

Deepak Agrawal @ Deepu vs State Of Odisha Opp. Party on 4 October, 2021

Author: S.K. Sahoo

Bench: S.K. Sahoo

IN THE HIGH COURT OF ORISSA, CUTTACK

BLAPL No. 2508 Of 2021

An application under section 439 of the Code of Criminal Procedure in connection with Markatnagar P.S. Case No.20 of 2021 corresponding to G.R. Case No.122 of 2021 pending on the file of S.D.J.M. (Sadar), Cuttack.

Deepak Agrawal @ Deepu

-Versus-

State of Odisha

For Petitioner:

-

M/s. Yas
(Senior
Devashis
Sudipto
D.K. Moh
B. Jena

For Opp. party:

-

Mr. Jyot
Addl. St

P R E S E N T:

THE HONOURABLE MR. JUSTICE S.K. SAHOO

Date of Order: 04.10.2021

S.K. SAHOO, J.

The

petitioner

Deepak

Agrawal

knocked at the portals of this Court by

fili

under section 439 of Code of Criminal Procedure seeking for bail

in connection with Markatnagar P.S. Case No.20 of 2021

// 2 //

corresponding to G.R. Case No.122 of 2021 pending on the file of learned S.D.J.M. (Sadar), Cuttack in which charge sheet has been submitted for the offences punishable under sections 417, 420, 272, 273 of the Indian Penal Code, sections 51, 52, 53, 59 of the Food Safety and Standard Act, 2006 (hereafter referred to as '2006 Act'), sections 33 and 36 of the Legal Metrology Act, 2009 (hereafter referred to as '2009 Act') and Rule 32 of the Legal Metrology (Packaged Commodities) Rules, 2011 (hereafter referred to as '2011 Rules').

The petitioner moved an application for bail in the Court of learned 1st Additional Sessions Judge, Cuttack, which was rejected vide order dated 23.03.2021 mainly on the ground that the investigation of the case was under progress and the complete chain of adulteration was to be unearthed and there was every chance of tampering with the evidence.

2. The factual matrix of the case on hand is that, Pradipta Kishore Naik, Inspector in-charge of Markatnagar police station, Cuttack UPD drew up a plain paper F.I.R. to the effect that on 30.01.2021 while he was in the police station, he got credible information regarding storage of huge quantity of adulterated and duplicate ghee at Plot No.7D/1275, Sector-9, C.D.A., Cuttack by the petitioner. He conducted confidential enquiry and during enquiry, he ascertained that the information

received was correct. He intimated the fact to his superiors and also gave requisition to the Food Safety Officer, C.M.C., Cuttack and Senior Inspector, Legal Metrology, Cuttack-II to accompany with him during the search. He along with his staff proceeded to the spot for conducting search in the house of the petitioner to verify the authenticity of the information and he procured two independent witnesses, namely, Bikash Bhanja and Satyananda Das on the way. At about 12.20 p.m., they reached in the house of the petitioner and noticed that the petitioner was present in his house. On being asked, the petitioner disclosed that he was selling different brands of ghee and other burning oils in his house to different small shops at Cuttack and Angul. On verification of his house, it was noticed that there was storage huge quantities of ghee of different brands. There was storage of Balaji Puja Vanaspati Binayak ghee in plastic jars of different quantities, tin jars of Rice bran oil, Maa Tarini til oil (each 100 ml.), Binayak ghee jars (empty jars of different quantities), Jyoti Castrol oil jars (empty jars), Bijaya til oil (empty jars each 200 grams), Binayak til oil (empty jars each 1 kg.), Binayak honey (empty jars each 50 gram), one seed packet of Kumkum seed which was used especially to bring colour in ghee and one electronic weighing machine, packing materials and gas burners. On being asked, the petitioner failed to produce any kind of

