

Kum Kum Roy Chaudhary D/O Late Sc Roy vs State Of Gujarat on 27 October, 2023

R/SCR.A/5709/2015

CAV JUDGMENT DATED: 27/10/2023

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
R/SPECIAL CRIMINAL APPLICATION (QUASHING) NO. 5709 of 2015
With
R/SPECIAL CRIMINAL APPLICATION NO. 5710 of 2015
With
R/SPECIAL CRIMINAL APPLICATION NO. 5711 of 2015
With
R/SPECIAL CRIMINAL APPLICATION NO. 5713 of 2015
With
R/SPECIAL CRIMINAL APPLICATION NO. 5715 of 2015
With
R/SPECIAL CRIMINAL APPLICATION NO. 5716 of 2015
With
R/SPECIAL CRIMINAL APPLICATION NO. 5717 of 2015

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE SANDEEP N. BHATT

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?

===== KUM KUM
ROY CHAUDHARY D/O LATE SC ROY Versus STATE OF GUJARAT & 3 other(s)
===== Appearance:

MR.PERCY KAVINA, SENIOR ADVOCATE WITH MS GARIMA MALHOTRA & MS NEHA GUPTA for the Applicant.

MR BHASH H MANKAD(6258) for the Applicant(s) No. 1 MR CHINTAN DAVE, APP for the Respondent(s) No. 1 MR DIGANT B KAKKAD(6523) for the Respondent(s) No. 2 MR HRIDAY BUCH(2372) for the Respondent(s) No. 3
=====

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undefined CORAM:HONOURABLE MR. JUSTICE SANDEEP N. BHATT Date :
27/10/2023

1. All these petitions are filed under Article 227 of the Constitution of India read with Section 482 of the Code of Criminal Procedure, 1973 ('the Code' for short) for quashing and setting aside the complaint being Criminal Case No.2197 of 2014 titled as B.C.Kathiriya V/s Sh.Amitbhai Jentibhai Shah & Ors. Pending in the Court of learned Chief Judicial Magistrate at Junagadh district which is filed under Sections 3(1)(zz)(1)26(5), 27(2)(c) and 59(1) of the Food Safety and Standards Act, 2006 ('FSSAI Act for short) and the summoning order dated 28.7.2015 passed in the same.

2. As the common question of facts and law are involved in all these petitions, at the request of learned advocates for the parties, they are heard together and disposed of by this common judgment.

2.1 The facts leading to filing of these petitions, as stated in the petitions, are such that on 30.7.2013, the respondent no.2-took samples of food item being packaged drinking water (1000 ML Batch No.MPo82, Mfg. Dated 1.6.2013) maximum retail price Rs.18 only referred to as NEUTRAL CITATION R/SCR.A/5709/2015 CAV JUDGMENT DATED: 27/10/2023 undefined Code & Serial No.10/FDA/MU/JND/1/44/2013 and issued form VA (form of notice to the Food Business Operator) with the acknowledgement and sign of the respondent nos.3 and 4;

that the respondent no.3, vide its letter dated 30.7.2013, intimated the Municipal Corporation Junagadh, Gujarat that the respondent no.2 had purchased the Sahara Q Shop Packaged Drinking Water (1000ML) from his firm and the same was sent to Food Analyst, Gujarat for testing. It was also informed by respondent no.3 that total number of bottles purchased by respondent no.2 were 16 in number costing Rs.10 per litre and Rs.160 in total; that the respondent no.2 sent vide Form VI (memorandum to Food Analyst) the aforesaid articles to the Food Analyst, Gujarat Food & Drugs Laboratory, Vadodara on 31.7.2013 for analysis under Clause A of sub-section (1) of Sections 38 and 47 (except 47(5) of the FSSAI Act; further, a copy of memorandum and specimen impression of the seal used to seal the packet of sample was being sent separately via. Regd.A.D.; thereafter, the respondent no.2, vide letter dated 31.7.2013 intimated Municipal Corporation, Junagadh that remaining three parts of sample no.44/2013 that were collected from respondent no.3, were sent to Municipal Corporation, Junagadh in terms of Section 47(1)(c)(ii)(c)(iii) of FSSAI Act; that on

