

# **BOMBAY HIGH COURT**

State

Vs.

Amratlal Bhogilal

Criminal Appeal No. 641 of 1953, Case No. C 171 of 1952

(Gajendragadkar and Chainani, JJ.)

06.08.1953

## **JUDGMENT**

### **Chainani, J.**

1. This is an appeal by the State of Bombay against the order passed by the Additional Stipendiary Magistrate, First Class, Ahmadabad, acquitting the opponent, who was prosecuted under Section 4 (1) (a) and Section 4 (1) (b) of the Bombay Prevention of Adulteration Act, 1925. The opponent, who was accused No. 2 in the trial Court, is the manager of a shop in Ahmadabad, at which ghee and other articles are sold. On March 7, 1952, the food inspector of the Ahmadabad Municipality, witness Dave, went to this shop. He purchased 3/4 lb. of ghee from the opponent and paid him Rs. 1-11-0 for it. He told the opponent that the ghee was to be sent for analysis. He then divided the ghee purchased by him in three parts, put each of them in a separate bottle and sealed, labeled and signed each bottle. One of the three bottles was given to the opponent, who was asked to pass a receipt. The opponent then gave the inspector a receipt stating that he had received Rs. 1-11-0 for 3/4 lb. of ghee sold to the inspector for getting it analyzed and that he had also received a sample bottle. The other two samples were sent to the municipal laboratory for examination. The public analyst found that the ghee was adulterated to the extent of 14 per cent. In his opinion it was not genuine ghee. Its B. R. reading at 40 C was 44.3 and its R. W. value was 21.1. The opponent, along with the owner of the shop, who was accused No. 1 in the trial Court, was then prosecuted for selling and keeping or exposing for sale adulterated ghee under Section 4 (1) (a) and Section 4 (1) (b) of the Bombay Prevention of Adulteration Act (hereinafter referred to as the Act). Both the accused pleaded not guilty. The owner of the shop stated that the opponent, accused No. 2, looked after the entire business of the shop, that he never attended to it and that consequently he was not liable. The opponent (accused No. 2) in his statement also stated that he had been entrusted with the management of the shop and that accused No. 1 had no concern with it. The learned Magistrate, therefore, acquitted accused No. 1. The opponent further stated that all tins of ghee kept for sale at his shop had been tested in the

laboratory of the Ahmadabad Ghee Merchants' Association, who had certified it as genuine ghee and that he had therefore taken sufficient care to see that the ghee which was sold at his shop was pure ghee. The opponent examined one Chimanlal, who claims to be the President of an association of ten ghee merchants in Ahmedabad. Chimanlal has deposed that he had employed one Bansilal for taking B. R. readings of the ghee sold by him, that he never sold ghee of which the B. R. reading was more than 44 at 40 C and that he had sold two tins of ghee to the opponent on March 5, 1952, i.e. two days before the opponent's shop was visited by the food inspector. The learned Magistrate accepted the opponent's defense that the ghee sold by him was pure, as according to the evidence of Chimanlal its B. R. reading was less than 44. He also appears to have been of the opinion that the sale of ghee to a food inspector would not be 'sale' within the meaning of Section 4(1) of the Act. The learned Magistrate has also observed that from the "statements and demeanour" of the accused, it was clear that they were not guilty. It is not easy to understand how the learned Magistrate came to this conclusion, for the oral statement of accused No. 1 consists of only one sentence that he was filing a written statement, while that of the opponent consists of five sentences. The learned Magistrate accordingly acquitted the opponent. Against his order acquitting the opponent, the present appeal has been filed.

2. Section 4 (1) (a) of the Act provides that any person who sells or causes to be sold or offers for sale to the prejudice of the purchaser any article of food which is not of the nature, substance or quality demanded by or on behalf of the purchaser, shall, on conviction, be punished with the punishment prescribed in this section. Clause (b) of sub-sections (1) of this section makes it an offence to offer, keep' or expose for sale any article of food which is not of the nature, substance or quality which it purports to be.

Section 8 of the Act states that a local authority may appoint any person to be an inspector under the Act either specially for any article of food or generally for all articles of food. Section 9 empowers an inspector to procure and send for analysis any article or sample of food offered, kept or exposed for sale. Section 11 provides that if any inspector shall apply to 'purchase' any article or sample of food exposed or offered for sale, whether wholesale or retail, and shall tender the price for the quantity which he shall require for the purpose of analysis not being more than shall be reasonably requisite and the person exposing or offering such food for sale refuses to 'sell' such article or sample, the person so refusing shall, on conviction, be punished with the punishment specified in the section.