authority for manufacturing and possessing the above articles. Since the above activities of the petitioner seemed to be illegal to the informant, he kept the spot guarded and made requisition to the Health Officer, C.M.C., Cuttack for deputation of Food Safety Officer and to the Assistant Controller, Weighing and Metrological Department, Cuttack to depute one of the officers to assist him and to remain present during the search. The Senior Inspector, Weighing and Metrology Department and Food Safety Officer arrived at the spot along with their respective team at 2.30 p.m. and in presence of the witnesses, Inspector of Weighing and Metrology Department and Food Safety Officer, the search of the house of the petitioner was conducted and 10 nos. of empty Bijaya til oil plastic bottles (each 200 gram), 10 nos. of empty Binayak til oil plastic bottles (each 200 gram), 40 nos. of empty plastic bottles of Binayak honey (each 50 gram), five nos. of paper cartoons containing 91 numbers of one kg. Binayak Puja Vanaspati ghee plastic jars, three nos. of paper cartoons containing 74 numbers of 500 grams Binayak Puja Vanaspati ghee plastic jars, 22 nos. of tin containers containing Rice bran oil (each 15 ltrs), one polythene packet containing one kg. of Kumkum seeds, one electronic weighing machine and three numbers of silver trays were found during the search.

On detailed verification of the above materials and after discussion with the Food Safety Officer and Metrology officials, it was ascertained that the petitioner was manufacturing ghee like substance by mixing palmolein, Vanaspati seeds for colour and other chemicals which were fully adulterated. Similarly, he was procuring different kinds of oil and was preparing til/castor oil by mixing the same with other chemicals. The petitioner was selling the above products after packing the same in plastic containers/bottles with brand name Binayak ghee, Balaji Puja Vanaspati ghee and Maa Tarini castor/til oil etc. with false, deceptive and misleading claim. The petitioner falsely represented the products as ghee and circulated the same in market for sell to common men and thereby forced the common men to use the same and the petitioner was also using different kinds of weighing instruments which were not renewed or certified by the appropriate authorities. The Food Safety Officer collected samples in duplicate i.e. (i) Binayak ghee 500 ml. five plastic jars, (ii) Maa tarini til oil 100 ml. six bottles. She packed and sealed all the sample packets in presence of the witnesses and the petitioner. They handed over one collected, packed and sealed sample packet from the each packed sample to the informant for further action. They took one packet with them for onward transmission to the Deputy Director -cum- Food Analyst

to Government of Odisha for examination and opinion. He seized the above materials (excluding the sample items) under proper seizure list and drew up plain paper F.I.R. at the spot.

3. On the basis of such plain paper F.I.R., Markatnagar P.S. Case No.20 of 2021 was registered under sections 417, 420, 272, 273 of the Indian Penal Code read with sections 51, 52, 53 and 59 of the 2006 Act, sections 33, 36 of the 2009 Act and Rule 32 of the 2011 Rules against the petitioner.

The I.I.C., Markatnagar police station directed Jyoti Prakash Sahoo, S.I of police to take up investigation of the case. During course of investigation, as prima facie case was made out against the petitioner, the I.O. arrested the petitioner on 30.01.2021 and forwarded him to the Court of learned S.D.J.M. (Sadar), Cuttack. He seized exhibits collected by the Food Safety Officer, C.M.C., Cuttack and took steps for sending the same to the State Food Testing Laboratory, Bhubaneswar for chemical examination and the food analysis report was obtained. As the petitioner was in judicial custody and the stipulated period under section 167 of Cr.P.C. was going to be completed and some steps were yet to be taken to ascertain the involvement of other persons, the I.O. prayed to D.C.P., Cuttack U.P.D. to pass order to submit charge sheet against the petitioner keeping the investigation open under section 173(8) of Cr.P.C. and

accordingly, he received order to submit charge sheet against the petitioner.

From the fact and circumstances, the investigating officer found prima facie case under sections 417, 420, 272, 273 of the Indian Penal Code, sections 51, 52, 53, 59 of the 2006 Act, sections 33, 36 of the 2009 Act and Rule 32 of the 2011 Rules against the petitioner and accordingly on 30.05.2021, he submitted charge sheet against the petitioner keeping the investigation open under section 173(8) of Cr.P.C.