6/7.8.2013, the Food Analyst received the Sample No.44/2013 from respondent no.2 for analysis and the same was tested; that NEUTRAL CITATION R/SCR.A/5709/2015 CAV JUDGMENT DATED: 27/10/2023 undefined the Food Analyst vide Form B sent a report on 17.8.2013 to the Food Officer under FSSAI Act, stating that the sample no.44/2013 was sub-standard; on 13.9.2013, the Office of Assistant Commissioner Food and Drugs Control Administration, Junagadh, vide their letter informed respondent no.3 and respondent no.4 that the sample no.44/2013 had been declared 'sub-standard'; it was further informed to respondent nos.3 and 4 that against the above mentioned report of Food Analyst, Vadodara, he can file an appeal under section 46(4) and to test the sample at referral Laboratory within thirty days of receipt of the notice. 2.2 It is further averred in the petition that on 13.1.2014, the Referral Food Laboratory, Ghaziabad issued Certificate of Analysis for sample 44/2013 in the prescribed Form A stating that the said sample did not conform with the standards laid down under regulation 2.10.8 of FSSAI Regulations 2011 and declared the said sample was unsafe under Section 3(1)(zz)(i) of FSSAI Act and the same was informed by the Director, Referral Food Laboratory, Ghaziabad on 28.1.2014 informing the Designated Officer, Food and Drugs Control Administration, Junagadh, Gujarat about analysis of sample no.44/2013; on 1.2.2014, the office of the Assistant Commissioner Food and Drugs Control Administration, Junagadh informed respondent no.2 that NEUTRAL CITATION R/SCR.A/5709/2015 CAV JUDGMENT DATED: 27/10/2023 undefined sample no.44/2013 was declared unsafe; that on 11.4.2014, the Designated Officer, Food and Drugs Control Administration, Junagadh informed respondent no.2 to seek details along with all the documents pertaining to sample no.44/2013; that on 23.7.2014, the Commissioner of Food and Safety gave written permission to respondent no.2 to initiate the prosecution against certain persons and firm under Section 30(2)(e) of FSSAI Act and therefore on 28.7.2014, the impugned complaint came to be filed before the Court of learned Chief Judicial Magistrate, Junagadh against the petitioners and other accused persons, wherein a composite summoning order against the accused persons including the present petitioners was passed on 28.7.2014; thereafter summons was re-issued by the Court of learned Chief Judicial Magistrate, Junagadh against the petitioners and other accused persons directing them to appear on 27.8.2015.

2.3 The petitioners approached this Court by way of filing these petitions, wherein this Court, vide order dated 6.10.2015 issued notice and granted stay of the proceedings of the impugned complaints and the summoning order. Thereafter, vide order dated 20.6.2016, after hearing learned advocates appearing for the respondents, issued Rule and ordered the interim relief to be continued.

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3. Heard learned advocates for the parties. 3.1 Learned senior advocate Mr.Kavina for the petitioners submitted that the petitioners in Special Criminal Application Nos.5709 of 2015, 5716 of 2015, 5710 of 2015 were never directors of the company-accused no.10 whereas the petitioners of Special Criminal Application Nos.5717 of 2015, 5711 of 2015, 5717 of 2015 and 5713 of 2015 were directors of the company but they had resigned on 2.4.2012, 16.7.2012, 30.3.2013 and 30.3.2013 respectively and the samples in the complaint in question are said to have been collected on 30.7.2013 i.e. much later than the said dates when the petitioners have resigned. He further submitted that the manufacturing date of the bottles of samples collected is 1.6.2013 which is also much later than the dates on which the petitioners have resigned. He referred to the Form no.32

submitted by the petitioners and submitted that it is very much mentioned therein about the resignation of the petitioners from the post of Director and therefore, submitted that the petitioners cannot be held vicariously liable as, according to Section 66 of the FSSAI Act, the person is said to be vicariously liable who, at the time of the offence, is said to be in charge of, and responsible to the company for the conduct of the business of the company. He, further submitted that even on bare reading of the complaint NEUTRAL CITATION R/SCR.A/5709/2015 CAV JUDGMENT DATED: 27/10/2023 undefined in question, no role is attributed to the petitioners and therefore, the petitioners cannot be held liable for the offence in question. He has further argued by referring to various sections of the FSSAI Act and has submitted that prosecution in the present case is not maintainable in the eye of law. 3.2 Learned senior advocate Mr.Kavina further submitted that the learned Magistrate has not followed the mandatory procedure prescribed under Section 202(1) of the Code under which it was mandatorily required to defer the issuance of process and either conduct an enquiry or direct an investigation as the accused resides outside his territorial jurisdiction, therefore, the summoning order is violative of mandatory provisions of Section 202(1) of the Code as no enquiry has been conducted the Magistrate and only the statement of the complainant has been recorded under Section 200 of the Code.

3.3 In support of his submissions, learned senior advocate Mr.Kavina has relied on the following decisions:

(1) Gunmala Sales Private Limited V/s Anu Mehta and Ors.

Reported in (2015)1 SCC 103.

