

(1989) 05 CAL CK 0005

Calcutta High Court

Case No: C.R. No. 327 of 1982

Reckitt and Colman of India Ltd.

APPELLANT

Vs

The State and Others

RESPONDENT

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**Date of Decision:** May 31, 1989**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 4, 468
- Prevention of Food Adulteration Act, 1954 - Section 13(2), 16, 2(ix)(g), 20, 20A

**Citation:** 94 CWN 297**Hon'ble Judges:** Mukul Gopal Mukherji, J; Manabendra Nath Roy, J**Bench:** Division Bench**Advocate:** Dipankar Ghosh and Dilip Kumar Dutta, for the Appellant; C.R. Das, Pronoti Goswami and Tapas Ch. Kar, for the Respondent

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**Judgement**

Mukul Gopal Mukherjee, J.

The present revisional application is directed against an order dated 30th November, 1981 passed by Sri A.K. Basu, Judicial Magistrate First Class, Siliguri, in Case No. C.R. 363 of 1977 and also for quashing of the entire proceedings of the said case. The petitioner company is a manufacturer and the opposite party No. 2, Azad Hind Stores. Siliguri. is a Distributor in respect of Siliguri town and other adjoining areas of its articles of manufacture which includes Purity Indian Barley. On 17th May, 1977 the Food Inspector of Siliguri Municipality, collected a sample of Purity Indian Barley from the possession of Sri Radheshyam Agarwalla. a partner of M/s. Azad Hind Stores observing legal formalities as provided under the Prevention of the Food Adulteration Act and purchased samples on payment of a price of Rs. 15/- only. The articles were all sold in sealed tins and at the relevant time M/s. Azad Hind Stores had a total stock of five dozen of Purity Indian Barley sealed tins. One part of the sample was sent to the Public Analyst and a report was obtained to the effect that the sample was misbranded.

2. There was a prosecution against M/s. Azad Hind Stores. Siliguri and its partners. Evidence was tendered on behalf of the prosecution as Well as on the defence on a charge u/s 7 read with Section 16 of the Prevention of the Food Adulteration Act, to which the accused persons all pleaded not guilty and contended, inter alia, that the firm as also the partners thereof were covered by a warranty executed by the manufacturer, Reckitt & Colman of India Limited. On 3/11/79, while the learned Magistrate framed charge against M/s. Azad Hind Stores represented by its partner Radheshyam Agarwalla, who was at the relevant time the person-in-charge of the firm and also against the partner Sri Radheshyam Agarwalla, the vendor in respect of the seized articles, the other partners were all discharged

3. P.W. 1 was Ajit Kumar Dutta, the Additional Inspector of Siliguri Municipality who proved the taking of samples of Purity Indian Barley on serving a notice on Radheshyam Agarwalla in the prescribed form u/s 6 in accordance with Rule 12. He admitted that it was given out to him that Reckitt & Colman of India Ltd., was the manufacturer of the barley. He also proved the payment of consideration price of Rs. 15 for the sample taken for which a moneyreceipt was obtained. He further proved that the sample was sent to the Public Analyst at Calcutta and that he sent all the relevant documents and other samples to the local health authority, Siliguri and the Public Analyst sent his report direct to the local health authority. It is only after obtaining the report from the Public Analyst that the prosecution was lodged by the local health authority. He admitted that he took samples of barley powder. He admitted further that he always saw barley being sold in tins in a powdered form and he could easily understand from the packing condition and get-up of the tins that barley powder was within. He did not, however, notice any difference between the tins seen by him and the tins taken by him by way of samples. He had seen Purity Indian Barley in powder form long before since the advent of his knowledge. He admitted that Radheshyam Agarwalla showed him an invoice on 17/5/77 which was marked as Ext. A. He admitted his own signature also thereupon which was marked as Ext. A/1. He admitted further that three tins which he took were sealed and labeled by the manufacturer. One of the samples was opened in court and he told that the sample supplied by the defence and marked as material Ext. A was identical with the sample taken by him. The lid was opened and it contained barley. He admitted further that Reckitt & Colman of India Ltd., who supplied the barley was a reputed concern which also manufactured Robinson Barley. He could not, however, say candidly in cross-examination as to whether the samples were misbranded and why. And from the appearance of the label on the tin of the barley, it did not appear to him that barley was misbranded.