4. Mr. Yasobanta Das, learned Senior Advocate appearing for the petitioner contended that the ingredients of none of the offences alleged against the petitioner are made out since the manufacture and sale of the product was not meant for human consumption but for puja purposes only which was clearly reflected on the label of the manufactured product where the word 'ghee' is conspicuously absent and it is specified as 'non-edible' and 'not for human consumption'. The provisions of the 2006 Act, 2009 Act and 2011 Rules under which the F.I.R. has been registered and first charge sheet has been submitted are prima facie not made out. According to Mr. Das, 2006 Act applies to substances intended for human consumption and not to non-edible products. The implication of the petitioner in the case basing on the alleged statement of the investigating officer

suspecting that the petitioner had indulged in manufacturing and marketing for sale for human consumption is based on no material as the labels clearly indicate that the products were not meant for human consumption and for puja use only with the words 'non-edible' written boldly on the labels. He argued that in the absence of any material to show that the articles were being purchased and used for human consumption, no criminal liability can be attached to the petitioner's business activities which is neither illegal nor prohibited inasmuch as the petitioner had a license for such manufacturing activities which expired in March 2020 and could not be renewed on account of COVID-19 pandemic. It is further argued that the mere recovery of the manufactured products by itself cannot be construed as incriminating against the petitioner in the commission of the penal offences for which he has been forwarded. It is further argued that in view of the Food Analyst report, the prima facie ingredients of offences under sections 272 and 273 of the Indian Penal Code are also not attracted. The petitioner is having no criminal antecedents and he has remained in judicial custody for a substantial period and the major part of investigation is now over and the petitioner being a resident of CDA under Markatnagar police station, there is no chance of his absconding or tampering with the evidence as the witnesses to the seizure

are mainly official witnesses and therefore, the bail application may be favourably considered.

Mr. Jyoti Prakash Patra, learned counsel for the State, on the other hand, vehemently opposed the prayer for bail and contended that the statements of some witnesses indicate that Binayak Vanaspati was used by them for food purpose, since it was less costly and sold in the market at Rs.120/- to 150/- per packet in spite of specification of the articles written boldly on the labels. It is argued that the report of Food Analyst, Government of Odisha indicates that the sample has been tested as Vanaspati falling under Regulation No.2.2.6:1 of the Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011 and opined to be 'sub-standard' under section 3(1)(zx) of 2006 Act. It is further argued that the further investigation of the case is under progress and therefore, at this stage, it would not be proper to grant bail to the petitioner as it would give a wrong signal to the society.

5. During course of hearing of the bail application, a query was made to the learned counsel for the State as to whether the seized articles are harmful to human health if it is utilized for puja purpose. The learned counsel for the State produced a letter dated 02.09.2021 of the S.I. Police, Markatnagar police station addressed to the Deputy Director

Food Analyst, State Food Testing Laboratory, Govt. of Odisha, Bhubaneswar to analyse whether the sample emits harmful gas when burnt during puja purpose which would be harmful to human health, if inhaled and whether it is harmful for human health, if consumed during puja purpose in any manner. Subsequently, he produced the report of the Deputy Director -cum- Food Analyst to Govt. of Odisha dated 27.09.2021 which indicates that it was not in the purview of the laboratory to test for emission of harmful gases during burning of ghee for puja purpose and that the sample is not a food product and it cannot be used for human consumption in any manner. The investigating officer shall find out which authority can answer the query made him in the letter dated 02.09.2021 and accordingly, sample be sent to the concerned authority for analysis. However, if it is found that it is within the purview of the laboratory of Deputy Director -cum- Food Analyst to Govt. of Odisha to test and furnish the analysis report as sought for in the letter dated 02.09.2021 and that the Deputy Director had tried to misguide the investigating officer and the Court, appropriate action shall be taken against him in accordance with law.