(2) Harshendra Kumar D. V/s Rebatilata Koley and Others, reported in (2011)3 SCC 351.

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4. Per contra, learned APP Mr.Dave has submitted that the complaint is under the FSSAI Act which is a special statute, which relates to food items and over all health of the public is stake if the provisions of the said Act are not followed in proper manner and in this case, prima facie, the packaged water is found to be unsafe for consumption and therefore this Court may not exercise the inherent powers under Section 482 of the Code, which are to be exercised sparingly, as the facts of the case on hand require a full fledged trial. He, therefore, prayed to dismiss these petitions. 4.1 Learned advocate Mr.Kakkad for respondent no.2- complainant has submitted that FSSAI Act is a special statute which lays down its own procedure, manner and method of prosecution; that Section 73 of the said Act lays down the procedure in case of summary trial; that the procedure followed by the learned Magistrate is in accordance with the said Act and therefore it is not mandatory to follow procedure and principles of the Code while dealing with the matter pertaining to the said Act.

4.2 He further submitted that the report of the Referral Food Laboratory, Ghaziabad found Cyanide in the bottle of water, which should be absent as per the Regulations and therefore in the case where the chemical NEUTRAL CITATION R/SCR.A/5709/2015 CAV JUDGMENT DATED: 27/10/2023 undefined which should have been found absent is found present, the complaint may not be

quashed; that the company-accused no.10 is governed and managed by the Directors and the company is supposed to nominate an authorized person for safety measurements of the Act, but there is no such person in this case appointed by the accused no.10-company and therefore the petitioners are liable as they are presumed to be in day-to-day business of the company. He submitted that the point of the role of each director could be established in a full fledged trial and there is no incontrovertible material or acceptable circumstance to substantiate the contention that the petitioners were not engaged in day-to-day affairs of the company as directors.

4.3 Learned advocate Mr.Kakkad further submitted that the respondent no.2 sent a notice to the accused no.10- company on 31.7.2013 and sought some information regarding construction, registration of the company and in reply to the same, the accused no.10-company sent the details and name of all the directors are stated in the Certificate of Incorporation and based on that, the petitioners are named as accused in the impugned complaint, he, therefore, submitted that it cannot be said that the petitioners are not directors of the said accused-company.

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5. Learned advocate Mr.Buch for respondent no.3 submitted that the respondent no.3 is vendor from whom the complainant purchased the samples and he does not have any knowledge about the manufacture. He, therefore, submitted that appropriate order may be passed by this Court in the facts and circumstances of the present case.

6. I have heard learned advocates for the parties and perused the material placed on record.

6.1 The main contention raised by the learned senior advocate for the petitioners is about the petitioners not being directors of the company at the time of the alleged offence. In this connection, if the material placed on record is perused, it transpires that the petitioners of Special Criminal Application Nos.5709 of 2015, 5716 of 2015, 5710 of 2015 were never directors of the company-accused no.10 whereas the petitioners of Special Criminal Application Nos.5717 of 2015, 5711 of 2015, 5717 of 2015 and 5713 of 2015 were directors of the company but they had resigned on 2.4.2012, 16.7.2012, 30.3.2013 and 30.3.2013 respectively and the samples in the complaint in question are said to have been collected on 30.7.2013, for which the Form no.32 submitted by the petitioners supports the said fact. As regards the Certificate of Incorporation, it seems that it is digitally taken NEUTRAL CITATION R/SCR.A/5709/2015 CAV JUDGMENT DATED: 27/10/2023 undefined online, which does not have any supporting document nor any material sent by the accused no.10-company with signature of any official member showing that the petitioners were directors on the date of the alleged incident. Further, there is no specific averment in the impugned complaint against the petitioners as to how they are responsible for the alleged sub-standard or unsafe product of packaged water. Except bare allegation against the petitioners that they being the directors of the accused no.10-company, they are responsible for the day-to-day affairs of the company, there is no specific role attributed to the petitioners to show that they are actually responsible for the day-to-day affairs of the company.

7. At this stage, it is fruitful to refer to Section 66 of the FSSAI Act, which reads as under:

"66. Offences by companies. (1) Where an offence under this Act which has been committed by a company, every person who at the time the offence was committed was in charge of, and was responsible of, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. Provided that where a company has different establishments or branches or different units in any establishment or NEUTRAL CITATION R/SCR.A/5709/2015 CAV JUDGMENT DATED: 27/10/2023 undefined branch, the concerned Head or the person in-charge of such establishment, branch, unit nominated by the company as responsible for food safety shall be liable for contravention in respect of such establishment, branch or unit:

Provided further that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation - For the purpose of this section, -

(a) "company" means anybody corporate and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm."