4. P.W. 2 was Makhan Chandra Dey, a Peon under the Food Inspector of Siliguri Municipality, who had been to the Azad Hind Stores along with his Inspector, P. W.1. He proved the fact that P.W.1 tried to collect local witness, but he failed. He further proved that the Inspector wanted samples of barley from that firm and also served a notice upon the accused, Radheshyam Agarwalla in the prescribed form. He

admitted in cross-examination that what the Inspector took samples of was barely powder. He himself purchased barley from the shop in powder form. Whenever he want barley, it was always given in powdered form.

5. P.W. 3, Nirmal Kumar Pramanik, was the Public Analyst. He proved the fact that one sample tin of Purity Indian Barley was sent to him by the Food Inspector, Siliguri Municipality for necessary analysis. He made the necessary analysis and sent his report, which contained an opinion that the sample was misbranded within the meaning of Section 2(ix)(g) of the Prevention of the Food Adulteration Act. His contention was that barley and barley products were categorised under the appendix "B" in the Prevention of Food Adulteration Rules and in Appendix "B" they were classified in four categories (i) barley grains as specified under food grains; (ii) pearl barley specified under Item No. A 18"05; (iii) barley powder under paragraph 2 of the Item 2A 18"05 and (iv) whole meal barley powder specified under Item No. A 18"05"01. His contention further was that from the printed level of the sealed container "Purity Indian Barley" it could not be categorised under any of the above items. The label of the sample-tin "Purity Indian Barley" did not bear any reference to the contents thereof. It was also not possible for any one to make any estimation of the contents thereof even if the lid was opened. When the lid was cut only powder material was found thereon. It was also not possible to say whether the contents" could either be barley or whole meal barley powder. He admitted that the sample was caused to be analysed by him and the result of analysis was to the effect that there was similarity of the contents of the sample with the category of whole meal powder. But the printed label of the sample tin did not reveal its specification, "whole meal barley powder". As such, according to Section 2(ix)(g) of the Prevention of Food Adulteration Act, 1954, the contents of the sample tin were, "misbranded". He admitted that he did not get any tin of such barley earlier for the purpose of analysis. The contents of the sample sent to him were in powder form and he did not get any tin of Purity Indian Barley besides the present one for the purpose of analysis. He also did not see any tin of "Robinson Barley". When a tin of Robinson Barley was shown to him, he contended that the contents thereof were also "misbranded" in his opinion, if the same does not give out that it was contained barley powder. He admitted that no rodent hair and excreta as given in his report was found in the contents of the sample sent to him. He further gave out that in the case ascertaining whole meal barley powder, the percentage of aleotic acidity was to be determined by following the dry basis method. The sample tin sent to him did not contain anything "adulterated". The sample tin sent to him did not also contain anything harmful to health.

6. P.W. 4 was Dr. M.N. Basak, the Sub-Divisional Health Officer, who was also the local health authority. He admitted that he got a report from the Public Analyst regarding the sample analysed and the copy of the said report was marked as Ext. 12. He filed complaint as he got report from the Public Analyst. The letter of complaint was also proved by him and marked Ext. 13. He also proved service of

notice by registered post with acknowledgment due upon the accused persons in accordance with section 13(2) and Rule 9(A) of the Prevention of the Food Adulteration Act and Rules. He admitted that acknowledgement due card did not come back to him.

7. It is the contention of Reckitt & Colman of India Limited that the barley was in good and saleable condition and that the report of the Public Analyst was incorrect. Even according to the Public Analyst or the local Health Authority, the sample taken for analysis was not found to be adulterated but the only defect was about description of the article in the label of the container inasmuch as it was not specifically mentioned therein that the barley was sold in the container as a powdered barley or as a whole meal barley powder. The laboratory report on "Purity Barley" also revealed that there was no adulteration found either on physical examination or on chemical examination and the barley actually did conform to the normal standard. It is thus the specific case for the prosecution that the sample was "misbranded" as the printed label of the package did bear a statement regarding ingredient which was misleading with respect to its actual content and it fell within the mischief of section 2(ix)(g) of the Prevention of the Food Adulteration Act, 1954. The petitioner on the other hand contends that the Public Analyst has not referred to any specific statement on the package which did bear to be misleading. The label of Purity Indian Barley did not contain any statement regarding the ingredient on the Barley pack or any statement whatsoever which could be considered as misleading. Therefore, Purity Indian Barley was not a misbranded item and did not attract the provisions of Section 2(ix)(g) of the Prevention of the Food Adulteration Act.