6. 2006 Act was enacted for laying down science-based standards for articles of food and to regulate their manufacture, storage, distribution, sale and import and to ensure availability

of safe and wholesome food for human consumption and for matters connected therewith or incidental thereto. It is a piece of consumer legislation which regulates to some extent the consumer-supplier relations. Consumerists demand enforcement of discipline among the producers or manufacturers of food to ensure safety in the realm of food. Food adulteration, even if it be only to the slightest extent, is likely to adversely affect the health of every human being. Even marginal or border line variations of the prescribed standards under 2006 Act are matters of serious concern for all as public interests are involved in them. The Act does not provide for exemption of marginal or border line variations of the standard from the operation of the Act. An article of food when a standard has been fixed under 2006 Act has to be observed in every detail. The consumer's legitimate ignorance and his almost total dependence on the fairness and competence of those who supply his daily needs have made him a ready target for exploitation. The purpose of enactment of the Act is to protect the consumers against outright frauds.

Section 97 of 2006 Act provides for repeal of enactments as specified in the Second Schedule to the said Act. In the Second Schedule to the Act, the first Act that is to be repealed is the Prevention of Food Adulteration Act, 1954.

Though 2006 Act received the assent of the President of India on 23rd August 2006 and published in the Gazette of India on 24th August 2006 but the provisions of different sections were enforced from different dates. Section 97 as well as sections 51, 52, 53, 59 of 2006 Act was brought into force on 29th July 2010.

7. Section 31 of the 2006 Act provides for licensing and registration of food business and stipulates that no person shall commence or carry on any food business except under a licence. Sub-section (2) of Section 31 exempts a petty manufacturer who himself manufactures or sells any article of food or a petty retailer, hawker, itinerant vendor or a temporary stall holder or small scale or cottage or such other industries relating to food business or tiny food business operator. However, it provides that they shall register themselves with such authority and in such manner as may be specified by Regulations, without prejudice to the availability of safe and wholesome food for human consumption or affecting the health of the consumers. Sub-section (3) of this section provides that any person desirous to commence or carry on any food business shall make an application for grant of a license to the Designated Officer in such manner containing such particulars and fees as may be specified by regulations. Sub-section (4) provides that the

Designated Officer on receipt of an application under sub-section (3), may either grant the license or after giving the applicant an opportunity of being heard and for reasons to be recorded in writing, refuse to grant a license to any applicant, if he is satisfied that it is necessary so to do in the interest of public health and shall make available to the applicant a copy of the order. Proviso to sub-section (4) stipulates that if a license is not issued within two months from the date of making the application or his application is not rejected, the applicant may start his food business after expiry of the said period and in such a case, the Designated Officer shall not refuse to issue a license but may, if he considers necessary, issue an improvement notice under section 32 and follow procedures in that regard. Sub-section (8) of section 31 provides for an appeal against the order of rejection for the grant of license which shall lie to the Commissioner of Food Safety. Proviso to sub-section (9) stipulates that if an application for renewal of a license is made before the expiry of the period of validity of the license, the license shall continue to be in force until orders are passed on the application.

Though contentions were raised by the learned counsel for the petitioner that the petitioner had a license for such manufacturing activities which expired in March 2020 and

could not be renewed on account of COVID-19 pandemic, but neither the charge sheet submitted mentions in that respect nor any document in that respect has been filed with the bail application by the petitioner or produced during course of hearing of bail application.

8. During course of investigation, the investigating officer sought for opinion from the Food Safety Officer, Cuttack Municipal Corporation, Cuttack on 20.02.2021 on the following aspects of sample collected:-

- (i) Whether Binayak Ghee (Vanaspati) are adulterated ghee or not?
- (ii) Whether the above ghee are unsafe, noxious to human health or not?
- (iii) Whether the above ghee products are misbranded/substandard or not?
- (iv) Whether there is any legal terminology like Vanaspati or not? If yes, then what is its resemblance with ghee?
- (v) Whether Maa tarini til oil are genuine til oil having all its properties or not?
- (vi) Whether any licence of authority was issued to the accused or in the brand name Harsh Industries or not for manufacturing of such product?
- (vii) Any other opinion which may be treated as vital evidence during the process of investigation.

