 37A and 38 it is misbranded and thereby the accused committed the offences u/s 16(1)(a)(i) and (ii) and Section 7(ii)(v), of the Act and the Rules.

7. As per Section 2(ix)(k) of the Act an article of food shall be deemed to be misbranded, if it is not labelled in accordance with the requirements of the Act and the Rules made thereunder. u/s 7(i) no person shall himself or by any person on his behalf manufacture for sale or store, sell or distribute any adulterated food. u/s 7(ii) no person shall himself or by any person on his behalf manufacture for sale or store, sell or distribute any misbranded food. u/s 7(v) no person shall himself or by any person on his behalf manufacture for sale, store or sell or distribute any article of food in contravention of any other provisions of the Act or Rules. The prosecution case is that petitioner manufactured and marketed Banatone powder claiming to be a natural banana powder, in violation of the Rules. The Rules allegedly violated are Rules 37A, 37-B(2) and 38 of the Rules. The case is that the product is thus misbranded. That case is built up on the edifice that Banatone is an infant food and so there is violation of the Rules, relating to the infant food, as provided under the Rules, and therefore an offence punishable under Sections 16(1)(a)(ii) is committed. If Banatone is not an infant food, as defined under the Rules, continuation of the proceedings could only be

an abuse of process of the court. The crucial question therefore is whether "Banatone" marketed by the petitioner is an infant food.

8. Prevention of Food Adulteration Rules 1955 defines an "infant" under Clause (da) of Rule 2 as means "a child not more than twelve months of age. "Infant food" is defined under Clause (db) as follows:

"infant food" means any food (by whatever name called) being marketed or otherwise represented as a complement to mother's milk, to meet the growing nutritional needs of infant after the age of six months and up to the age of two years).

"Infant milk substitute" is defined under Clause (dc) of Rule 2 as meaning any food being marketed or otherwise represented as partial or total replacement for mother's milk for infant up to the age of two years. From the definition itself it is clear that an infant food could be any food which is being marketed or otherwise represented as a complement to mother's milk to meet the growing nutritional needs of infant after the age of six months and up to the age of two years and infant milk substitute means any food marketed or otherwise represented as partial or total replacement for mother's milk for infant up to the age of two years. If any food is marketed as a partial or total replacement for mother's milk, it is an infant milk substitute. On the other hand, if any food is marketed as a complement to mother's milk to meet the growing nutritional needs of infant it would be an infant food. In both the cases one aspect is common. The food must either be marketed or represented as a complement to mother's milk or partial or total replacement for mother's milk. Unless it is as a complement to or replacement, partial or total for mother's milk it will not be an infant food or infant milk substitute as defined under the Rules.

9. Rule 37A was amended by the Prevention of Food Adulteration Seventh Amendment Rules 2006, which came into effect from 21.8.2006, as per G.S.R.491(E) dated 21.8.2006. The original Sub-rule (1) of Rule 37A reads:

Manufacture of proprietary foods and infant milk substitute/infant foods- (1) article of infant milk substitutes/infant foods whose standards are not prescribed in Appendix B shall be manufactured for sale, exhibited for sale or stored for sale only after obtaining the approval of such articles of food and its label from Government of India.

By the amendment heading of Rule 37A, reads only "manufacture of proprietary food." Original sub-rule(1) was taken away from Section 37A and substituted as Sub-rule (1) of Rule 37B. Consequently original Sub-rule (2) of Rule 37A is changed as Sub-rule (1) with modification. As we are not concerned with proprietary food in this case, it is not relevant for the purpose of this case. By the Amendment Act, Sub-rule (1) of 37A was substituted as Sub-rule (1) of Rule 37B and original Sub-rule (1) was renumbered as Sub-rule (1-A). Second respondent without taking note of the amendments alleged that there is violation of Rule 37A, when as per the case the alleged violation is of Rule 37B. The case

is that Banatone is an infant food and hence Rule 37A is applicable when it in fact after the amendment it applies only to proprietary foods and the rules which are applicable to infant foods is only Rule 37B. Sub-rules (1) and (2) of Rule 37B (omitting Sub-rule (1-A)) read:

37-B Labelling of infant milk substitute and infant food-(1)an article of infant milk substitutes/infant foods whose standards are not prescribed in Appendix B shall be manufactured for sale, exhibited for sale or stored for sale only after obtaining the approval of such articles of food and its label from Government of India.