8. A defence witness was examined in this case who was none else than Sri Bhudeb Gupta, who was the chemist-cum-engineer of Reckitt & Colman of India Ltd. He possessed a B.Sc Degree with Hons. in Chemistry and B. Tech in Food Technology and Bio-chemical Engineering as also M.I.E. He proved that Purity Indian Barley and Robinsons Barley were the products of Reckitt & Colman of India Limited. He identified the material Exts. 1 and A. He proved that their company had been selling Purity Indian Barley in this form for the last fifty years and Robinsons Barley for the last forty years. Barley powder which was processed from barley grains was the content of each tin. Barley grain without processing could not be used as human food. According to him, there was no chance of confusion from the brand of their product and they never got any complaint earlier. Barley powder was sold in the market as food product and it could not be called as misbranded. In cross-examination he denied the suggestion of the prosecution that barley could be sold without being processed as powder. He admitted that the word "barley powder" was not mentioned in the tin. He denied the suggestion that there was confusion between barley and barley powder. A suggestion was further given to him by prosecution that under the Prevention of the Food Adulteration Act, barley means three standards of barley.

9. After conclusion of evidence on 30/11/81, which was the date of pronouncement of judgment, the learned Magistrate was of the view, as would be evident from the order dated 30/11/81 itself that when the Food Inspector, P.W. 1, collected the sample of Purity Indian Barley, the vendor accused Radheshyam Agarwalla, showed him the warranty in respect of Purity Indian Barley and the said warranty was from the manufacturing company viz. Reckitt & Colman of India Limited and that warranty has been marked as Ext.A in this case. He further found that at the time of collection of sample the Food Inspector sent notice also to the manufacturing company u/s 11(A) of the Prevention of the Food Adulteration Act and on receipt of the report from the Public Analyst, a notice u/s 13(2) of the Prevention of the Food Adulteration Act, was sent to the manufacturing company of which they acknowledged receipt and sent a letter to the local health authority challenging the correctness of the said report. The learned Magistrate shirking the responsibility to pass a judgment in accordance with law, though it wise to implead the present petitioner, Reckitt & Colman of India Ltd. in this case. He thought that u/s 20A of the Prevention of the Food Adulteration Act, he was empowered to proceed against the manufacturer and that being so, he directed that the petitioner, Reckitt & Colman of India Limited should be proceeded against and he reserved the judgment against the other accused persons, M/s. Azad Hind Stores as represented by its partner, Radheshyam Agarwalla and the vendor Radheshyam Agarwalla and directed issuance of process against the petitioner.

10. Mr. Dipankar Ghosh, the learned Senior Advocate appearing on behalf of the petitioner company, drew attention to the fact that the alleged purchase of the sample was made on 17/5/77 and on 27/8/77 the complaint was lodged against M/s. Azad Hind Stores and its partners u/s 7 and 16 of the Prevention of the Food Adulteration Act. It was on 3/11/79 that the charges were framed and thereafter evidence was taken in the matter and the matter was posted for judgment on 30/11/81. His contention further was that the initiation of the proceeding against the petitioner company on 30/11/81 which was clearly more than three years from the date of commission of offence, was clearly barred u/s 468 of the Code of Criminal Procedure. Mr. Ghosh further contended that in view of section 4 of the Code, the complaint under the Prevention of the Food Adulteration Act was also governed by section 468 of the Cr.P.C. In Re : [Delhi Bottling Co. Pvt. Ltd. Vs. Municipal Corporation of Delhi and Another](#), The answer to this contention is that the cognizance was already taken within the prescribed period of limitation in so far as the offence is concerned and that being so, nothing turns out if the present petitioner as a manufacturer pursuant to a warranty given by it was sought to impleaded as a manufacturer u/s 20A of the Prevention of the Food Adulteration Act. The language used in the statute is, "as though a prosecution had been instituted against him u/s 20".