Page 14 of 22

// 15 //

The report of Food Analyst, Government of Odisha dated 17.03.2021 indicates that the sample has been tested as Vanaspati, falling under Regulation No.2.2.6:1 of the Food Safety

and Standards (Food Products Standards and Food Additives) Regulations, 2011 and opined to be 'sub-standard' under section 3(1)(zx) of 2006 Act.

The term 'food' has been defined in section 3(1)(j) of 2006 Act. An article of food shall be deemed to be 'sub-standard' under section 3(1)(zx) of 2006 Act, if it does not meet the specified standards but not so as to render the article of food unsafe. The term 'unsafe food' in section 3(1)(zz) of 2006 Act means an article of food whose nature, substance or quality is so affected as to render it injurious to health.

In the case of Raj Kumar -Vrs.- The State of Uttar Pradesh reported in A.I.R. 2019 Supreme Court 4902, Hon'ble Justice Deepak Gupta speaking for the Bench held as follows:

"8. We are of the considered view that once standards are laid down by the legislature then those standards have to be followed. In items like milk which is a primary food, under the Act, it is not necessary to also prove that the food item had become unfit for human consumption or injurious to health. In cases of food coming

Page 15 of 22

// 16 //

under the Act, it is not required to prove that article of food was injurious to health. In this case, the only question to be determined is whether the article complies with the standards laid down or not? If it fails to comply with the standards then it will have to be treated as an adulterated article even if it is not rendered injurious to health. Even marginal deviation from

The purpose for which articles of 'food' covered by the 2006 Act are manufactured, distributed or sold was that they should reach the consumers to be used as 'food'. Thus, the use of the article sold was not entirely irrelevant. It is more correct to say that it is presumed from the nature of the article itself or the circumstances and manner of offering it for sale. Where circumstances raise a genuine doubt on the question whether what was kept by a seller was 'food' at all, this must be resolved by the evidence in the case. It is matter of common knowledge that certain articles, such as milk or bread or butter or food grains are meant for human consumption as food. Other articles may be presumed to be meant for human consumption from representations made about them or from circumstances in which they are offered for sale. Where an article is generally or commonly not used for human consumption or in the preparation of human food but for some other purpose, notwithstanding that

Page 16 of 22

// 17 //

it may be capable of being used, on rare occasions, for human consumption or in the preparation of human food, it may be said, depending on the facts and circumstances of the case, that it is not 'food'.

When the sample collected in the case in hand is not a food product and it cannot be used for human consumption in any manner as per the report of the Deputy Director -cum- Food

Analyst to Govt. of Odisha dated 27.09.2021 and it is specified in the articles as 'non-edible' and 'not for human consumption' and 'for puja use only' written boldly on the labels, in view of report of Food Analyst that the sample was 'sub-standard' or in other words, the standards that have been specified under 2006 Act for Vanaspati were not met, by no stretch of imagination, it can be said that the samples taken from the articles seized from the petitioner be deemed to be injurious to health and as such prima facie it does not attract the provisions under sections 51, 52, 53, 59 of 2006 Act.

Section 272 of the Indian Penal Code deals with punishment for adulteration of food or drink intended for sale. In order to attract the ingredients of offence under section 272 of the Indian Penal Code, the following ingredients are required to be satisfied:

Page 17 of 22

// 18 //

- (i) the article involved was food or drink meant to be consumed by the live persons;
- (ii) the accused adulterated it;
- (iii) such adulteration rendered the food or drink as noxious; and
- (iv) the accused adulterated it with intention to sell such article as food or drink or knew it to be likely that such article would be sold as food or drink.

Section 273 of the Indian Penal Code deals with punishment for sale of noxious food or drink and for such

offence, the following ingredients are required to be satisfied:

- (i) selling or offering or exposing for sale as food or drink some article;
- (ii) such article must have become noxious or must be in a state unfit for food or drink;
- (iii) the sale or exposure must have been made with a knowledge or reasonable belief that the article is noxious as food or drink.