(2) No containers or label referred to sub-rule(i) relating to infant milk substitute or infant food shall have a picture of infant or women or both. It shall not have picture or other graphic materials of phrases designed to increase the saleability of the infant milk substitute or infant food. The terms "Humanised" or "Maternalised" or any other similar words shall not be used. The package and/or any other label of infant milk substitute or infant food shall not exhibit the words, "Full Protein Food" "Energy Food" "Complete Food" or "Health Food" or any other similar expression.

10. It is clear that Rule 37-B(1) corresponding to Rule 37-A(1), as originally stood, applies only to "an infant milk substitutes/or infant foods, "whose standards are not prescribed in Appendix B.

11. As defined under Rule 2(db), an infant food could only be a food marketed or otherwise represented as a complement to mother's milk to meet the growing nutritional needs of an infant. There is no allegation in the complaint that the food product Banatone banana powder is marketed or otherwise represented as a complement to mother's milk. On the other hand, the only allegation is that it is an infant food, without explaining how it will be an infant food when its carton does not show that it is an infant food.

12. The learned Public Prosecutor made available the label in the carton of Banatone banana powder marketed by the petitioner and argued that it is clear that it is being marketed as a complement to mother's milk to meet the growing nutritional needs of the infant. The label made available does not contain any claim or representation that it is a complement to mother's milk to meet the growing nutritional needs of an infant as provided under Rule 2 (db). It only shows that Banatone banana powder could be consumed from the age of four months onwards apart from depicting the picture of an infant in its carton. The nutritional information contained in the label reads:

Banatone banana powder may be given from about 4 months onwards as a further variety to baby's diet unless otherwise advised by your doctor. Banatone banana powder is good for growing children at any mealtime.

This is all what is contained in the label. Even if the said claim is looked into to find out whether it is marketed or represented as a complement to the mother's

milk to meet the growing nutritional needs of the infant, it does not claim to be a complement to mother's milk. Learned Public Prosecutor pointed out that " The Infant Milk Substitutes, Feeding Bottles and Infant foods (Regulation of Production, Supply and Distribution) Act, 1992 ((Act 41 of 1992)" which is enacted to provide for the regulation of production, supply and distribution of infant milk substitutes, feeding bottles and infant foods with a view to the protection and promotion of breast feeding and ensuring the proper use of infant foods and for matters connected therewith or incidental thereto came into force with effect from 1.8.1993. It is also pointed out that the definition of "an infant food," and "infant milk substitute" are the same as in the Prevention of Food Adulteration Rules 1955. The definition of infant food u/s 2 (f) of Act 41 of 1992 reads:

"infant food" means any food (by whatever name called) being marketed or otherwise represented as a complement to mother's milk to meet the growing nutritional needs of the infant (after the age of six months and up to the age of two years).

True, the definition is identical to the one in Rule 2(db) of the Rules. But the question is whether it makes any difference in the interpretation of the ambit and scope of infant food as provided under the Rules. As is clear from the Infant Milk Substitutes, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Act, 1992, the said Act was mainly enacted to promote breast feeding and ensuring proper use of infant foods. It is clear that what is intended by enacting the Act 41 of 1992 is prevention of marketing or promoting sale of food under the guise that it is a complement to mother's milk or a substitute or a partial or total replacement of the mother's milk, for the ultimate goal of promoting breast feeding. By the relevant provisions of Prevention of Food Adulteration Act and Prevention of Food Adulteration Rules, infant foods and infant milk substitutes are brought within the ambit of the Act and the Rules. At the same time, all food items which could be consumed by an infant are not brought within the ambit of infant food as defined u/s 2(db) of Prevention of Food Adulteration Rules. What is prevented is only marketing or otherwise representing the food article either as a complement to mother's milk or as a partial or total replacement of mother's milk. Otherwise definition of infant food may have to be redrafted "as any food which is marketed which could be consumed by an infant as a complement to meet the growing nutritional needs of infants". If that be so, the word mother's milk will be redundant in the rule. That cannot be the case. There are several food items marketed, which could also be consumed by an infant. But all those food items cannot be an infant food as provided under Rule 2(db). Take for example, case of pure milk powder. It could be given to an infant. For the reason that it can be consumed by an infant, it cannot be said that the ordinary milk powder is either a "milk substitute" or an "infant food" as defined under the Rules. Unless the food article is marketed or otherwise represented as a complement to mother's milk, it will not be an infant food as defined under Rule 2(db).