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8. Keeping in mind the aforesaid provision, if the facts of the present case are seen, it cannot be said that the petitioners are responsible for the said offence, as it is only those shall be deemed to be guilty of offence who are responsible for the conduct of the busienss of the company, wheras in the case of hand, it is coming forth from the record, that the petitioners were not directors of the accused no.10-company on the date of the incident, as discussed hereinabove. Hence, in my opinion, the petitioners are not responsible for the offence in question. Sections of FSSAI invoked in the impugned complaint are as under:

"3(1)(zz)(1) "unsafe food" means an article of food whose nature, substance or quality is so affected as to render it injurious to health:-

- (i) by the article itself, or its package thereof, which is composed, whether wholly or in part, of poisonous or deleterious substances; or
- (ii) by the article consisting, wholly or in part, of any filthy, putrid, rotten, decomposed or diseased animal substance or vegetable substance; or
- (iii) by virtue of its unhygienic processing or the presence in that article of any harmful substance; or
- (iv) by the substitution of any inferior or cheaper substance whether wholly or in part; or NEUTRAL CITATION R/SCR.A/5709/2015 CAV JUDGMENT DATED: 27/10/2023 undefined
- (v) by addition of a substance directly or as an ingredient which is not permitted; or
- (vi) by the abstraction, wholly or in part, of any of its constituents; or
- (vii) by the article being so coloured, flavoured or coated, powdered or polished, as to damage or conceal the article or to make it appear better of of greater value than it really is; or
- (viii) by the presence of any colouring matter or preservatives other than that specified in respect thereof; or
- (ix) by the article having been infected or infested with worms, weevils, or insects; or
- (x) by virtue of its being prepared, packed or kept under insanitary conditions; or
- (xi) by virtue of its being mis-branded or sub-standard or food containing extraneous matter; or
- (xii) by virtue of containing pesticides and other contaminants in excess of quantities specified by regulations.

26(5) : Where any food which is unsafe is part of a batch, lot of consignment of food of the same class or description, it shall be presumed that all the food in that batch, lot or consignment is also unsafe, unless following a detailed assessment within a specified time, it is found that there is no evidence that the rest of the batch, lot or consignment is unsafe:

Provided that any conformity of a food with specific NEUTRAL CITATION R/SCR.A/5709/2015 CAV JUDGMENT DATED: 27/10/2023 undefined provisions applicable to that food shall be without prejudice to the competent authorities taking appropriate measures to impose restrictions on that food being placed on the market or to require its withdrawal from the market for the reasons to be recorded in writing

where such authorities suspect that, despite the conformity, the food is unsafe.

27. Liability of manufacturers, packets, wholesalers, distributors and sellers.

(1) xxxx (2) The wholesaler or distributor shall be liable under this Act for any article of food which is -

(a) xxxx

(b) xxxx

(c) unsafe or misbranded; or xxxxx

59. Punishment of unsafe food -Any person who, whether by himself or by any other person on his behalf, manufactures for sale or stores or sells or distributes or imports any article of food for human consumption which is unsafe, shall be punishable-

(1) where such failure or contravention does not result in injury, with imprisonment for a term which may extend to six months and also with fine which may extend to one lakh rupees;

xxxxx"

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9. A reference at this stage to the judgments relied on by learned senior advocate Mr.Kavina will be fruitful.

10. In the case of Gunmala Sales Private Limited (supra), it is held in paragraph 34 as under:

"[34] We may summarize our conclusions as follows:

34.1 Once in a complaint filed under Section 138 read with Section 141 of the NI Act the basic averment is made that the Director was in charge of and responsible for the conduct of the business of the company at the relevant time when the offence was committed, the Magistrate can issue process against such Director;

34.2 If a petition is filed under Section 482 of the Code for quashing of such a complaint by the Director, the High Court may, in the facts of a particular case, on an overall reading of the complaint, refuse to quash the complaint because the complaint contains the basic averment which is sufficient to make out a case against the Director. 34.3 In the facts of a given case, on an overall reading of the complaint, the High Court may, despite the presence of the basic averment, quash the complaint because of the absence of more particulars about role of the Director in the

complaint. It may do so having come across some unimpeachable, uncontrovertible evidence which is beyond suspicion or doubt or totally acceptable circumstances which NEUTRAL CITATION R/SCR.A/5709/2015 CAV JUDGMENT DATED: 27/10/2023 undefined may clearly indicate that the Director could not have been concerned with the issuance of cheques and asking him to stand the trial would be abuse of the process of the court.