It has been urged that as there is an obligation to sell an article of food exposed or kept for sale to an inspector, the sale of the article to him is not a voluntary sale and that consequently it cannot be regarded as a sale within the meaning of Section 4 (1) (a) of the Act. There is no substance in this argument. If the article supplied to the inspector is found to be adulterated, there can be no doubt that an offence under Clause (b) of sub-sections (1) of Section 4 has been committed, for the article which was kept or exposed for sale was not of the nature, substance or quality which it purported to be. There is also no reason why in such a case the article should not be held to have been sold to the inspector within the meaning of Section 4 (1) (a). He has paid for the article purchased by him like any other customer. Moreover Section 11 itself uses the words "purchase"

and "sell" in regard to the inspector's obtaining an article for the purpose of analysis and paying the price for it. It is, therefore, clear that the Legislature wanted such a transaction to be regarded as a sale for the purposes of the Act.

3. It has also been contended that when an inspector purchases an article for the purpose of analysis and not for his own use, there is no sale "to the prejudice of the purchaser", because the inspector is not personally affected, whether the article is pure or adulterated. We are unable to accept this contention. The words "to the prejudice of the purchaser" appear to have been inserted in the section in order to ensure that the supplying of an article, superior in quality to that demanded, would not ordinarily be regarded as an offence under the section. These words, in our opinion, mean, to the prejudice of an ordinary person who purchases or may purchase such an article. If an ordinary person is likely to be prejudiced by the purchase of such an article, the offence under Section 4 (1) (a) would be committed, even though the actual purchaser in the particular case may not have been prejudiced. The words "to the prejudice of the purchaser" are also used in the English Act, the Food and Drugs (Adulteration) Act, 1928. In Halsbury's Laws of England, Second Edition, in paragraph 244 in Vol. XV, it is stated :

". . . . The prejudice, however, is not confined to pecuniary prejudice, nor to prejudice arising from the consumption of unwholesome food, nor to prejudice or damage to the actual purchaser in the particular case. But there is prejudice whenever there is a sale of an article in such a state that an ordinary unskilled person would have been prejudiced if he had received it in response to his demand for an article of that denomination, although for some reason, peculiar to himself, the actual purchaser is not prejudiced. It is no defense to a prosecution to allege that the purchaser, having bought only for analysis, was not prejudiced by the sale."

Similar words were used in Section 6 of the earlier English Act, the Sale of Food and Drugs Act, 1875. The question how these words should be construed was considered in - '*Pearks, Gunston and Tee Ltd. v. Ward!*', (A). It was held in that case that a sale may be to the prejudice of the purchaser within Section 6, although the purchaser had special knowledge, not derived from information given by the seller, that the article sold was not of the nature, substance, and quality demanded by him and that the test is whether the sale would have been to the prejudice of a purchaser who had not that special knowledge. Darling, J., in his judgment observed (p. 9) :

"With regard to the other point, it is said that there was no sale to the prejudice of the purchaser, because the woman knew that there was moisture in the butter, and also because she did not really want the butter which she bought. It is frequently argued in these cases that it must be proved by the prosecution that the sale was to the prejudice of the particular purchaser. I do not think that is the meaning of the section. I think the words 'to the prejudice of the purchaser' are used in the sense that there is a sale to the prejudice of the purchaser if a purchaser in the abstract would be prejudiced, although the actual

purchaser may for some reason peculiar to himself not be prejudiced.

Goods might be sold under a false description and might not inflict any actual injury, because they were in fact of a better quality than the goods demanded; but it was never intended that in such a case there should be a prosecution; and I think that is the reason why the words 'to the prejudice of the purchaser' are inserted in the section. Provision is made in Section 13 for the purchase by inspectors of nuisances, officers of health, and other similar persons, of samples of food or drugs for the purpose of analysis, and, if it were necessary to prove that the sale was to the prejudice of the particular purchaser, it never could be proved in such a case as that, because the purchaser is probably provided with money out of the public funds to pay for the article, and, however bad it may be, he

<sup>1</sup>1902-2 KB 1

is none the worse off, because the article is not intended to be used by him, but is to be analyzed. A person in that position cannot in the nature of things be prejudiced by the sale."

With respect, we agree with these observations.

4. We are accordingly of the opinion that even when an inspector purchases an article or sample of food for the purpose of analysis, the transaction is a sale within the meaning of Section 4 (1) of the Act. This question has also been previously considered by this Court on several occasions. In - '*State v. Shomabhai Purshottam*<sup>2</sup>', (B) it was held that when an adulterated article of food is sold to a food inspector, the person selling it commits an offence under Section 4 (1) (a) of the Act. The same view was taken in - '*Imperator v. Hiralal Lallubhai*<sup>3</sup>', (C), in - '*State v. Patel Somabhai Jorabhai*<sup>4</sup>', (D), and in - '*State v. Nathu Jhina*<sup>5</sup>',

5. Rule 6(B) (i) of "The Bombay Prevention of Adulteration of Articles of Food Rules" made under the Act is as follows :

"(B) The following articles of food shall be presumed, until the contrary is proved, to be not of the nature, substance or quality which they purport to be -

(i) Ghee which has a butyro refractometer reading at 40 C of less than 40 or more than 44.5, or a Reichert Woollny Value of less than

24, or which has an acidity of more than 2.5, per cent. calculated as Oleic Acid."