13. Learned Counsel appearing for the petitioner pointed out that the meaning of the word "complement" as per Compact Oxford Reference Dictionary is as follows:

complement-n./kom.pli.muht/l a thing that contributes extra features to something else so as to improve it. 2. the number of quantity that makes something complete. 3. a word or words used with a verb to complete the meaning of the subject (e.g. happy in the sentence we are happy) v./kom-pliment/act as a complement to. ORIGIN Latin complementum.

The meaning as seen in New Websters Dictionary is:

complement-(kam,pla.mant) n. that which supplies a deficiency, something completing a whole; the full quantity or number; v.t to complete; to supply a deficiency, alary a completing (L.complere, to full up).

The complaint does not contain a specific allegation that Banatone banana powder is being marketed or otherwise represented as a complement to mother's milk to meet the growing nutritional needs of the infant and therefore it is an infant food eventhough the label does not show that it is an infant food.

14. If Banatone banana powder is being marketed or otherwise represented as a complement to mother's milk, there should be a claim or allegation in the label of the carton that Bantone banana powder could be supplied for the deficiency in mother's milk or that it improves deficiency in the mother's milk. There is no such allegation in the complaint. There is no claim or statement in the carton that it can be given to an infant to complement the mother's milk. If so it cannot be an infant food.

15. A learned single Judge of High Court of Gujarat in Rama Fertilizers Pvt. Ltd. Vs. State of Gujarat, had considered whether the sample of cereal depicting a large picture of an infant and three small pictures of infants on the label of the container makes it an infant food. It was held:

7.5. On the other hand, Sub-rule (1) of Rule 37-B does not apply to any and all "infant foods" but applies only to infant milk food, infant formula and any other special infant food marketed as breast milk substitutes. These three categories viz. Infant milk food, infant formula and any other special infant food are, in the context of Sub-rule (1), required to be read in conjunction with each other because of the presence of the conjunction "and" used in the phrase, and also because the concept of marketing is considered not in the singular, but in plural viz. marketed as breast milk substitutes. If any of these categories are marketed as breast milk substitutes, the prohibition imposed by Rule 37-B applies with full force, but not otherwise.

7.6. Firstly it is nobody's case including that of the prosecution that the product in question is marketed as a breast milk substituted. On the contrary the label clearly indicates that it is a "weaning food" i.e. it is a complement or supplement to breast milk. Obviously any product which is a complement or supplement to

breast milk cannot possibly be treated as a substitute for breast milk. Certainly it is not the prosecution case that the product contains any printing or any other indication on the label that it is marketed or professed to be marketed or professed to be "breast milk substitute.

8. For the reasons aforesaid, I am of the view that Rule 37-B has no application to the product in question.

16. Learned Counsel appearing for the petitioner also relied on the decision of the High Court of Orissa in Lakhiram Agarwal Vs. C.R. Dash, Food Inspector, where the question whether Farex manufactured by Glaxo India is misbranded or not was considered. As in this case, the Farex powder depicts the picture of an infant on its label. The case was that it is an infant food. The learned single Judge held:

For the purpose of Rule 37-A, the Explanation provides an inclusive definition of "infant food". It deals with an article of infant food whose standards are not prescribed in Appendix B. Even in the case of Rule 37-A, the Weaning Food in order to be encompassed must be a food which may be used for partial or total replacement of breast milk and is called breast milk substitute, as is suitable as a complement to breast milk.

The word "complement" in the context it is used means to fill up, that which is required to make up a deficiency, to make something else perfect and complete, that which fills up or completes. The food had to be a "replacement" and "suitable" and "weaning food" is defined to be one. In order to attract application of Rule 37-B the food must be a special infant food marketed as breast milk substitute if it is not an infant milk food or infant formula. "Substitute" means to put instead of, something put in the place of, used instead of. It is clear from Section 37-B (2)(iv) that for the purpose of Rule 37-B, weaning food is not included in Infant formula. Infant Milk Food, Special Infant Food referred to in Rule 37-B(1). The use of the expression in addition to mother milk is clearly indicative of the legislative intent that weaning food for the purpose of Rule 37-B is not considered as a partial or total replacement of breast milk, commonly called breast milk substitute.