Despite the presence of basic averment, it may come to a conclusion that no case is made out against the Director. Take for instance a case of a Director suffering from a terminal illness who was bedridden at the relevant time or a Director who had resigned long before issuance of cheques. In such cases, if the High Court is convinced that prosecuting such a Director is merely an arm-twisting tactics, the High Court may quash the proceedings. It bears repetition to state that to establish such case unimpeachable, uncontrovertible evidence which is beyond suspicion or doubt or some totally acceptable circumstances will have to be brought to the notice of the High Court. Such cases may be few and far between but the possibility of such a case being there cannot be ruled out. In the absence of such evidence or circumstances, complaint cannot be quashed; 34.4 No restriction can be placed on the High Court's powers under Section 482 of the Code. The High Court always uses and must use this power sparingly and with great circumspection to prevent inter alia the abuse of the process of the Court. There are no fixed formulae to be followed by the High Court in this regard and the exercise of this power depends upon the facts and circumstances of each case. The High Court at that stage does not conduct a mini trial or roving inquiry, but, nothing prevents it from NEUTRAL CITATION R/SCR.A/5709/2015 CAV JUDGMENT DATED: 27/10/2023 undefined taking unimpeachable evidence or totally acceptable circumstances into account which may lead it to conclude that no trial is necessary qua a particular Director."

11. In the case of Harshendra Kumar D. (supra), it is held as under:

"24. In Awadh Kishore Gupta³ this Court while dealing with the scope of power under Section 482 of the Code observed:

(SCC p. 701, para 13) "13. It is to be noted that the investigation was not complete and at that stage it was impermissible for the High Court to look into materials, the acceptability of which is essentially a matter for trial. While exercising jurisdiction under Section 482 of the Code, it is not permissible for the court to act as if it was a trial Judge."

25. In our judgment, the above observations cannot be read to mean that in a criminal case where trial is yet to take place and the matter is at the stage of issuance of summons or taking cognizance, materials relied upon by the accused which are in the nature of public documents or the materials which are beyond suspicion or doubt, in no circumstance, can be looked into by the High Court in exercise of its jurisdiction under Section 482 or for that matter in exercise of revisional jurisdiction under Section NEUTRAL CITATION R/SCR.A/5709/2015 CAV JUDGMENT DATED: 27/10/2023 undefined 397 of the Code. It is fairly settled now that while exercising inherent jurisdiction under Section 482 or revisional jurisdiction under Section 397 of the Code in a case where complaint is

sought to be quashed, it is not proper for the High Court to consider the defence of the accused or embark upon an enquiry in respect of merits of the accusations. However, in an appropriate case, if on the face of the documents which are beyond suspicion or doubt placed by the accused, the accusations against him cannot stand, it would be travesty of justice if the accused is relegated to trial and he is asked to prove his defence before the trial court. In such a matter, for promotion of justice or to prevent injustice or abuse of process, the High Court may look into the materials which have significant bearing on the matter at prima facie stage.

26. Criminal prosecution is a serious matter; it affects the liberty of a person. No greater damage can be done to the reputation of a person than dragging him in a criminal case. In our opinion, the High Court fell into grave error in not taking into consideration the uncontroverted documents relating to the appellant's resignation from the post of Director of the Company. Had these documents been considered by the High Court, it would have been apparent that the appellant has resigned much before the cheques were issued by the Company."

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12. Though these judgments are under the provisions of the Negotiable Instruments Act, as Section 141 of the Negotiable Instruments Act is para materia with Section 66 of FSSAI Act, the judgments would be applicable to the case on hand.

13. Further, learned senior advocate Mr.Kavina has submitted on the technical lapses conducted during the process of collecting samples and submitting the report and to file a complaint. Be that as it may. As I am coming to the conclusion that the petitioners are not responsible for the offence in question, as discussed hereinabove, I am restricting myself to discuss on those points, as entering into merits on the provisions of FSSAI Act and the procedure undertaken by the respondent no.2-complainant, may lead to giving my findings at this stage on the offence being proved or otherwise, which will be in favour of or against the accused no.10-company, which is not before this Court for quashing of the complaint. Therefore, applicability of sections of FSSAI is not dealt with in the present case.

14. In view of the above discussion, these petitions are allowed. The impugned complaint being Criminal Case No.2197 of 2014 titled as B.C.Kathiriya V/s Sh.Amitbhai Jentibhai Shah & Ors. Pending in the Court of learned Chief NEUTRAL CITATION R/SCR.A/5709/2015 CAV JUDGMENT DATED: 27/10/2023 undefined Judicial Magistrate at Junagadh district and the consequent summoning order dated 28.7.2015 is quashed qua the petitioners herein. Direct service is permitted.

(SANDEEP N. BHATT,J) SRILATHA