'Noxious' means making the food or drink as poisonous or harmful or both and thereby unfit for human consumption. Mere possession or storage of noxious food or drink would not attract the ingredients of offence under section 273 of the Indian Penal Code, unless it is sold or offered or exposed for sale having knowledge or reason to believe that food or drink has become noxious.

Page 18 of 22

// 19 //

In view of report of Food Analyst dated 17.03.2021 that the sample was 'sub-standard' under section 3.1(zx) of 2006 Act and further report dated 27.09.2021 that the sample is not a food product and cannot be used for human consumption in any manner and more particularly when the articles have been specified as 'non-edible' and 'not for human consumption' and 'for puja use only' written boldly on the labels, therefore, the prima facie ingredients of the offences under sections 272 and 273 of the Indian Penal Code are lacking. However, since the investigation is still continuing, no final conclusion can be arrived

at this stage. Coming to the contentions raised by learned counsel for the State that Binayak Vanaspati was used by some persons for food purpose, since it was less costly and sold in the market in spite of specification of the articles written boldly on the labels, whether liability can be fixed on the petitioner for such use by such persons is to be adjudicated by the learned trial Court at the appropriate stage and it would not be proper to express any opinion on the same.

9. Law is well settled that while considering an application for the grant of bail, the following factors are to be taken into account:

Page 19 of 22

// 20 //

- (i) The nature of the alleged offence, the nature of the accusation and the severity of the punishment in the case of a conviction;
- (ii) Whether there exists a reasonable apprehension of the accused tampering with the witnesses or being a threat to the complainant or the witnesses;
- (iii) The possibility of securing the presence of the accused at the trial or the likelihood of the accused fleeing from justice;
- (iv) The antecedents of and circumstances which are peculiar to the accused;
- (v) Whether prima facie the ingredients of the offence are made

out, on the basis of the allegations as they stand, in the F.I.R.;

(vi) The significant interests of the public or the State and other similar considerations.

(Ref: Arnab Manoranjan Goswami -Vrs.- State of Maharashtra; (2021) 2 Supreme Court Cases 427)

In view of the foregoing discussions, when the investigation has almost reached at a penultimate stage and first charge sheet has been filed and food analyst reports have been collected, material witnesses who are mostly the official witnesses have been examined, in absence of any criminal antecedents against the petitioner, the nature of accusations

Page 20 of 22

// 21 //

against him, the nature of punishment prescribed for the offences alleged under 2006 Act, 2009 Act and 2011 Rules, the period of detention in judicial custody and absence of any chance of absconding, I am inclined to release the petitioner on bail subject to following conditions:-

- (i) He shall furnish bail bond of Rs.2,00,000/- (rupees two lakh) with two local solvent sureties each for the like amount to the satisfaction of the learned Court in seisin over the matter with such terms and conditions as the learned Court may deem just and proper;

- (ii) He shall not commit the alleged manufacturing, storage, distribution and selling activities except in accordance with law;
- (iii) He shall not try to come in contact with any of the prosecution witnesses or tamper with the evidence;
- (iv) He shall appear before the investigating officer as and when required till conclusion of further investigation;
- (v) He shall not indulge in any criminal activities;
- (vi) He shall appear before the learned trial Court on each date to which the case would be posted for trial.

Page 21 of 22

// 22 //

Violation of any of the terms and conditions shall entail cancellation of bail.

Accordingly, the BLAPL is allowed.

10. Before parting, I would like to place it on record by way of abundant caution that whatever has been stated hereinabove in this order has been so said only for the purpose of disposing of the prayer for bail made by the petitioner. Nothing contained in this order shall be construed as expression of a final opinion on any of the issues of fact or law arising for decision in the case which shall naturally have to be done by the trial Court at the appropriate stage of the trial.

Issue urgent certified copy as per Rules.

.....
S.K. Sahoo, J.

Orissa High Court, Cuttack The 4th October 2021/RKMishra