The views of the High Courts of Gujarat and Orissa also support the view taken by me earlier. As Banatone banana powder is neither marked nor represented as a complement to mother's milk, it is not an infant food as defined under Rule 2(db) of the Rules. Therefore neither Rule 37-B(1) nor 37-B(2) applies. Hence there is no violation of Rule 37B(1) or 37B(2) of the Rules or consequential commission of an offence as alleged.

17. Violation of Rule 38 is alleged for the reason that the label contains an inscription that "An ISO 9001 - 2000 certified company." Rule 38 reads:

38. Labels not to contain reference to Act or rules contradictory to required particulars- the label shall not contain any reference to the Act or any of these

rules or any comment on, or reference to, or explanation of any particulars or declaration required by the Act or any of these rules to be included in the label which directly or by implication, contradicts, qualifies or modifies such particulars or declaration.

It cannot be said that by showing the manufacturer company "as an ISO 9001-2000 certified company" there is violation of Rule 38 of the Rules. Thus Prosecution for the offence u/s 7(ii)(v) u/s 16(1)(a)(i) and (ii) of Prevention of Food Adulteration Act is bad when Banatone is not an infant food and as there is no violation of Rule 37-A or 37-B(1) 37B(2) or 38 of the Rules.

18. Added to this learned Counsel pointed out that Annexure A6 report of Public Analyst which was obtained on 25.1.2008, after analysing the sample of Banatone natural banana powder manufactured by the petitioner and sent for analysis by the second respondent Food Inspector shows that it is not adulterated and if it is misbranded as claimed by the second respondent, Public Analyst would have definitely stated so in Annexure A6 report. There is force in the submission of the learned Counsel appearing for the petitioner that knowing that Public Analyst will not provide a report that there is misbranding, the sample taken from the shop of the second accused on 5.4.2008 was not got analysed by the Public Analyst after the sample forwarded was rejected for defects. Learned Counsel appearing for the petitioner rightly pointed out that when the sample was collected by the Food Inspector, in exercise of the power provided u/s 10 of the Act following the procedure provided u/s 11 of the Act, it is mandatory that one of the three samples should be sent to the Public Analyst for examination and the two remaining samples are to be forwarded to the Local Health Authority. Prosecution for the offence under the Act in such circumstance, could only be lodged after getting the report of the Public Analyst as provided u/s 13 of the Act. The attempt of the second respondent in lodging the complaint, without getting a report from the Public Analyst could only be to get over an adverse report from the Public Analyst as the allegations in the complaint is that there was misbranding and Annexure A6 report obtained from the Laboratory earlier does not support that case.

19. Learned Counsel relied on the decision of learned single Judge of the Andhra Pradesh High Court in Pothuri Ananda Venkata Subba Rao Gupta Vs. State of Andhra Pradesh, where it is held that by a reading of Section 11(1)(c) it is manifestly evident that a duty is imposed on the Food Inspector to send one of the parts of sample to the Public Analyst and no further proceeding can be taken under the Act without getting a report from the Public Analyst. It was therefore argued that without getting a report, the prosecution is not maintainable.

20. In view of Sections 10, 11, 12 and 13 of Prevention of Food Adulteration Act and Rules 7 and 9 of the Rules, it can only be held that without getting the report of a Public Analyst, Food Inspector is not to lodge a complaint alleging that there is misbranding, when sample was taken by the Food Inspector for sending it to the Public Analyst. As rightly argued by the learned Counsel appearing for the

petitioner sending of the sample of food article to the Public Analyst is not an empty formality. If it is to be held otherwise, a Food Inspector could prosecute a manufacturer for the offence of misbranding alone, when in fact there is adulteration. Permitting to lodge a complaint without getting a report the Public Analyst is not therefore in the public interest. It is detrimental to the very object of enactment of the Act. As the prosecution is lodged, without getting a report of the Public Analyst, on that ground also, the prosecution is not sustainable. The continuation of the proceeding is thus only an abuse of process of court.

Petition is allowed. C.C. 163/2008 on the file of Judicial First Class Magistrate Court III, Thiruvananthapuram is quashed.