This rule, therefore, lays down three circumstances in which ghee will be presumed to be not of the nature, substance or quality which it purports to be, i.e. it will be presumed to be not pure or genuine. These circumstances are :

- (1) If its B. R. reading is less than 40 or more than 44.5, or
- (2) If its R. W. value is less than 24, or,
- (3) If its acidity is more than 2.5 per cent.

The use of the word "or" in the rule clearly shows that if either of these three tests is satisfied, the sample of ghee will not be presumed to be genuine or pure. In this case, all that the opponent may be said to have succeeded in proving is that the ghee which was kept by him for sale had a B. R. reading of less than 44, because the only reason given by his witness Chimanlal for certifying it to be pure is that its B. R. reading was less than 44. This, however, is not sufficient, because the presumption under the rule can be drawn even if the B. R. reading is less than 40 or if the R. W. value is less than 24. The report of the Public Analyst shows that the R. W. value of the sample of ghee purchased from the opponent was 21.1, i.e. less than 24. Consequently under the above rule it must be presumed, until the contrary is proved, to be not of the nature, substance or quality which it purported to be, that is to say, that it was not pure ghee. There is no evidence to the contrary. The presumption cannot be said to have been rebutted by the evidence of Chimanlal, whose opinion is based solely on the B. R. reading being less than 44. It must, therefore, be held that the ghee kept for sale at the opponent's shop and of which a sample

<sup>2</sup> Cri. A. No. 715 of 1949, D/-19-7-50 (Bom)

<sup>4</sup> Cri. A. No. 481 of 1950, D/-21-9-50 (Bom)

<sup>3</sup> decided on 24th January 1946 (Bom)

<sup>5</sup> Cri. A. Nos. 860 and 861 of 1950, D/-28-2-51 (Bom)

was sold by him to the food inspector was not pure ghee. The opponent is consequently liable under Clauses (a) and (b) of Section 4 (1) of the Act.

6. Sub-section (3) of Section 4 of the Act states that in any prosecution under this section it shall be no defense to allege that the seller was ignorant of the nature, substance or quality of the article of food sold by him, or that the article was not defective in all three respects, namely, nature, substance and quality. There is a proviso to this sub-section which runs as follows :

"Provided that the seller shall not be deemed to have committed an offence under this section if he proves to the satisfaction of the Court -

- (a) that the article sold was purchased or obtained as agent by him as the same in nature, substance and quality, as that demanded by the purchaser and with a written warranty to the effect that it was of such nature, substance and quality;
- (b) that he had no reason to believe at the time when he sold it that the article was not of such nature, substance and quality as aforesaid; and
- (c) that he sold it in the same state in which he purchased it."

It has been urged that as the ghee which the opponent had kept for sale at his shop had been certified to be pure by the Ghee Merchants' Association, the opponent had no reason to believe that it was adulterated ghee and that consequently he is not liable in view of Clause (b) of the proviso. This clause can, however, only apply in cases referred to in Clause (a), that is if the article is purchased as an agent and with a written warranty. The word "and" between Clauses (b) and (c) shows that all the three clauses of the proviso must be read together and that Clause (b) cannot be considered apart from Clauses (a) and (c). This is also the view which Mr. Justice Bhagwati and Mr. Justice Vyas took in - '*State v. Mathurji Bhaupatji*<sup>6</sup>', A contrary view appears to have been taken by Mr. Justice Bavdekar and Mr. Justice Vyas in - '*State v. Matadin*<sup>7</sup>', (G). In

that case the learned Judges gave the accused the benefit of Clause (b) without considering whether the case fell within the scope of Clause (a). The point that all the three clauses of the proviso must be read together does not appear to have been then argued. The attention of the learned Judges does not also appear to have been drawn to the earlier decision in - '*State v. Mathurji Bhaupatji*'. On a plain reading of the section, it seems to us, with respect, that the view taken in - '*State v. Mathurji Bhaupatji*' is correct.

7. In this case the opponent has not contended that the ghee kept for sale at his shop had been purchased by him under a warranty. He cannot, therefore, claim the benefit of the proviso to Section 4 (3) of the Act.

8. The order passed by the learned Magistrate acquitting the opponent is, therefore, set aside. We convict him under Section 4 (1) (a) and Section 4 (1) (b) of the Bombay Prevention of Adulteration Act and sentence him to pay a fine of Rs. 100 under Section 4 (1) (a) of the Act. In view of Section 71, Indian Penal Code, we pass no separate sentence under Section 4 (1) (b) of the Act.

Appeal allowed.

<sup>6</sup> Cri. A. No. 804 of 1951, D/-26-9-51 (Bom)

<sup>7</sup> Cri. A. No. 286 of 1952, D/-20-6-52 (Bom)