11. We have to keep in mind in this context of the charge of misbranding the legal maxim, "false demonstratio non nocet cum de corpore onstat". On the question of

misbranding itself, let us advert to section 2(ix)(g) of the Prevention of Food Adulteration Act; "if the package containing it, of the label on the package bears any statement, design or device regarding the ingredients or the substances contained therein, which is false or misleading in any material particular or if the package is otherwise deceptive with respect to its contents". We gave our anxious consideration as to whether the package really did contain or the label on the package did bear a statement, design or device regarding the ingredients or the substances contained therein, which is false or misleading in any materials particular or if the package is otherwise deceptive with respect to its contents, but we do not find any such admitted deception or any false statement per se or any misleading statement either. It is indeed true that in so far as the prevention of the Food Adulteration Rules are concerned, A 18.05 given out that pearl barley shall be the product obtained from sound and clean barley (*Hordeum vulgare* or *Hordeum districhon*). It shall be whitish in colour and shall be free from fermented, musty or other objectionable taste or odour, adulterants and insect and fungus infestation and rodent contamination. It shall not contain other foodgrains more than 1 per cent by weight. Barley powder shall be the product obtained by grinding clean and sound dehusked barley (*Hordeum vulgare* or *Hordeum districhon*) grains. Barley starches shall not be less than 98.0 per cent by weight. Barley powder shall also conform to the following standards:

|       |                                                                                  |                  |      |     |     |       |
|-------|----------------------------------------------------------------------------------|------------------|------|-----|-----|-------|
| (i)   | Total<br>ash<br>(on<br>dry<br>basis)                                             | :<br>Not<br>more | than | 1.0 | per | cent. |
| (ii)  | Ash<br>insoluble<br>in<br>dilute<br>hydrochloric<br>acid<br>(on<br>dry<br>basis) | :<br>Not<br>more | than | 1.0 | per | cent. |
| (iii) | Crude<br>fibre<br>(on<br>dry<br>basis)                                           | :<br>Not<br>more | than |     | per | cent. |

|      |           |                   |      |      |     |      |
|------|-----------|-------------------|------|------|-----|------|
| (iv) | Alcoholic | :                 | than | 0.10 | per | cent |
|      | acidity   | Not               | with | 90   | per | cent |
|      |           | more              |      |      |     |      |
|      |           | (as               |      |      |     |      |
|      |           | H <sub>2</sub>    |      |      |     |      |
|      |           | SO <sub>4</sub> . |      |      |     |      |
|      |           | Alcohol)          |      |      |     |      |

12. Whole meal barley powder is dealt with in Rule 18/05/01, which means the product obtained by grinding clean dehusked barley (*Hordeum Vulgare* or *Hordeum districhon* grains). It shall conform to the following standards:

(a) Moisture not more than 14.0 per cent, (when determined by heating at 130-133 C. for 2 hours).

(b) Total ash (in dry weight basis) - Not more than 3.0 per cent.

(c) Ash insoluble in dilute HCL (on dry weight basis) - Not more than 0.5 per cent.

(d) Alcoholic acidity (with 90 per cent, alcohol) expressed as H<sub>2</sub> SO<sub>4</sub> (on dry weight basis) - Not more than 0.17 per cent.

Rodent hair and excreta shall not exceed 5 pieces per kg. There is no such case made out in the facts and circumstances of the present one that there was any adulteration or any presence of rodent hair and excreta or there was any, crude fibre or alcoholic acidity or ash content more than the prescribed standard, hence, even on merits, we are constrained to hold that there is no case made out for "misbranding" within the meaning of section 2(ix)(g) of the prevention of the Food Adulteration Act. However, for abundant caution, we shall direct the petitioner company to sell barley powder by way of a clear description of the contents henceforth in its packages and containers.

13. Another contention, though highly technical, was taken by Mr. Ghosh to the effect that no prosecution did lie against a manufacturer by way of impleading the said manufacturer, when the original person against whom prosecution was lodged, was himself or itself a distributor and in support of this proposition, [D. Mitra Vs. The State of Bihar and Another](#), which unfortunately had no relevance to the facts and circumstances of the present case except that it laid down the proposition that warranty need not conform to the prescribed form. The other decision in [Roshan Lal Singhanian and Others Vs. Municipal Corporation of Delhi and Another](#), did give out the pre-conditions for the exercise of powers u/s 20A and they were as follows:

(i) The trial for an offence under the Act should be pending against a person other than the manufacturer, distributor or dealer of any article of food;

(ii) There must be evidence before the court that such manufacturer, distributor or dealer was concerned with the offence with which the person concerned was charged; and

(iii) The court should be satisfied by evidence that such manufacturer, distributor or dealer is concerned with the offence.

14. It is only if all the conditions are satisfied that the Court can proceed against such manufacturer, distributor or dealer. In this decision a previous judgment of the Delhi High Court in *P.L. Lamba v. State* reported in 1975 I.F.A.C. 337 was referred to. In that decision the opening part of section 20A was held to be significant since a manufacturer, distributor or dealer would incur the liability within the scope of the foregoing provision only in a case where the trial is going on in respect of a person who by himself did not fall in any trial with respect to such a person then the provision would not come on for application. However, the Delhi High Court in *Roshan Lal Singhanian's* case did not express any clear view in this context, but stated merely that section 20A could not be invoked for summoning the petitioners in that case and accordingly, quashed the proceedings. In a Kerala High Court Full Bench decision in [Fodd Inspector Vs. Seetharam Rice and Oil Mills and Others](#), the following principles were laid down:

(i) Section 20-A envisages a joint trial of the vendor and the manufacturer or distributor or dealer of any article of food, as the case may be;

(ii) The powers given u/s 20A can be invoked only during the trial of any person, not being the manufacturer, distributor or dealer of any article of food, for any offence under the Act;

(iii) Under this section it is imperative for the court to implead a manufacturer, distributor or dealer of any article of food, whenever it is satisfied on the evidence adduced before it, that such manufacturer, distributor or dealer is also concerned with the offence with which the vendor is charged;

(iv) The satisfaction referred to in this section is to be reached by the court on the basis of the materials already on record and no hard and fast rule or any guideline can be laid down regarding the data or quantum of material necessary or sufficiency to reach this satisfaction;

(v) Even if a manufacturer, distributor or dealer is not present in court, the magistrate is empowered to implead such a manufacturer, distributor or dealer without a complaint or written consent or sanction as contemplated u/s 20 of the Act;

(vi) Impleading under this section can be done at any stage after the commencement of the trial and before the conclusion of the trial of the vendor, the original accused, by convicting or acquitting him and not thereafter; and



(vii) After impleadment of the manufacturer, distributor or dealer, as the case may be, the entire proceeding against the original as well as the newly added accused shall commence afresh in accordance with law. On this analogy, Mr. Ghosh contended that if the original person proceeded against was a distributor, the manufacturer could not be impleaded u/s 20A. Mr. Ghosh also cited the decision in [D. Mitra Vs. The State of Bihar and Another](#), for the proposition that such impleading would be possible, had the initiation of prosecution been against the vendor and the seller and that the expression, "vendor", in the Act, referred to one other than the manufacturer, distributor or dealer and if M/s. Azad Hind Stores was a distributor itself, the impleading of the petitioner, Reckitt & Colman of India Limited, was not permissible in law. Mr. Ghosh also referred to a decision of the Gujarat High Court in *I. M. Nayak v. Kantila Sambalal Sah*, reported in 1973 F.A.C. 148.

15. Since we have pronounced our opinion on merits as to whether or not this is a real case of misbranding, we do not go into this question; but leave this question open for proper adjudication in a proper proceedings as and when such occasion does arise. We are satisfied on merits that M/s. Azad Hind Stores and its partner, Radheshyam Agarwalla, representing the said firm as also he himself, as the vendor, were entitled to defence of warranty. In this context the decision in "[Beharilal Agarwalla and Another Vs. The Corporation of Calcutta](#)", which in its turn followed an earlier Supreme Court decision in [K. Ranganatha Reddiar Vs. The State of Kerala](#), are relevant. In the result, the proceeding impugned stands quashed on merits. It was rather unfortunate that the proceedings were kept pending for long 12-years. The ends of justice would be sufficiently met if the petitioner as also M/s. Azad Hind Stores and the other accused, Radheshyam Agarwalla, be acquitted forthwith.

The Rule, accordingly, is made absolute and the proceeding is quashed.

Manabendra Nath Roy, J.

I agree.